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ASSESSING THE EFFICACY OF AFRICAN BOUNDARY DELINEATION LAW AND POLICY: THE CASE OF ETHIO– ERITREA BOUNDARY DISPUTE SETTLEMENT

Lantera Nadew Anebo

Golden Gate University School of Law, lnebo@gmail.com

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GOLDEN GATE UNIVERSITY

SCHOOL OF LAW

**ASSESSING THE EFFICACY OF AFRICAN BOUNDARY
DELINEATION LAW AND POLICY: THE CASE OF ETHIO-
ERITREA BOUNDARY DISPUTE SETTLEMENT**

A dissertation submitted to Golden Gate University
School of Law, Department of International Legal
Studies, in partial fulfillment of the requirements for
the conferment of the degree of *Scientiae Juridicae*
Doctor (SJD).

BY

LANTERA NADEW ANEBO

April 27, 2016

San Francisco, California

DISSERTATION COMMITTEE MEMBERS:

1. Professor (Dr.) Chris Okeke
2. Professor Sophie Clavier
3. Professor Gustave Lele

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Dedication

Dedicated to the memory of my late mother, Wro Dalbe

Kabero, who offered all she had for the success of my education

at all levels.

Acknowledgement

At the outset, I would like to praise Lord Jesus Christ who guides me throughout my life and has enabled me to complete this work. Next, heartfelt thank goes to numerous people who supported me in varying degrees for the success of this study. Though it is not possible to mention names of all generous people in this limited page, some deserve express appreciation. I don't have good words to express my gratitude to Professor (Dr.) Christian Okeke, distinguished Professor of International Law and Director of SJD and LL.M programs in International Legal Studies whose extraordinary intellectual advise and guidance has enriched this study. Professor Okeke has been in touch with me before my admission to the Golden Gate University and built my confidence and future goals. My deepest appreciation also goes to my Graduate Research Committee members, Professor Sophie Clavier and Professor Gustave Lele, who devoted their precious time to read lengthy chapters and forwarded encouraging feedbacks that fueled my energy to work hard and complete this study within the scheduled time framework.

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Abstract

Africa is poor in the midst of plenty. Though multiple causes and reasons may be claimed for Africa's shrinking state of development, disruptive effects of colonialism takes forefront. Present-day Africa is literally free but colonial footprints are still apparent in the borderlands. The study pinpoints how natural borderline development was thwarted by the infamous Berlin Conference of 1884 -1885. As result, people, ethnic groups, nations and nationalities have been disintegrated. Ethnic disintegration and arbitrary colonial boundaries lines have been source of unavoidable *intra and inter state* conflicts in Africa. Ironically, in fear of opening "Pandora's Box" that would further unlock unmanageable conflict, founding fathers of OAU have decided to abide by the colonial boundaries "whether they are good or bad" in Cairo Resolution of 1964, thereby suppressing Kwame Nkrumah's vision of forming United Sates of Africa by removing colonial boundary lines. The study argues that Africa has missed the best opportunity that would avoid boundary conflict that constitutes 90% of African interstate conflicts.

This study proves deficiencies of the Cairo Declaration of 1964 that has honored colonial boundaries, as boundaries between independent African States taking Ethio-Eritrean boundary as case study. The Ethio-Eritrean boundary meant to be defined by the three successive colonial treaties of 1900, 1902, and 1908 that were concluded between Italy, Ethiopia and Great Britain, but the actual boundary line never been drawn on the ground and cannot be define in accordance with the awkward terms of the treaties. Any attempt for strict application of the elusive treaty wordings exacerbates the complexity, confusion and ultimately fuels up conflict.

The study focuses on resolving the current impasse between Ethiopia and Eritrea by drawing an acceptable boundary line through constructive dialogue. A true and acceptable boundary line cannot be drawn simply on the basis of elusive colonial treaties, but through constructive and honest dialogue. Drawing a line of separation is not a goal by itself, but it would perpetuate peace, create good neighborhood, and contribute for rebuilding sense of brotherhood by avoiding animosity and mistrust. Peaceful coexistence, coupled with effects of globalization, therefore, would stimulate economic and political integration that would ultimately remove restraining effects border walls. This will effectuate AU's Border Program that aims to change the nature of borders from barriers to bridges thereby enable everyone to freely move all over Africa once again.

Acronyms

ARDUF: Afar Revolutionary Democratic United Front

AU: African Unity

AUBP: African Union Border Program

BMA: British Military Administration

CIA: Central Intelligence Agency

CSCE: Conference on Security and Cooperation in Europe

EEBC: Eritrea Ethiopia Boundary Commission

EECC: Eritrea Ethiopia Claims Commission

EEZ: Exclusive Economic Zone

ELF: Eritrean Liberation Front.

EPLF: Eritrean Peoples' Liberation Front

EPRDF: Ethiopian Peoples' Revolutionary Democratic Front

ESAT TV: Ethiopian Satellite Television

EU: European Union

FBI: Federal Bureau of Investigation

GA: General Assembly

HIV: Human Immuno Deficiency Virus

IBC: International Boundary Commission

IBRD: International Bank for Reconstruction and Development

ICJ: International Court of Justice

IGAD: Inter Governmental Authority on Development

IMF: International Monetary Fund

LLDC: Land Locked Developing Countries

ML : Muslim League

OAU: Organization of African Unity

PFDJ: Peoples' Front for Democracy and Justice

PSC: Peace and Security Council

S.C. : Security Council

TLF: Tigray Liberation Front

TPLF: Tigray Peoples' Liberation Front

U.N. : United Nations

U.S.S.R: United Soviet Socialist Republic

UNDP: United Nations Development Program

UNMEE: United Nations Mission in Eritrea and Ethiopia

UP: Unionist Party

VCLT: Vienna Convention on Law Treaty

WTO: World Trade Organization

WW: World War

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CHAPTER ONE

INTRODUCTION

1.1. Background

Africa is the first home to mankind¹, and believed to be the source of ancient civilization.² Emerging archeological evidences and remnants of ancient civilization prove Africa's early innovative acumen and progress.³ Moreover, Africa is endowed with hardworking people, fertile land, and untapped natural resources.⁴ Ironically, Africa houses most of the world's poorest nations that frequently look for external aid.⁵ This is an issue that claims diverse socio-economic and political causes and reasons.⁶

Devastating effects of colonial policy and resultant recurrent *intra and inter state* conflict that has been common in Africa takes forefront position among the variables that have engendered Africa's shrinking development. Since independence in 1960s numerous African states have been enduring violent conflicts that claimed lives of huge number of people and consumed resources amounting to billions of dollars.⁷ States and intergovernmental African

¹ The oldest modern human fossil was discovered in Ethiopia. See Cook Clive, *Discovery of Earliest Homo Sapiens Skulls back "out of Africa" Theory* BSF, http://www.bradshawfoundation.com/herto_skulls.php (Accessed: 10/28/13).

² Gollin Michael remarks, "During ancient times technical and cultural leadership moved from Africa to Europe and then during [the] middle ages to Islamic societies and China...." (Emphasis added). GOLLIN MICHAEL, DRIVING INNOVATION: INTELLECTUAL PROPERTY STRATEGIERS FOR A DYNAMIC WORLD, 13(2008).

³ Archeological facts and remnants of ancient civilization prove Africa's early progress (take for instance the famous Egyptian Pyramids, 2000 yeas of old churches that were curved from a single stone in Ethiopia, places and ancient cities some to mention). Some regard Africa as "The cradle of civilization and the origin of human society." See, <http://library.thinkquest.org/C002739/AfricaSite/LMEgyptAncient.htm> (Accessed: 10/28/13)

⁴ See, Kaberuka Donald, *Africa's Mineral Wealth: A Blessing or A Curse?* <http://www.afdb.org/en/> (Accessed, 10/28/13).

⁵ See, Walker Emily, *What we're Reading: How can Africa move away from aid dependency? ONE* (May 2, 2013), <http://www.one.org/us/2013/05/02/what-were-reading-how-can-africa-move-away-from-aid-dependence/> (Accessed 10/28/13).

⁶ Acemoglu and Robinson, "Why is Africa poor?" <http://scholar.harvard.edu/jrobinson/publications/why-africa-poor> (Accessed, 12/12/2013).

⁷ Stelios Michalopolulos & Elias Papaloannou, *The Long-run Effects of the Scramble of for Africa* Working Paper 17620 NATIONAL BUREAU OF RESEARCH (November 2011), <http://www.nber.org/papers/w17620> (Accessed on 12/10/13); See also Richard A. Griggs, *Boundary and War in Africa in 1935: IBRU BOUNDARY & SECURITY BULLETIN*, 64-68 (1997).

institutions appear not proactive enough to avert conflict and save lives. Needless to say living standard of common people has been steadily deteriorating.

Imaginary boundary line that was drawn during the scramble for Africa is often blamed for triggering recurrent conflicts in Africa.⁸ Colonial boundary is characterized as “imaginary” because it was a simple ingenuity of “powerful” people that were far away in Europe and unfamiliar with the African reality. Lord Salisbury affirms artificiality of African boundary stating:

We have been engaged ... in drawing lines upon maps where no white men's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.⁹

Needless to say, crafters of African borders have partitioned the continent in total disregard of local conditions, geographic, ethnographic, linguistic and cultural compositions. In the words of Radie Berketeab, “...the scramble for Africa surgically divided the future nations ... using pencils and rulers without paying any consideration for [...] differences.”¹⁰ Colonial powers never worried about the interest of Africans nor concerned about negative consequences of arbitrary border creation. They simply ventured on dividing Africa and African people in a way avoiding “war” among Europeans in getting their own share of Africa.¹¹ The people who never visited Africa remotely partitioned it even without taking time

⁸ President Chadly of Algeria views colonial boundaries as “*delayed action bombs left by colonialism.*” See J.R.V. PRESCOTT, POLITICAL FRONTIERS AND BOUNDARIES, 254(1987). [emphasis added]. See also Azure Gilman, *The violent Legacy of Africa's Arbitrary Borders*, <http://freakonomics.com/2011/12/01/the-violent-legacy-of-africas-arbitrary-borders/> (Accessed, 12/10/2013).

⁹ S. N. LALONDE, DETERMINING BOUNDARIES IN CONFLICTED WORLD; THE ROLE OF UTI POSSIDETIS 106 (2002). Salisbury's statement of 1890 quoted by Judge Ajibda in Territorial dispute (Libya v. Chad) 6 ICJ Rep. 53 (1194). See also 12:5 EJIL 867 – 889 (2001).

¹⁰ Redie Bereketeab, *The Complex Roots of the Second Eritrea-Ethiopia Wars: Re-examine the Causes*, 13 AFR. J. INT'L AFF. 21, 15 - 59(2010).

¹¹ Stelios Michalopolulos & Elias Papaloannou, *supra* note 7.

to get some basic information from Africans, explorers or missionaries who had worked for the great powers.¹²

Arbitrary colonial boundary has been breeding a ‘painful seed’ that has been generating terrible memories in almost all over Africa. Colonial boundaries have split communities, ethnic groups and families that have been living together from the time immemorial and still wish to live together with their ethnic kinsmen.¹³ In East Africa, for instance, it is not uncommon to have a family in Somalia, Kenya, Ethiopia, Eritrea or Djibouti, especially in border regions. Afar ethnic group is divided into Eritrea, Djibouti, and Ethiopia. Half of the Nuer ethnic groups situated in Gambella region of Ethiopia and the rest in South Sudan, Luo ethnic group has been dispersed in Kenya, Uganda, South Sudan, Ethiopia, and Tanzania.¹⁴ Similarly, “Maasai have been partitioned between Kenya and Tanzania [...]”¹⁵ Ethnic disintegration and resultant unending conflict is not only features of East Africa. It is an incurable “colonial disease” that has spread all over Africa. A study reveals 177 (40%) ethnic groups in Africa were split by the arbitrary boundary.¹⁶ Some of the ethnic groups were divided among six states. Ethnic split into two to four states is very common.¹⁷

Divided ethnic groups often ignore boundary line and crave to socialize with their peers across the border. This obviously results in interstate conflict or regional war.¹⁸

Amaral, remarks,

¹² *Id.* at 3.

¹³ After decolonization, Africa was plagued gaining with endless territorial or border-induced conflicts. Lalonde *supra* note 9 at 119.

¹⁴ Kidane Mengisteab, *Relevance of Regional integration in the Greater Horn Region*, in KINDANE MENGISTEREAB & REDIE BREKETEAB (eds.), REGIONAL INTEGRATION, IDENTITY AND CITIZENSHIP IN THE GREATER HORN OF AFRICA, 8(2012).

¹⁵ Stelios Michalopolulos & Elias Papaloannou, *supra* note 7.

¹⁶ *Id.*, at note 1.

¹⁷ Luo ethnic group scattered in six Eastern African Countries, see Kidane Mengisteab *supra* at note 14.

¹⁸ See, William Zartman, *Bordering on war: The Clear Marking of Boundaries between African Nations can Help Prevent Costly and Debilitating Border Conflicts*, FOREIGN POLICY (May 1, 2001), http://www.foreignpolicy.com/articles/2001/05/01/bordering_on_war?print=yes&hidecomments=yes&page=ful

... many groups do not identify themselves with the states in which they live. Some of them belong to the group split by international boundaries which do not conform to their cultural distribution. Others are minorities seeking either a degree of political autonomy within the existing states, or total separation. Beneath the surface are always problems related to the actual meaning of international boundaries.¹⁹

The arbitrary borderline has impeded free movement of people and restrained resource sharing. Before creation of the divisive borderline, Africans used to move freely and shared common resources. It was their nation, land, and resources that nature offers to all Africans. Consequently, tribal herdsmen freely moved wherever their cattle moved in search for greener pasture. The artificial borderline, however, has been restraining this natural movement and has been source of recurrent conflict. Sporadic conflicts have been surfacing in all corners of Africa.²⁰ Gilman comments, “ The arbitrary borders of an entire continent have caused untold bloodshed and misery that could have been avoided.”²¹ Similarly, Michalopoulos and Papaloannou note, “ [...] partitioning has led to ethnic struggles, patronage politics, and spurred civil conflict and under development.”²² The researchers further argue that, “ [...] civil conflict is concentrated in the historical homeland of partitioned ethnicities [...] and] causality and durations [...] is higher approximately by 25% in areas where partitioned ethnicities reside [...]”²³

In addition to splitting inter-related people and tearing the fabric of communal life, artificial boundary is hard to clearly mark on the ground.²⁴ As pinpointed above, crafters of the borders were not versant with topographic and socio-economic conditions of Africa, but rushed to partition the continent drawing an elusive boundary line. This has made demarcation process

¹ (Accessed:10/2/13). See also Adeleye Oyeniyi, *Conflict and Violence in Africa: Causes, Sources and Types*, TRANSCEND MEDIA SERVICE (February 28, 2011), www.transcend.org” (Accessed:10/28/13).

¹⁹ Ilidio do Amaral, *New Reflections on the Theme of International Boundaries*” in Clive H. Schofield (ed.) *WORLD BOUNDARIES, I GLOBAL BOUNDAREIS*. 17(1994).

²⁰ Stelios Michalopolulos & Elias Papaloannou *supra* note7.

²¹ Azure Gilman *supra* at note 8.

²² Stelios Michalopolulos & Elias Papaloannou *supra* note7.

²³ *Id.*

hard or impossible, or any attempt to demarcate colonial delimitation assumed to create a new “brand” of conflict. A study conducted by the African Union reveals that before 2007 only 25% of African boundary was actually demarcated.²⁵ Due to Africa’s new approach, in 2010 this figure rose by 10%.²⁶ Residents of *unmarked* boundaries have been living in a way their ancestors had been living for centuries. It appears possible to imagine that these people never thought that they were living in a territory that belonged to a foreign nation, nor in a territory that belonged to another ethnic group. When they find themselves belonging to a state that they never supposed to, or when they learn that they were about to split from their kinsmen a devastating conflict arises. This calls for the need to rebuild a mutually acceptable boundary line with less restraining effect.²⁷ There is no question in need to redraw boundary line, but there is no consensus in *modus operandi*.

At the end of 1950’s, before the formation of Organization of African Union (OAU), there was revisionist movement that aimed at redrawing African boundaries in a way uniting disintegrated ethnic groups. S. N. Lalonde notes, “ Boundary readjustment, and even abolition, was seen as a desirable prelude to the formation of regional groupings based on cultural. Linguistic, and religious affinity that would eventually become African common wealth.”²⁸ The Movement held continental conference in Accra, Ghana and called for “abolition or readjustment of colonial frontiers...”²⁹

Pan African activists were fully aware of the horrific effects of arbitrary colonial boundary and envisioned to redraw African borders, but the movement itself vanished after the

²⁴ Peter Collier, *Boundary Demarcation between British and Portuguese Colonial Territories in East Africa* AFRICANA STUDIA, No. 9 237, 223 - 238(2006).

²⁵ AUBP, *Draft Progress Report on the Implementation of the African Union Border Program* 6(2012) <http://www.peaceau.org/uploads/auc-com-report-aubp-09-05-2012.pdf> (Accessed: 12/12/13).

²⁶ *Id.*

²⁷ Ilidio do Amaral *supra* note 19

²⁸ Lalonde *supra* note 9 at 116.

²⁹ *Id.*

formation of OAU due to fear of unmanageable conflicts that thought to “kill” the then young continental organization- OAU.³⁰ The very motive of the founding fathers of OAU was to devise an African umbrella organization that can facilitate continental integration. Thus, with a view to maintain territorial integrity of Africa, founding fathers of OAU starting from the heydays of continual organization have relied on the international law principle of territorial integrity norm. Reliance on territorial integrity norm thought to keep undivided Africa. Moreover, it appears that the Latin American policy of *Uti possidetis* had some influence in Organization of African Union’s stand to cherish *status quo ante*. But the reality of Africa was totally different from conditions in Latin America. First, substantially a single European power colonized Latin America and the whole continent considered to be one nation. After independence regional boundaries were taken as international boundary. The African situation was different. Africa was partitioned by numerous European superpowers that had conflicting colonial policy. Colonizers had their own multifarious interests and they had been competing for African resources.

Despite tragic consequences, founding fathers of OAU decided to respect colonial boundary line on actual date of independence.³¹ Founding fathers of the then continental organization did not like to open “Pondera’s box” in fear of further conflict. This stance may be taken as the only viable option at the formative stage of OAU in order to calm down looming conflict scenarios, but it is still a “disease” that never been effectively diagnosed and cured. Communities and ethnic groups have been suffering because of unfair and unrealistic colonial policy on boundary delineation. Border related conflict is not uncommon in all corners of Africa. Unending border related conflict in the Horn of Africa calls for special attention.

³⁰ Immediately after decolonization, while Pan Africanism was at high point, redrawing African boundaries would have been easier, but Africa has missed the best moment that would have facilitated African political integration

Though borderline facts and issues are unique and demand varied resolution strategy, the Horn Africa case, especially current border related tension between Ethiopia and Eritrea would explain effects of colonial border policy in Africa.

The Horn of Africa has been suffering from unending current and potential intra-national or international boundary conflicts. There is unresolved tension between Ethiopia and Eritrea, South Sudan and Sudan, Ethiopia and Somalia, Eritrea and Djibouti, Somalia and Kenya. As a result of unresolved boundary related conflicts, residents of border regions endure extensive suffering.³² Ethiopia and Somalia had undergone shattering effects of wars of 1970s. Thousands lost their lives, massive property destroyed and billions of dollars was spent to purchase lethal machine guns and further enriched former colonial masters.³³ Huge number of people fled to neighboring countries. On top of loss of life and property, the distrust and antagonism has left scars of animosity among neighboring states.³⁴

Shortly, after seceding from Ethiopia, Eritrea wrestled with multiple border related wars.³⁵ The boundary war between Eritrea and Yemen, Ethio-Eritrean boundary conflict of 1998 – 2000, boundary conflict between Djibouti and Eritrean not only left permanent scars, but also subjects of these states endure unresolved tension.³⁶ The people of Horn of Africa

that would absolutely avoid boundary induced conflicts.

³¹ Ilidio do Amaral *supra* note 19 at 20.

³² See Malcolm N. Shaw, *Peoples Territorialism and Boundaries* 3 EUR. J. INT'L. Law, 478, 478 - 507(1997).

³³ Griggs rightly observes, "... African colonial boundaries are also the causes for high economic costs. ... due to border disputes African countries purchase armaments and sometimes the expense is equivalent to the foreign aid they are receiving." Griggs, Richard, A. *The Boundaries of an African Renaissance*. IBRU BOUNDARY SEC. BULLETIN, 66(1997), quoted in Wondwosen Teshome, *Colonial Boundaries of Africa: The case of Ethiopia's Boundary within Sudan*, 9ACADEMIC REV. 337 – 367 (2009).

³⁴ Rose Hebert notes, "Although the fighting has stopped, politically Ethiopia and Eritrea seem destined to maintain a cold war and complete economic separation for the foreseeable future." See Ross Hebert, *The End of the Eritrean Exception?* SOUTH AFRICAN INST. OF INT'L AFF. COUNTRY REPORT, No. 8 2(2002); Similarly, Redie Bereketeab observes, "Although the fighting has stopped, politically Ethiopia and Eritrea seem destined to maintain a cold war and complete economic separation for the foreseeable future." Bereketeab, *supra* note 10.

³⁵ Goitom Gebreluel & Kjetil Tronovell, *Ethiopia and Eritrea: Brothers at War No More* www. Aljazeera.com (December 08, 2013).

³⁶ Hebert, *supra* note 34.

pursue uncertain future as a result of potential conflict situation assuming the conflict would erupt again at any moment. The undefined boundary between the new African states, South Sudan and Sudan has been problem not only to the region, but disturbs regional peace and security.³⁷

The Ethio-Eritrea boundary best explicates challenges of the colonial boundary.³⁸ After seceding from Ethiopia, Eritrea sought certain territories that were never regarded as part of Eritrea ever but were marked in a colonial map and vaguely stated in the colonial era treaties. Residents of these villages and towns never assumed they have been living on an “alien” land. After five years of secession Eritrea, presumably driven by some economic and political motives³⁹, moved to occupy villages and towns that were under Ethiopian administration. The war claimed 70,000 – 100,000 lives and loss of billions of dollar worth of property. For almost two years OAU, and international community wrangled to convince Eritrea and Ethiopia to end war and negotiate to resolve the border conflict. Until defeated at Badme and its troops removed by force, Eritrea turned deaf ear to OAU’s Framework Agreement, Modalities of implementation and Technical Arrangements. After losing ground in all war front, Eritrea finally declared acceptance of OAU’s peace initiative. OAU’s Framework Agreement required the boundary dispute to be resolved in accordance with the pertinent colonial treaties and principles of international law.

The arbitration tribunal, Eritrea Ethiopia Boundary Commission (hereinafter EEBC) attempted to resolve the boundary conflict by applying the colonial treaties of 1900, 1902 and

³⁷ *Id.*

³⁸ Running for 651 miles (1,047 km.), the Eritrea – Ethiopia boundary extends from the boundary tripoint with Sudan on the Takkaze Rier in the north west to the tripoint with Djibouti in the southeast. See Gideon Biger, *The Encyclopedia of International Boundaries* (1995). (The Jerusalem Publishing House Ltd: Jerusalem).

³⁹ It is generally believed that the Ethio-Eritrea border war was motivated by undisclosed soio-economic and political motives. Details of the possible causes of border conflict are dealt in Chapter 6 of this Study. See

1908 treaties that were concluded between Italy and the then tribal Ethiopian king (Menelik II).⁴⁰ The Boundary Commission repeatedly submitted that the treaties and accompanying maps lacked clarity.⁴¹ There was no consensus in nomenclature of rivers that were supposed to mark the supposed boundary line. Deceptive acts and manipulations that were exerted by colonial agents have further complicated boundary setting.⁴² On top of this, there was communication barrier.⁴³ The treaties were concluded when Ethiopia lacked expert assistance and the country ruled by tribal kings that were not versant with international law. The treaties were not only obscure and lacked details but also favored the colonial power for no consideration. More over, the Boundary Commission attempted to fill treaty lacunae by reading maps that were drawn by the Italian cartographers who unilaterally mapped border regions. This presumably took some Ethiopian ethnic groups that never supposed themselves belonging to Eritrea.

The current Ethiopian map reveals how colonial masters mislead uneducated tribal chiefs taking all the red sea regions that were barn at the time and not habitable. For European powers, however, the red sea shores were very strategic sights to control international

Seyoum Yohannes Tesfay, *Eritrea-Ethiopia Arbitration: A Cure Based in Neither Diagnosis nor Prognosis*, 6:2 MIZAN L. REV. 172 – 185, 163- 199, (2012).

⁴⁰ Hebert, *supra note 34*.

⁴¹ Paragraph 4.3 of EEBC award states, “Article 1 delimits the boundary from the frontier with Sudan in the west to a point in the east the exact location of which is a matter of dispute.” EEBC *Decision Regarding Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia* Para 4.3. at 31.

⁴² *Id* at para 4.7 on page 33 states, Emperor Minilik of Ethiopia at first sought a frontier considerably to the north of the Mareb- Belesa- Muna line, but eventually agreed in 1900 to keep to that line (in exchange for payment of 5,000,000 Lires)

⁴³ For example Wuchale Treaty of 19th century was drafted both in Italian and Ethiopian languages. The Ethiopian King, Minilik II, simply relied on the Ethiopian language (Amharic version), but the Italian version did not match with the Amharic version. Italian version Article 17 of the treaty stated that Ethiopia could make foreign relation only through Italy while the Amharic version of the same Provision stated that Italy could cooperate with Ethiopia in making foreign relation. Finally the Ethiopian King resided the treaty and a massive war broke out in which white men for the first time defeated by black men.in battle of Adwa. This is an historic battle.

passageway.⁴⁴ Though few miles away from red sea, Ethiopia today is landlocked as a result of mischiefs by the colonial powers.

The Ethiopian government initially refused to honor the arbitral award claiming the decision parted not only ethnic groups but also families. Due to international pressure, Ethiopia later accepted the award but insisted discussion before demarcation in order to create lasting peace by making the boundary realistic. The Eritrean government, on the other hand, has declined dialogue and has been requesting Ethiopia to surrender regions awarded by EEBC. As a result, border residents of both states endure not only unsettled future, but also pursue life in state of tension. The cause of Ethio- Eritrean war at face value termed as border conflict but it was a cover up for the hidden political and economic motives.⁴⁵ To build long lasting peace therefor motives behind the conflict should be addressed. It is “imperative to understand the underlying motive behind [the conflict].”⁴⁶

At this point it appears almost impossible to reunite the divided ethnic groups under a single political authority in their traditional shape, but it is possible to facilitate free integration of the divided nations in a way akin to the pre-colonial situation. For example, Ethiopian Somali population were freely interact with their kinsmen in main land Somalia, Kenya or Djibouti, there would be no reason for Somalia to fight for reunion of divided Somalis. If their right to freely move, pasture their cattle and use trans-border resources, there will be no reasonable ground that will instigate conflict, at least as a result of boundary line.

⁴⁴ Italy bought land from a tribal chief from Eritrea and finally took its administration. It drew Eritrean boundary taking all the area surrounding Red Sea port. France bought land from a chief in Djibouti and finally contracted with the then King of Ethiopia later and held it for 99 years. Somalia was partitioned among three super powers: Great Britain, France and Italy. The scar is visible currently. We have Somalis in Ethiopia, Somalis in Djibouti and Somalis in Kenya. Afar, a big ethnic group, divided between Ethiopian and Eritrea. Some western Ethiopian people got their ethnic parts in South Sudan.

⁴⁵ For detailed discussion on motives behind Ethio-Eritrean boundary conflict see Tesfay *supra* note 39.

⁴⁶ Alexander Attilio Vadala. *Major Geopolitical Explanation of Conflict in the Horn of Africa* NORD – SUD aktuell 627, 627 - 634 (2003).

Realizing adverse effects that elusive colonial boundary lines in Africa, in 2007 African Union set up African Union Boundary Program (hereinafter AUBP). AUBP is regarded as an “imaginative program for the management of inter African borders, aimed not only promoting peace, security and stability but also at facilitating the socio-economic integration of ... Africa.”⁴⁷ AUBP thus gears toward achieving of two important goals: working toward promoting peace security and stability, and promoting and facilitating integration of Africa. Given elusive nature of colonial boundary lines, and animosity and hatred as a result of divisive colonial hands that are still alive all-inclusive integration of Africa appears unimaginable. A playground, thus, has to be leveled before attempting to create United States of Africa. In this regard AUBP’s objective of building peace, security and stability by assisting and encouraging AU Member States to redraw an acceptable borderline and complete demarcation process is vital. Attainment of AUBP objectives is up side journey, but it is possible. Effort that have been exerted so far and attention given to the very disease that makes Africa’s future uncertain is appreciable, but AUBP has long way to go. As pointed out above currently only 1/3 of African boundary is clearly defined. It is understandable that Africa is crawling with multifaceted socio-economic and political evils that need to be tackled, prioritizing border problem would solve lion’s share of Africa’s socio-economic evils.

This study suggests possible ways to cure the effects of destructive seeds that were sown by colonial powers in partitioning Africa. The best approach that will certainly settle Africa’s impending border issue is political integration by creating United States of Africa – “the Gadafi illusion.” Ideally it sounds an innovative idea, but due to external pull and internal push make the agenda of creating one nation “Africa” appears “*daydream*.” The other,

possibly, viable option is regional integration. This plan appears appealing because regions have already started some preliminary works for regional integration. For instance, East Africa Economic Community has been moving to issue common currency, free trade, free movement of goods and services, one passport that will take economic and ultimately political integration. Similarly, West Africa Economic Community has been aggressively working toward political integration of Member States. The third possible option is forming joint border commission that will investigate all border points and assess any potential ground for dispute and settle it by drawing acceptable boundary line. Neighboring states should not wait until border issue surfaces. The Joint Border Commission may be permanent and responsible to report to its respective states but work by drawing common agenda. This is a proactive approach that would mitigate destructive effects of elusive colonial boundary. AUBP encourages all Member States of AU to form a joint border commission in consultation with neighboring states and redraw elusive borderlines. The current wide spread conflict in all corners of Africa, however, has limited AUBP's proactive agenda. Thus, at this time, AUBP has been fully embarked on resolving current border disputes by assisting demarcation of borders.

1.2. Statement of Problem

In last 1950s, after a number of African nations got independence, African intellectuals and Revisionist Movement spearheaded by Kwame Nkrumah worked to redraw African boundaries in a way it coincides with geographic, ethnographic, cultural lines and ultimately create United States of Africa thereby making divisive colonial boundary line past history.

⁴⁷ German African Border Project (GABP), *From Barrier to Bridges*, (May 2009) <http://www.auswaertiges-amt.de/cae/servlet/contentblob/340666/publicationFile/3720/GTZ-GABP-Broschuere.pdf> (Accessed on: 01/13/14).

However, founding fathers of OAU have trashed Kwame Nkrumah's agenda⁴⁸ of revising boundary lines in fear of opening Pandora's box that would, supposedly, mess Africa with unmanageable boundary conflicts. It was not only fear of conflict that had dictated founding fathers to "acknowledge the sanctity of colonial boundaries." Some of the founding fathers had their own interest to control territories of partitioned ethnic groups or remain in power that they would lose had the boundary been redrawn in way uniting partitioned ethnic groups.⁴⁹

The decision to maintain colonial boundary, however, did not stop boundary conflict as it was thought. Devastating boundary wars and conflicts have been so common in all over Africa since heydays of OAU.⁵⁰ Vague colonial boundary laws and policies have been causing violent conflicts and unstoppable wars that sow animosity among African brothers. Boundary issues are very sensitive and can easily and quickly flare up into armed confrontation have been consuming lives of tens of thousands of Africans in short span of time.

Ethio-Eritrea boundary conflict has generated the most devastating conflict in 21st Africa. The war suddenly erupted, and took lives 70 – 100,000 people, resulted in destruction vast amount of property, displaced millions from their original territories and strained

⁴⁸ President Nkrumah observed that the rampant boundary justified for political unity stating, "Only African Unity can heal this festering sore of boundary disputes between our various States." See Lalonde *supra* note 9 at 117.

⁴⁹ One of the proponents of adherence to colonial boundary was Ethiopia's Haile Selassie I who remarked to accept colonial boundaries whether they were "good or bad." See Tomas Bartos, *Uti Possidetis, Quo Vadis?* 18 AUST. YBIL 56, 37-68 (1997). Similarly the then president of Madagascar, President Tsiranana remarked:
[...it is no longer possible, nor desirable to modify the boundaries of Nations, on the pretext of racial, religious or linguistic criteria... indeed, should we take race, religion or language as criteria for setting our boundaries, a few States in Africa would be blotted out from the map. (Lalonde *supra* note 9 at 117.

The president of Mali and Mauritania had there own private interest to keep colonial boundaries. (*Id.*) Morocco had claimed Mauritania as historical part of Morocco. It is plausible that Emperor Haile Selasse's motive was to escape from annexation of territories of Ethiopian Somalis to Somalia. Somalia and Morocco openly supported revisionist movement with a view to reunite with divided kinship. In failure of OAU to redraw African boundaries, and finally due to OAU support to the claim of Western Sahara, Morocco suspended its membership to OAU until now. Somalia remained as OAU Member State but it objected to the OAU's decision to recognize colonial boundary line.

⁵⁰ Before the signature on OAU's charter actually "dries up", in early 1964 a devastating border war erupted in the Horn of Africa between Ethiopia and Somalia, and in north between Morocco and Algeria. This had motivated

relationship of brotherly people. Invoking colonial treaties, Eritrea claimed certain borderland territories that were under Ethiopian control for centuries. This resulted in bloodshed and confrontation that is still unsettled. The war was formally ended by the Algiers Agreement of December 12, 2000, but the dispute is pending.

The Ethio-Eritrean boundary was defined by three successive colonial treaties of 1900, 1902, and 1908. Terms of the treaties were extremely vague to set a clear and acceptable boundary line on the ground. As the supposed boundary line was not demarcated, local people were ignorant of not only the supposed boundary line, but also the existence of boundary treaties. Borderland residents continued to live in the area, as their forefathers used to live. Attempting to resolve the Ethio-Eritrean border dispute, EEBC time and again pointed out that Ethio-Eritrea treaties were exceedingly vague. Confronted with unsolvable condition, the arbitration tribunal had resorted to unilateral colonial reports, notes, memorandums and third party maps that were not known to Ethiopia. This has further complicated boundary setting and the boundary line that was defined by EEBC remained unacceptable to Ethiopia as it would further divide families, towns, villages, and ethnic groups that have been living together for centuries. Some of the villages that were never claimed were awarded to Ethiopia and villages that were never been under Eritrea or Italian control were allotted to Eritrea.

Ethiopia argues that demarcation on the basis of the current arbitral award would not bring a lasting solution, and has been insisting for bilateral dialogue with Eritrea with a view to settle all issues with Eritrea once and for all. Eritrea, on the other has refused to accept Ethiopia's stance and has been demanding for strict enforcement of EEBC's delimitation decision. For about four years both States had stopped cooperation with EEBC that prompted

founding father's of OAU to expressly declare acceptance of colonial boundaries "whether they are good or bad," in First Summit of OAU, in 1964.

for declaration of virtual demarcation, which has further complicated the matter. Ethiopia regards EEBC's virtual demarcation as a legal fiction that cannot resolve the conflict. Eritrea, on the contrary, views the border dispute as resolved, and demands Ethiopia to surrender the claimed territories. However, as the boundary line is not yet marked on the ground, the actual line of separation remains elusive. Borderland residents now pursue uncertain future, expecting a devastating war to erupt at any moment.

The other perplexing task that may vitiate the possibility of resolution of border dispute is the fact that it is compounded by other issues that cannot be legally claimed. This means, there is high possibility for border issue to appear as a bargaining leverage. In the case of Ethiopia, and Eritrea, the government of Eritrea provoked boundary war after Ethiopia failed to accept Eritrea's economic and investment requests that would enrich Eritrea at the expense of Ethiopia. The boundary issue was not an immediate cause of the 1998 devastating war. Even the Eritrean government did not plan to cause a full pledged war. Eritrea, supposedly aimed to pressurize Ethiopia to negotiate economic and investment issues under threat of border issue, but Ethiopia took forceful occupation of Badme and its environs as invasion and formally declared war in lieu of sitting for negotiation. In some case, therefore, a mere attempt to resolve border conflict may not create a lasting peace and normalize relationship. Resolution of border dispute may demand settlement of other socio-economic issues that may activate unsettled border issues. Mere reliance on colonial boundary laws or policies may not be helpful to recreate brotherhood and normalize relationship. The arbitration award is not only difficult to implement, as it is tainted with unsolved side issues, but also it is unacceptable to the border residents. This calls for the need to search for another alternatives in order to avoid another destructive war and create peaceful in the region.

The complications of Ethio-Eritrean boundary demarcation reveal deficiency of African border policy and calls for the urgent need to revision OAU's policy of maintain colonial boundary as it was on the actual date of independence. In some cases, there is no clear drawn boundary line to maintain. In other case, it becomes hared to mark the point of separation in line with the term so colonial border treaty, as facts on the ground do not match with treaty wordings. Inadequacy of African colonial boundary system, thus, should be cured by urgent remedial action to avoid or mitigate border related conflicts in Africa.

1.3. Significance of the Study

The study attempts to show the fallacy and inefficacy of African boundary delineation laws and policies that is based on arbitrary and divisive colonial boundary setting rules. The study not only shades light how colonial boundary system has strained close relationship between Ethiopians and Eritrean, but suggests how to rebuild historic relationship and normalize relationship thereby enhance welfare of the two brotherly people. Consequently, instead of relying on colonial boundary laws and policies, the study suggests the need to strengthen the ongoing venture of AUBP to redraw African boundary in a way acceptable to local people with a view to remove divisive colonial footprints from African borderlines.

The study appreciates historic justification for border creation, but suggests for change of border in way accommodating changed circumstances and needs of the new generation in this highly interconnected and interdependent global phenomenon. Removing border walls will allow free movement of people, good and services. The policy of removing border walls is not a new concept – it is being applied in Schengen Area of Europe. Given destructive effects of terrorism, mass immigration, sovereignty issue, and the need to safeguard the interest of

domestic people from overwhelming foreign labor forces, open border policy may appear unrealistic, but possible and will better enhance wellbeing of new generation.

After all, border system is not a natural phenomenon, but it is man's creation that meant to safeguard the interest of certain group of people that termed as 'insiders' from incursion of outsider that viewed as "others". Nowadays, on account of globalization the classification as "insiders" and "others" has been steadily diminishing. Today, criminals in any corner of globe can perpetrate that act of crime stationed at far location bypassing strong border walls without being detected by border guards. Borders, in effect, fail to serve their traditional role – containing 'others'. Moreover, "others" may not necessarily be outsiders, but all bad people (cyber criminals, terrorists, illegal transactions and so forth). In the era of globalization, the best way to contain "others," therefore, is not defining traditional borderlines nor erecting huge border walls, but building strong relationship and global cooperation and coordination among nations and nationalities is the best tools to control and contain "others."

The study suggests African Union to further strength AUBP in its effort to delimit and demarcate elusive colonial border in a way acceptable to all in *give and take basis*. This is not to permanently separate Africans from their kinsmen, but a temporary solution to building lasting peace. AUBP's venture is a conflict prevention strategy. It is less expensive and not difficult to attain in comparison to costs that may be incurred in resolving actual dispute. The study proves that investment in AUBP will bear a good fruit to Africa in short and long run. The study adds some practical and theoretical underpinnings to the on going African Union Border Program in its effort to prevent potential disputes by drawing a clear boundary in Africa and build good neighborhood with the ultimate goal of changing African border from barriers to bridges.

In the case of Eritrea and Ethiopia, border delineation is not a goal but itself, but it is an important step to create good neighborhood and normalize relationship to rebuild brotherhood. The study shows that EEBC's legalistic approach cannot help to attain the goal of normalization of relationship. Ethiopia and Eritrea should sit together and reach at negotiated settlement. This will definitely help build cooperative spirit that will change borders from barriers to bridges. A borderline that serves, as bridge would allow free movement of people, goods and services while filtering and restraining "others."

1.4. Methodology

As an applied research, which targets at resolving an actual social problem, the study is interdisciplinary in nature and legalistic in approach. The Study affords due regard not only to multiple geopolitical, anthropological, and sociological considerations, but also maintains, the traditional role of doctrinal legal research method in critical stages. Accordingly, the Study assesses a range of global boundary setting norms, international law doctrines vis-à-vis boundary setting, some important decisions of international tribunals, pertinent resolutions of global and regional organizations, pertinent colonial treaties, international conventions, national boundary delimitation and demarcation rules, policies, practices, procedures, and boundary related dispute management systems. Steps taken to resolve the 1998 boundary conflicts between Ethiopia and Eritrea, and numerous arbitration attempts are given special attention.

The efficacy of current African border laws, policies, and institutional setup to manage recurrent and unending border conflicts that frequently claim human lives and economic resources is critically examined.

The study considers publicly available data from official web pages of African Union, specifically AUBP, decisions of EEBC, ICJ, U.N and African states. To authenticate the reliability and accuracy of data, the author has consulted a number of book, journals, (print and internet sources) both in international and African boundary making doctrines.

1.5. Coverage and Study Design

The study does not assess the entire African boundary conflict or conflict situation. It specifically addresses the Ethio-Eritrean boundary conflict as case study, which is not largely different from other African border conflicts that arise from colonial manipulations. After making necessary adjustment to suit prevailing socio-economic and political situation, findings and suggestions posed to Ethiopia and Eritrea boundary conflict may be referred in effort to resolve other border related conflicts elsewhere in Africa.

With a view to address the anthropological root of boundary system in general, chapter two of the study briefly summarizes the creation of boundary system in general. Accordingly, Chapter two highlights the nature of boundary system in general. Boundary/Border is not a natural phenomenon but man's creation. Man is responsible for its creation and alteration, and finally suffers, as a result of border conflicts. Modern state boundary system was born in Europe and exported to the rest of the world during colonization, or the idea was imported from Europe. The art of traditional system of bordering was developed and finally in the verge of demise/change by the process of *debordering* or *rebordering*. The study of historical emergence, function and nature of boundary system in general in Europe appears vital to study African border and border related problem to get some help, and solve boundary issues. Chapter two attempts to show a brief overview of the significance of borders for peacekeeping and security, its historical emergence, its meaning and nature. The chapter thus supplies a

theoretical guide that would assist in illuminating how to manage the current border tension between Ethiopia and Eritrea and find out a lasting solution to avoid potentially looming conflict and thereby set a working norm for the rest of Africa. The current conflicting view regarding demise of border or change of its nature from barrier to bridge or point of contact is briefly mentioned. Chapter two is a mix of multidisciplinary concepts involving political geography, political science, sociology and international law.

Chapter Three explores legal rules, principles and theories pertaining territorial or boundary delineation. A party invoking a right on territory or intending to set a boundary between two neighboring territories should prove title over the territory. Part I of this Chapter accordingly, briefly deals with the traditional modes of acquisition of title to territory and the prevailing legal rules or international authorities governing the determination of title to territory. In resolving territorial or boundary issue, especially when the boundary issue arise as a result of colonial boundary, the principle of *uti possidetis* is often invoked in international tribunals. With a view to assess the implications and application of the principle of *uti possidetis* to resolve African boundary conflict and in particular the current territorial and boundary conflict between Ethiopia and Eritrea, theoretical background and the current status of the principle of *uti possidetis* in international law and its relevance to African boundaries is outlined. The principle of territorial integrity is another important principle of international law that African states often invoke to avoid separation and promote peaceful co-existence.

The application of territorial integrity norm, while keeping territorial integrity of a given state prohibits invasion and separation. The Principle appears conflicting with self-determination and secession. This part assesses how to reconcile the apparent contradiction. Lastly the process and phases of international boundary making is briefly stated. This Part is

very essential as it directly addresses the processes and rules governing the actual boundary making. International boundary making involves four important phases. If all the phases are correctly and peacefully executed, aligning with local factors such as human and geographic factors, it is believed that the boundary will be acceptable and stable, thereby building international peace and security

Chapter Four summarizes African border regime. It attempts to point out how colonialism disrupted African border development and planted its divisive rule that has separated families, ethnic groups and built a border wall that hampered rights of people, nations and nationalities to live with their kinsmen and use resources wherever it was available in accordance with African mores. This Chapter pinpoints how the Pan African movement worked toward removing colonial boundary system and the end of revisionist movement after formation of OAU. The revisionist movement that spearheaded by Pan Africanist, Kwame Nkrumah of Ghana had aggressively worked to redraw African boundaries with the ultimate goal of forming United States of Africa. The agenda of redrawing African boundaries was dismissed by the founding father of OAU. Though it is often mentioned that founding fathers of OAU have opted to respect colonial boundary setting rules and policies in fear of opening Pandora's Box, the supposed fear was motivated by the desire of the founding Fathers not to lose territory or people therein. Chapter four attempts to shows the problems of affording sanctity to the colonial boundary and suggests for redrawing African boundary with a view to create good neighborhood until the nature of borders changed from barriers to bridges thereby realizing the ongoing mission of AUBP.

Chapter Five explores the historic link between Ethiopia and Eritrea. Ethiopians and Eritreans are basically one people. There is no basic difference between Tigrinya highlanders

of Eritrea, which is majority in Eritrea, and the people of Tigray region of Ethiopia. Both speak Tigrinya, are members of Orthodox Church, have common culture and intertwined by marriage and other cultural links. Eritrean Western Regions and low residents are Muslims and have their kinsmen on Ethiopian side too. That is why President Isias Afework, before outbreak of border war remarked, it was not possible to build a restraining wall between Ethiopia and Eritrea.⁵¹ But numerous socio-economic causes triggered sudden outbreak of the apparently border war in May 1998.

The last Chapter examines how the border war was flared up unexpectedly and subsequent consequences. After eruption of border war numerous international and regional actors attempted to stop the war and convince both sides to the negotiation table but all efforts could not succeed. As a result, devastating war erupted in all direction that took lives tens of thousands from both sides. After Ethiopia regained all of its occupied territories, Eritrea declared its intention to accept OAU's Framework Agreement. Accordingly an agreement on Cease Fire and Cession of Hostilities was signed and an arbitration tribunal was constituted. Due to elusive nature of colonial treaties, the decision of arbitration tribunal remained unacceptable. The two brotherly nations are still locked up in unsolvable deadlock. Finally, research findings, conclusionary remarks are briefly summarized

⁵¹ TEKESTE NEGASH & KJETIL TRONVOLL, BROTHERS AT WAR: MAKING SENSE OF THE ETRITREAN-ETHIOPIAN WAR, 10(2000).

CHAPTER TWO

The Creation and Nature of Boundary System

2.1. The Significance and Implications of Boundary

A sovereign power can exert its full authority within the bounds of a territory in which it can stretch its mighty hands to regulate, control and defend its subjects. Territoriality and sovereignty are closely associated concepts, as one can invoke all the effects of sovereignty within a defined (bounded) territory.¹ Put differently, sovereignty can be exercised within a territorial space that is marked by a point or line called boundary. Boundaries are outer edges of a territory within which a state can exercise exclusive power.² Boundaries, therefore, are intrinsically linked to the space they split from the wider global space in which authority over things and people therein can be claimed. Thus, “[...] borders demarcate state’s sovereignty [which...] starts at its borders and ends at its borders.”³ Hence, every territorial state needs a defined boundary because, “[... it] is the beginning of every order and every thing.”⁴

¹ Stanley Waterman, *Boundaries and the Changing World Political Order*, in CLIVE H. SCHOFIELD (ed), GLOBAL BOUNDARIES, 1 WORLD BOUNDARIES, 23(1994)., Sir Thomas Holdich, in his early 20th century notorious book, *Political Frontiers and Boundary Making*, remarks, “ The territorial limit, of any community state or nationality [...] is usually a fair indication of the distance from the central seat of control that the arm of the law can reach.” (THOMAS H. HOLDICH, POLITICAL FRONTIERS AND BOUNDARY MAKING, 31(1916)). According to Krukoski, “Territory is the surface, limited by boundaries over which the nation exerts its sovereignty.” See William Krukoski, *Frontiers and Boundaries* (Jose Krukosi, trans.), <http://info.lncc.br/artigo.html>. Last accessed 11/13/14.) In very limited circumstances sovereignty can be claimed beyond territorial limit. According to Caporaso, “ States and Corporations attempt to extend their authority outside their own territory.” (James A. Caporaso, *Changes in the Westphalian Order: Territory, Public Authority and Sovereignty*, 2 INT’L STUD. REV. 6 (2000)).

² VICTOR PRESCOTT & GILLIAN D. TRIGGS, INTERNATIONAL FRONTIER AND BOUNDARIES, LAW, POLITICS AND GEOGRAPHY, 140(2008).

³ GBARIEL POPESCU, BORDERING AND ORDERING THE TWENTY –FIRST CENTURY, 14(2012).

⁴ Ruben Zaiotti, *Cultures of Border Control*, PhD THESIS, DEP’T OF POL. SCIE. U. TRONTO (note 45) 44(2008), https://tspace.library.utoronto.ca/.../Zaiotti_Ruben_200811_PhD_Thesis. (Last accessed 01/21/15). As Jennings state, “The definition of statehood itself has the possession of a more or less defined territory as a necessary element.” See I.R.Y. JENNINGS, ACQUISITION OF TERRITORY IN LAW, 2(1963).

As borders of national territory signal the limit of the scope of power, it is significant for the subjects and the sovereign power.⁵ After all, “[b]order making is a power strategy that uses difference to assert control over space by inscribing difference in space.”⁶ This assumption has inspired border scholars to view a territory as a ‘bordered power-container’.⁷ Similarly, illuminating the nexus between boundary and authority, Richard Griggs, comments, “Just like smoke indicates fire, boundaries indicate power.”⁸ To Griggs, “Boundaries could be defined as the very shape of power.”⁹ Endorsing Griggs assertion, Donna and Wilson remark, “Borderlands are sites and symbols of power.”¹⁰ Prescott and Triggs, make almost an identical assertion pinpointing the interface of territorial boundary and sovereign competence.¹¹ In contemporary sense, boundary is “the firm and inherent attribute of [a] state.”¹²

On the same token, Ruben Zaiotti observes, “Territoriality – the control of a defined surface of the globe - and sovereignty [...] are two of the key principles defining the modern geopolitical vision.”¹³ A sovereign power is exclusively competent to declare compelling laws to regulate subjects within the limits of the territory, to enforce laws or adjudicate and punish lawbreakers exclusively. Needless to say, in normal course of things, a sovereign loses his/her might outside the bounds of a territory that he/she controls. This is because “... sovereignty over land defines what

⁵ Vladimir Kilossove & James Scott, *Selected Conceptual Issues in Border Studies*, BELGEO 5(2013), <http://belgeo.revues.org/10532>, accessed 02/11/15.

⁶ Popescu, *supra* note 2 at 20.

⁷ RUBEN ZAIOTTI, CULTURE OF BORDER CONTROL, 46 (2011).

⁸ Richard A Griggs, *Boundaries and War in Africa in 1995*, I IBRU BOUNDARY & SECURITY BULLETIN 77(1995).

⁹ *Id.*

¹⁰ DONNAN & WILSON, BORDER, FRONTIERS OF IDENTITY, NATION AND STATE, 1(1999), quoted in Andrei Cusco, *From an imperial Borderland to a “European Frontier”*, *History, Politics and the Ambiguity of Belonging* (The Case of Bessarabia/Moldova), www.geo.hunter.cuny.edu/courses/.../Frontiers%20and%20boundaries.p... (Accessed on 10/25/14).

¹¹ Prescott and Triggs, *supra* note 2.

¹² OSCE, *Applied Issues in International Land & Boundary Delimitation/Demarcation practices*, A seminar Organized by the OSCE Borders Team I Cooperation with Lithuanian OSCE Chairmanship (31 May – 1 June 2011). <http://www.osce.org/cpc/85263?download=true> (accessed 03/28/15).

constitutes a state.”¹⁴ Thus, “Borders represent the very essence of statehood,” as a defined border, reveals the scope of authority of territorial state in the international system.¹⁵

Boundaries or territorial limits of a given nations should, therefore, be unambiguously set. Delineation of an exact point of boundary is “[...] necessarily an outcome of determination of territorial sovereignty [...] and [...] typically defines the jurisdictional reach of the state.”¹⁶ Thus, borders enlighten the beginning and end of control and power. Consequently, “All political systems need some minimum definition of where the boundaries of authorities lie, and a mechanism for their maintenance and reproduction.”¹⁷

Francis Ikone, in his brief article entitled, *Africa’s international borders as potential sources of conflict and future threats to peace and security*”, highlights the compulsory nature of defined boundary for effective function of a state as follows:

In the modern state, well-defined borders are not only a key element of the definition of statehood.... Legitimate governmental objectives cannot be clarified or implemented unless the territory where such authority is to be exercised can be defined and understood. [...] While unconsolidated borders, combined with ineffective political institutions and incomplete nationalist projects, have been recipes for instability and conflict, the establishment of more or less stable borders has been identified as a precondition for the building of stable governments and states.¹⁸

An obscure boundary limit obviously results in elusive territory, which in turn, generates confusion in the scope of sovereignty. Residents of tenuous territory may defy orders of an ‘ostensible sovereign’ that may result in lawlessness and engender conflict. By implication, therefore, a defined territory is one of the indispensable elements constituting an effective State with a

¹³ Zaiotti, *supra*, note 7 at 45.

¹⁴ Briant Taylor Sumner, *Territorial Disputes at the International Court of Justice* 53 DUK. L. J. 1779 (2004).

¹⁵ Zaiotti, *supra* note 7 at 2.

¹⁶ Prescott & Triggs, *Supra* note 2.

¹⁷ Zoiatti, *supra*, note 7 at 45.

¹⁸ Francisco N. Ikome, *Africa’s International Borders as Potential Sources of Conflict and Future Threats to Peace and Security* ISS No. 233 2(2012).

sovereign organ that is conferred with irrefutable power over the subjects in the territory.¹⁹ Thus, international boundaries indicate the limits of territory at which “... the arm of the law can reach or the jurisdiction of each state....”²⁰ Sumner accordingly remarks, “The benefit of having territory [is ...] great [as long as] state borders are clear, because a state’s boundaries must be well defined for the modern state to function.”²¹ A territory may be assumed clearly defined when its borderlines are undoubtedly marked and largely uncontested.²²

A defined territory enables the sovereign to discharge its traditional functions of maintaining peace and security efficiently. The State, thus, can deploy its border guards to defend the territory and safeguard its citizens from foreign aggression within the limits of its territory. Moreover, a clearly set borderline affords the sense of security by discouraging unauthorized intrusion into the territory thereby enhancing stability. In medieval times, boundaries served, as checkpoints to scrutinize illegal exist and unauthorized entry. Some medieval cities built boundary walls that had limited gates in which only those permitted could get access. The gates also served as a check point for regulating exit out of the city. In case of unauthorized border crossing a clearly set border enables subjects in the secured border to take protective measures including use of force.

¹⁹ As stated in Montevideo Convention, among other things, a state as a person of international law, should possess a defined territory. (MONTEVIDEO CONVENTION ON RIGHT AND DUTY OF STATES Art. 1 (1933). In some cases the “territoriality” element of statehood may be blurred when two or more organs claim territory; however this does not mean a contested territory has no sovereign at all. The Arab – Israel territorial conflict can be taken a good example. According to Professor Philip Jessup, despite Arab claims, Israel has satisfied “doctrinal elements of statehood as early 1948.”; See also WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATINAL LAW 56(4th ed.: 2003).

²⁰ A.O.CUKWURAH, THE SETTLEMNTN OF BOUNARIES DISPUTES IN INTERNATIONAL LAW, 9(1967).

²¹ Briant Taylor Sumner, *supra note* 14.

²² This does not, however, mean every inch of borderline must be precisely delineated, nor uncontested. It rather means there should be a basic territory with the possibility of clear delineation. See *North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* I.C.J. Reports 132 Para 46 (1969). At the formative stage of Israel, even today, most of the boundaries of Israel are not well settled as neighboring countries contested the limits of Israel territory, but the State of Israel was formed and admitted to the membership of UN. Similarly, “Albania was recognized by a number of sates in spite of a lock of settled frontiers.” For the purposes of formation of a state the law simply requires “.. a reasonably stable political community and this must be in control of a certain area. “ see JAMES CRAWFORD, (ed.), *BROWNLIE’S PRINCIPLES OF PUBLIC*

In this regard, historically, boundary wall had served defensive functions as “foreign interlopers [within a defined boundary] move at their peril.”²³ In the modern era, international law authorizes states to take actions against any actual or provocative measures that may threaten the security of a territory.²⁴ Self-defense can be exerted against actions of another power if the provocative act targets people, property or territorial integrity of the defender. A claimant of self-defense, therefore, should prove that it launched the act of self-defense to prevent aggression within the bounds of its territory. For instance, in our case study, Eritrea sent armed personnel to the area that was administered by Ethiopia and resided by Ethiopians who have been residing in the contested areas for centuries. The unauthorized intrusion of armed men provoked the conflict. Ethiopia considered the unauthorized incursion as aggression, but neither Boundary Commission nor the Security Council, apart from EECC clearly designated the Eritrean act as aggression. Ethiopia’s initial use of force appears to meet the definition of self-defense. (For details see Chapter Six page 293ff).

Territorial boundary is man’s creation, but its sanctity is well accepted in several versions of the Bible. It is assumed a curse to mess a boundary limit either by destroying boundary marks or illegal expansion of one’s limit of land. The Book of Deuteronomy states, “Though shalt not remove thy neighbour’s landmark, which they of old time have set in thine inheritance, which thou shalt inherit in the land that the LORD thy God giveth thee to possess it.”²⁵

Samuel Finer attempts to reveal mental state of an ideal man vis-à-vis defined territory and boundary setting in state formation. Finer makes a powerful illustration stating, “Tell a man today

INTERNATIONAL LAW 128 -129(8th ed.: 2012). Thus, for existence of a state fully uncontested, frontiers is not a requirement though it is important for effective function of sovereign power.

²³ Prescott & Triggs, *supra*, note 2 at 139.

²⁴ *UN Charter* Art. 2 (4).

²⁵ *Deuteronomy* Xix, HOLY BIBLE, NIV (2011).

to go and build a state; and he will try to establish a definite and defensible territorial boundary and compel those who live inside it to obey him.’²⁶

According to Douglas Johnston “...political boundaries are a psychological necessity even in the absence of a direct military intrusion into a group’s living space.”²⁷ Sense of security and stability not only makes governance easier, but also it is pivotal for maintaining global peace and security thereby enhance wellbeing of everyone. Diener and Hagen highlight the nature of boundary as follows: “We live in a very bordered world. *The daily news is filled with controversies concerning the political, cultural, and economic borders that crisscross the Earth’s surface.*”²⁸[Emphasis mine]. The learned authors further remark, “ Borders are central features in current international disputes relating to security, migration, trade and natural resources.”²⁹

A defined boundary also offers subjects with the autonomy and home feeling. Belongingness is a natural character of human being. A tribe or an ethnic group normally trusts its fellow group member and strives to maintain intimacy in a territory that is not freely and easily available to a stranger. This natural character of human being builds some kind of inherently rooted, but hidden boundary line or encourages construction of notoriously visible boundary.³⁰ Douglas confirms this attitude of human being suggesting, “boundaries are essential to human autonomy because they serve to institutionalize our separateness from others, even our closest neighbors.”³¹ Similarly, Diener and Hagen remark, “ Territoriality [...] serves as a social mechanism [...] deriving the process of defining what is ‘ours’, in opposition to what is ‘theirs’.” To them, “ By

²⁶ Samuel E. Finer, *State building, state boundaries, and border control*, SOCIAL SCIE. INFO. 13 (4-5) 9 - 126(1974), <http://ssi.sagepub.com/content/13/4-5/79.extract> , last accessed on 12/29/14.

²⁷ DOUGLAS JOHNSTON, THE THEORY AND HISTORY OF OCIAN BOUNDARY – MAKING 12(1988).

²⁸ ALEXANDER C. DIENER & JOSHUA HAGEN, BORDERS: A VERY SHORT INTROUCTION, 1(2012).

²⁹ *Id.*

³⁰ David Newman, *The Lines that Continue to Separate us: borders in our borderless world*, 30 PROGRESS IN HUMAN GEOGRAPHY 147, 143 -161 (2006). <http://phg.sagepub.com/content/30/2/143> (Accessed: 4/11/16).

demarcating and defending territory, groups control specific spaces and resources in an effort to regulate extraterritorial practices, such as entry and exit, and intraterritorial practices, such as social hierarchies and governance.”³²

To Janique Dubois the expression “territoriality” encompasses broader connotation, which is more than a literal meaning of the term, holding emotional or symbolic value. Emotional significance of territoriality appears valid to assert the significance of territories having no current apparent economic importance. For example, deserts (barren lands) currently may have no, or lesser economic value but embodies stronger emotional implications, which may even supersede economic considerations. Thus, to Dubois territoriality is a concept linked with “ [...] *property, boundary and jurisdiction*.”³³ In the words of Dubois:

[...territoriality] does not simply refer to national borders or lines on a map. Rather, it expresses a relationship between land, people and identity [...] Territoriality is characterized as a process through which places are created to “satisfy both the material requirements of life and the emotional requirements of belonging – of placing oneself both in time and space”. A relational understanding of territory takes into account the symbolic as well as the functional roles [that] geographical areas encompass.³⁴

Emotional and symbolic significance of a territory makes border related conflicts hard to resolve. Ruben Zaiotti, rightly remarks, “ [...] borders are powerful symbols of identity and historical continuity, both for the state as institution and for the peoples they contain.”³⁵ The Ethio – Eritrea border conflict best explains the emotional implications of economically insignificant land. Commenting on Ethio-Eritrea war, the Economist cited a quotation, “ *Two bald men fighting over a*

³¹ Douglas *supra*, note 27 at 12.

³² Diener & Hagen *supra* note 28 at 6.

³³ Janique Dubois, *Beyond Territory: Revisiting the Normative Justification of Self-Government in Theory and Practice*. THE INT’L INDIGENOUS POLICY J. 2(2) (2011). <http://ir.lib.uwo.ca/iipj/vol2/iss2/1> (Accessed: 9/29/14).

³⁴ *Id.*

³⁵ Zaiotti, *supra* note 7 at 2. According to Paasi, bounded territorial space identifies people and serves as their historical symbol. See, Anssi Paasi, *The Changing Discourses on Political Boundaries – Mapping the Backgrounds Contexts and Contents*, in HENK VAN HOUTUM, et al (eds.) BORDERING/ ORDERING SPACE, BORDER REGION SERIES. 20 (2005).

comb”.³⁶ [Emphasis mine]. The expression portrays an idea that the two countries were fighting for a trifling barren land, which in economic terms does not justify for the expensive and destructive war. But to the people of Ethiopia and Eritrea the disputed village, *Badme*, was more than a ‘comb’. *Badme* never been under Eritrean control and no Eritrean regarded it as part of Eritrea territory, apart from the current Eritrean government. Ethiopians used to live in the village of *Badme* from the time immemorial. Residents of *Badme* never heard about the elusive treaty that was concluded in Addis Ababa between Emperor Minilik II and Italian colonial power. Eritrea on the other hand claims *Badme* has been Eritrean land since colonial treaty of 1902 in accordance with the Cairo Resolution of OAU, which is akin to doctrine of *uti possidetis juris* Spanish Latin America.

For both nations the dispute over *Badme* appears more than a simple border issue. It involves the question of supremacy and has renewed the old ethnic issue. Northern Ethiopian region, Tigray and Eritrea, are power rivalries and often battle for superiority. Eritreans consider them superior to Tigray people though both speak the same language, almost the same culture and religion. Thus, it appears the battle for supremacy, which entails emotional consideration, supersedes economic and human cost that the war has consumed. On top of this, residents of *Badme* consider the disputed border as expression of identity. They have been living in the vicinity for centuries peacefully. If *Badme* is surrendered, residents should leave their village and resettle in Ethiopia or Eritrea, depending upon their choice, which is not simple to decide.

In some cases, border issue demands the need to balance competing interests with a view to maintain peace and stability. In geographic terms some authors view this internal and external

³⁶ *The Economist*, in June 11th 1998 issue labels the border war as “Two bald men fighting over a comb.” The Economist further sums, “Both Ethiopia and Eritrea are, ... two poorest countries in the world ...[but fought]... for a few square miles of barren mountain where a few thousand souls barely scratch a living. The whole border is

pressure as “centrifugal and centripetal forces”. In the words of Douglas, “ ... a state is dependent for its survival on the preservation of a balance between centrifugal and centripetal forces...”³⁷ Subjects of a sovereign state pressurize the government to safeguard their interest against competing external forces and maintain social and cultural wellbeing while non-subjects compete for resources and opportunities that are necessary for survival. As Diener and Hagen, rightly remark, “ ... social groups instinctively seek territorial control to secure resources necessary for survival. This suggests humans are subject to perpetual ‘survival of the fittest’ and deny access to competing groups.”³⁸

The border between United States and Mexico is a good illustration to demonstrate the internal and external pressure on the government. Border issue, in United States, is not uncommon, especially in election seasons. During presidential campaign, Governor Perry of Texas said: “This violence will not stand [...] *If Washington won’t stand to secure the border, as the governor of Texas, I will.*”³⁹ (Emphasis added). The enactment of numerous immigration legislations, law enforcement institutions, and customs and border protection efforts exhibit the government’s battle to maintain balance between exterior and interior forces.

When the scope of limit of boundary is contested the pressure on the government is so intense as both internal and external forces rationalize their resentment on economic, social and cultural grounds. Though there is no active governmental boundary related conflict between Ethiopia and Sudan, border residents on Ethiopian side often protest against the Ethiopian government asserting the government negotiated to surrender a portion of Ethiopian farm land.

now a battle zone, and the two countries are war footing.” See <http://www.economist.com/node/134580> (Accessed: 10/17/14).

³⁷ Douglas, *supra* note 27 at 13.

³⁸ Diener & Hagen, *supra* note 28 at 5.

³⁹ Aman Bethlja, THE TEXAS TRIBUNE, August 8, 2014, <http://www.texastribune.org/2014/08/08/speech-perry-vows-secure-border-spread-red-state-p/> (Accessed: 02/11/15).

Sudanese farmers on the other hand exert armed conflict against Ethiopian farmers claiming that the land belonged to them. There is an elusive colonial treaty that was never applied on the ground (not demarcated). The two governments have established a boundary commission and have been working to settle the issue amicably, but border residents of both countries are not satisfied by what their respective governments have been doing.⁴⁰

Boundary related issue is an old one, but it is still a “disease” that never been “treated well and cured” to the extent of banishment. Human being, in history, has experienced numerous destructive border motivated wars but all efforts could not end it. Causality of border war appears out number victims of fatal diseases or natural catastrophe. Scientists often succeed in finding vaccine for killer diseases. Today, the world is safe from some of the old time devastating diseases and the race to invent medicine for fatal diseases like Ebola, HIV and cancer is so high. Huge campaign is being made to eradicate those killer diseases. But since the emergence of human boundary, human being has been suffering, but no effective solution was devised to safeguard victims of border conflict. In some cases, destructive effects of border wars supersede effects of HIV or cancer. Violent border conflicts destroy thousands of lives in short span of time. For instance, in two years border war (1998 – 2000), Ethiopia and Eritrea lost about 100, 000 lives.⁴¹ Since World War II human being experienced numerous border conflicts, and embroiled by destructive wars. Vast number of nations is still in confrontation and huge military personnel and killer machines are ready to release hot fire on the crowd of borderland people. Border related conflicts are very sensitive and often end up in armed confrontation.

⁴⁰ See Tisepero Mncina, *Sudan border demarcation causes Ethiopia Unease*, <http://www.afrol.com/articles/28964> Accessed on 10/19/14

⁴¹ Kevin Hamilton, *Beyond the Border War: The Ethio-Eritrean Conflict and International Mediation Efforts*, 11 J. PUB. & INT’L AFFAIRS- PRINCETON 119, 113 – 136 ((2000)

Most, if not all, medieval international or intergovernmental wars had the issue of territory one way or another. Boundary conflict was common in primitive communities, as rulers often wished to have more territory and people as manifestation of power. In present state boundary conflicts appear never ending, unless national and international agencies honestly work with full determination to end it by defining borders or changing the nature of borders from barriers to bridges rather than lines of separation. Christianity supports sanctity of borders but it has no binding effects and powerful nations often disregard Deuteronomy 27:17, which proclaims: “Cursed be he that removed his neighbors landmark.” (Deuteronomy 27:17). Though the validity may be disputed at present, the expression, “ Good fence makes good neighbors (Robert Frost, Mending Wall),” appears still valid.

Recurrent African territorial violation does not imply that medieval Africa did not have territorial boundary at all. Though elusive and in some cases difficult to precisely locate, as it was not drawn in modern senses, medieval Africa had its own indigenous kind of territorial boundary. Every tribe or ethnic groups had their own land with known boundaries that they could exclude others. Though there was no map or clearly defined frontier, in modern sense, each tribe, ethnic group, nations and nationalities had their own land with known boundary which was marked by natural features of land like mountain, in most cases rivers, lakes or forests. Ethiopia, for instance, has several nations and nationalities that currently constitute one political entity. The territorial limits of borderland tribes or ethnic groups that make up Ethiopia considered as Ethiopian boundary.

In ancient times, it was not uncommon to build border fences of city-states. Though not affording the traditional function of excluding “other”, the Harar city border wall in Ethiopia is still alive. The city of Harar was fenced with 5 gates that serve now as one of the tourist attraction sites.

In other areas, though the periphery not fenced like the City of Harar, there was boundary known to the local people. Unfenced borders were crossable in belief that God has created passage. Border residents, though they were aware of the facts that they crossed a boundary line and entered into the land of someone else only in merely exercising their right of passage. This was based on the belief that God has created lines even in human body (lines in human body in which blood transported). Thus, everyone had unlimited access unless expressly prohibited or fenced to restrict the access.

In this increasingly globalized contemporary world, territoriality and boundary may appear a shrinking or obsolete phenomenon, but facts on the ground and emerging global security concern demand construction of strong barriers and dictate for firm vigilance and scrutiny in all borders of contact. Thus, in the era of globalization too, borders may be used as protective tools against threat of security and unauthorized immigration, which may have adverse impact in keeping peace and security. In the words of Gabriel Popescu,

Recently borders have been taken on heightened significance in an era of globalization. They are central to the profound changes globalization is generating in the way people and societies relate to space at the outset of the twenty first century. If during the early 1990s globalization pressures on state borders led some to envision the emergence of a borderless world (debordering). By early 2000s it became clear that borders were retaining their significance albeit under new appearances (rebordering). Despite unprecedented opening up to various globalization flows, borders are far from fading away.⁴²

Borders are also significant for smooth working of globalization by filtering undesired actors and facilitating free movement of “good” people, goods and services or the actuality of a new type of border that can enhance friendship, and contribute for building lasting peace and security. Global economic inter-dependence will effectively work in friendship atmosphere where peace prevails over conflict. It may appear awkward to talk about the significance of border while working for its destruction. Border related disputes are extremely potent to generate armed conformation, and hence it is almost impossible to *deborder* unless friendship atmosphere prevails

by delineating mutually acceptable border lines and build good fences that can create good neighborhood. Global peace and security smoothens interdependence and would facilitate the emergence of truly borderless world. According to Prescott and Triggs, “Boundaries are the line of physical contact between states and provide opportunities for cooperation and risks of discord. “⁴³The old maxim “ Good Fences Make Good Neighbor”, really works to establish a smooth relationship and mutual co-existence which is vital for building sustainable friendship and ultimately transform boundaries from barriers to bridges for peaceful interaction and integration.

2.2. The Origin and Nature of Boundary

2.2.1. How boundary system was created?

All human beings are “created free”, and endowed with a full liberty on earth.⁴⁴ As prescribed in the Sacred Books, God conferred men with utmost freedom to freely move anywhere and enjoy almost all the fruits of earth.⁴⁵ Thomas Holdich, in his seminal book entitled, *Political Frontiers and Boundary Making* remarks, “ Nature knows no boundary lines.”⁴⁶ Similarly, Gabriel Popescu, acclaims, “Nature does not offer compelling rationales to justify the creation of borders between places.”⁴⁷ An African boundary researcher, Cukwurah paraphrases this view stating,

⁴² Popescu *supra*, note 3 at 23.

⁴³ Prescott & Triggs, *supra* note 3 at 5.

⁴⁴ In Christianity, the ideal truth is everyone has got freedom to decide his/her destiny though it is not advisable to pursue a root that ultimately would end up in hell. Christians believe that God gave human being the freedom to pursue their way in direction they think good, including bypassing God’s laws. The violator, however, is expected to harvest fruits of his/her free actions (Galatians 6: 7 – 10). As stated in the Deuteronomy 30:19 “Man” has utmost freedom to choose life or death, heaven or hell or blessing or cursing. According to Tanveer Hussain, The Quran also stipulates almost an identical point on Man’s free will. “ The Quran says, “ Do whatever you will; there is absolutely no compulsion in the Deen” Tanveer Hussain, The Quran, Determinism and Free will, http://www.academia.edu/902712/The_Quran_Determinism_and_Free_Will, (Accessed 7/30/14).

⁴⁵ Take, for instance, the case of nomads who moved and lived in any part when needed. To them, the earth and assets it hold belonged to human being in common and when needed anyone could use it. Nomads assume unlimited freedom of movement irrespective of man-made barriers. This character of nomads is also visible even in the modern world. Ethiopian nomads, for example, often bypass the international boundary between Ethiopia and Kenya. Following pastureland and water nomads travel irrespective of national or international boundary. They often class with law enforcement agencies or permanent settlers.

⁴⁶ THOMAS H. HOLICH, POLITICAL FRONTIERS AND BOUNDARY MAKING 2(1916).

⁴⁷ Popescu, *supra*, note 3 at 20.

“Nature Abhors Boundaries.”⁴⁸ Cukwurah further suggests, “ On the whole, human factors were primarily responsible for the creation of [...] boundaries and for their variance [...]”⁴⁹ It is true that human being has crafted boundaries with a view to exclude “other”; frequently ventured to alter it with the motive to expand territorial limits. Needless to say, the battle for territorial expansion often causes animosity and tension among neighboring nations.

Naturally, thus, there was no limit or barrier that meant to impede movement. According to Diener and Hagen, medieval people, “[...] lived within small bands of nomadic foragers known as hunter-gatherers whose migration [was...] patterned by changing seasons and environmental conditions that affected availability of food and other resources.”⁵⁰ Hence, ancient people freely moved anywhere they wished provided they earth could accommodate them by supplying things to eat and offering conducive climate.⁵¹

This absolute freedom, presumably, encouraged nomadic way of life, which is still apparent in some societies.⁵² Nomads often disregard boundaries, like birds and natural beasts. In search for better way of life and abundant resources for themselves and their cattle, nomads unless impeded by topography or other man-made hurdles, often move, ignoring boundaries.⁵³ As protective measure against attack by wild beasts ancient people moved in small groups for “hunting, fishing,

⁴⁸ Cukwurah, *supra*, note 20 at 12.

⁴⁹ *Id.* at 14.

⁵⁰ Diener & Hagen, *supra*, note 28 at 19.

⁵¹ Omar Abubakar Bakhashab, *The Legal Concept of International Boundary*, 9 JKAU 34 (1996).

⁵² According to a study conducted by African Development Bank, today nomads constitute 6% of African population and can be found in 20 African countries. See <http://unesdoc.unesco.org/images/0014/001405/140562e.pdf> last accessed 7/28/14. Today there are about Tens of million of nomads globally. Africa, Middle East, South West and Central Asia houses millions of nomads. See also Saverio Kraetli, *Education Provision to Nomadic Pastoralists* Dec. 2000), <http://www.uni-oldenburg.de/zef/cde/OMDE%20Fall%202003/Technology/Nomads/Kraetli.doc>. (Accessed 7/28/14).

⁵³ Bakhashab, *supra*, note 51; Ancient movement of people may be analogized with present migration of birds or other wild animals. Birds freely migrate depending on the weather condition and availability of minimum requirement of life. Though present wild beast have some kind of restriction, they migrate if the place they situated is not secure or in search of water and food. Nature created man to enjoy full freedom but it man or mans action that brought limitations.

pasture and simple tillage in their earliest form.”⁵⁴ The choice of route for migration was not a predetermined one. Migrating people simply avoided natural barriers like mountains, lakes, huge rivers, unmanageable thick forests, dangerous wild beasts, and moved until they got food for themselves or greener pasture for their cattle.⁵⁵ If the nomads or migrants by chance landed at an area that had been already occupied by another group, the new comers and the original settlers clash. The winner expelled the looser and strengthened its ownership of the land and resources on it and set its own boundary. As there was no binding rule yet, self-help was the only way of protecting ones interest. Social Darwinism best explains how a stronger fitted to a situation and a weaker wiped out.

The unimpeded movement was curtailed by the emergence of powerful groups that effectively safeguarded their private land holding and its resources. This has discouraged frequent migration, and hunting steadily replaced by agriculture. This has facilitated the emergence of private property.⁵⁶ Private land holding coupled with human civilization necessitated imposition of certain limits on the freedom of movement. John Lock’s assertion of origin and rationale for private property appears to confirm this fact.⁵⁷ Locke justifies personal nature of property in his notorious philosophy called *Labor Theory*. He asserts, “ Though the Earth [... is] common to all Men, yet every Man has a property in his own Person. *This no Body has any Right to but himself.*”⁵⁸ [Emphasis added]. Thus, involvement of one’s labor either by occupying master-less land and

⁵⁴ Cukwurah, *supra* note 20 at 13.

⁵⁵ *Id.*

⁵⁶ Regarding the exact point of emergence of private property there is divergence of idea. See Scott A. Beaulier and David L. Prychitko, *Disagreement over the emergence of private property rights: alternative meanings, alternative explanations* (2006), http://www.gmu.edu/depts/rae/archives/VOL19_1_2006/3-Beaulier_Prychitko.pdf (Accessed 7/28/14).

⁵⁷ John Lock confirms communal property nature of earth. To Lock, “ God gave the world to men in common.” (John Lock, *Two Treatise on Government* §25 (1821). <http://press-pubs.uchicago.edu/founders/documents/v1ch16s3.html>. See also STANDARD ENCYCLOPEDIA OF PHILOSOPHY, available at: <http://plato.stanford.edu/entries/property/> (Accessed 7/28/14).

⁵⁸ *Id.*

resources on it, or improvements on the land or its resources rendered fruits of labor personal, and no one could claim it, other than the person who had invested his labor. The restriction that was imposed as a result of one's personal belonging (private property) has, supposedly, created a borderline that cannot be freely crossed by an unauthorized person. Accordingly Lock concludes:

“The Labour of [.. man's] body, and the Work of his Hands, we may say properly his. Whatsoever, then he removes out of the State that Nature hath provided, and left it in, he hath Mixed his Labour with , and joyned to it something that is his own, add thereby makes it his Property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it, *that excludes the common right of other men.*”⁵⁹ (Emphasis added).

It is true that the emergence of private property by itself cannot curtail ordinary movement of people but it has evidently restricted free enjoyment of resources that the earth offers. Thus, a person who invested his labor either by occupying a master-less property or improved it could deprive a stranger to use the resources already occupied or improved. Excluding others by setting limits is one of the important consequences of ownership, which makes unwelcomed intrusion trespass.⁶⁰

According to Diener and Hagen, ancient societies, though lived in a nomadic way of life, had territory that they claimed “theirs”.⁶¹ They kept moving back and forth and periodically vacated a given spot, but this did not mean abandonment. In the words of Diener and Hagen:

“[...] pre-historic humans possessed surprisingly elaborate territorial arrangement. Rather than wandering aimlessly, hunter-gatherer groups likely operated within relatively stable local regional foraging ranges or what might best be described as networks of foraging sites. These networks were shaped by extended kinship or alliance relationships, religious beliefs, and ecological conditions.”⁶²

Hunter-gatherer groups had invested labor and considerable energy in clearing forests and paving ways for the effective utilization of natural resources. Even if they knew that they would

⁵⁹ *Id.*

⁶⁰ Needless to say, an Unauthorized crossing of the line hoodwinks ownership and illegal. The owner can enforce his/her ownership right either using law enforcement agencies, if any, or take self-help measures.

⁶¹ Diener & Hagen, *supra* note 28 at 19.

move from the spot, depending on the situation, pre-modern men had endeavored to make life relatively comfortable and deserved protection against trespassers. This plausibly accords with Locke's Labor Theory, and thus, the law should safeguard fruits of their labor by setting boundaries to avoid or restrict unauthorized intrusion.

Boundary system starts at individual landholding and goes to national political boundary.⁶³ The first kind of boundary is the one that separates neighbors, be it, individual or community. As quoted by Krukoski, Castillos Goycochea observes:

The first boundary was traced on the ground by the first being that understood his position in face of his neighbor's. From individual property it passed to the collective sovereignty, i.e. to the household, from the household to the city, from the city to the province, and from the province to the country. Everything has limits, lanes, fences, walls or some other designation that defines the characteristics of the material possessions, of some being, be that a man or a social entity.⁶⁴

Territorial limits of medieval societies had been very porous and often difficult to locate. Moreover, boundaries were set on the basis of sufficiency of resources, and subjectively on need basis or on condition of inhospitality of a territory or a given region or obstacles that make border crossing impossible or difficult such as rivers, mountains and deserts.⁶⁵ Even though an exact limit of a boundary may not be easily noticed, it is undeniable fact that pre-modern societies had territories that exclusively belonged to the society in common in which any member moved freely. Strangers were not allowed to collect fruits from privately held territories, advance permission from the group. It is rightly remarked:

Although it is tempting to think of ancient hunter – gatherers groups as nonterritorial since clear borders seem absent among their modern - day counterparts, these early group most likely featured complex strategies for regulating membership, territory, and resources that intermingled notion of exclusivity and reciprocity contingent upon animists religious practices, kinship customs, and resources availability.⁶⁶

⁶² *Id.* at 1.

⁶³ Oscar J. Martinez, *The Dynamics of Border Interaction*, in Clive H. Schofield (ed). *WORLD BOUNDRIES: IGLOBAL BOUNDARIES*, 7, 1– 14 (1994).

⁶⁴ William R. M. Krukoski, *Frontiers and Boundary*, <http://info.lncc.br/artigo.html> (Accessed 11/13/14).

⁶⁵ *Id.*

⁶⁶ Diener & Hagen, *supra* note 28 at 21.

For the purposes of exclusive use of fruits of the territory some ancient societies had exerted efforts to demarcate their territories by investing “ [...] considerable energy in claiming and maintaining exclusive access to specific hunting and foraging areas.”⁶⁷ Though not free from doubt and lacked precision, medieval societies had used various mechanisms signaling limits of their boundary and protected their territorial limit. For instance:

... the Tsimshian, coast Salish, and many other groups in North America Pacific Northwest developed intricate social systems focusing on ownership of and access to resources sites. Although punishment for trespassers could be severe, property-owning lineages were expected to share their bounty through ritual celebrations. The Veddah peoples of Sri Lanka also marked and rigorously safeguarded specific territories. Each band was expected to be self-sufficient within its own hunting areas, and trespassing was strictly prohibited in nearly all circumstances. In areas lacking an obvious natural features, the Veddahs would carve symbols into tree trunks to mark the border.⁶⁸

As pointed out elsewhere, some ancient societies, had shared resources of their territories on reciprocity basis.⁶⁹ To this group of pre-modern people, friendly aliens could enter into their territories and gather fruits provided they get permission from the group who claim the territory. Members of the group could freely gather fruits in their territory without the need to seek permission. Members had option to gather resource and use privately or share it with the community. There was a system of private ownership of the fruits gathered though the territory belonged to the group.

The practice of delineating territorial limits (boundary) by using landmarks had originated in medieval times. The landmark need not be a given point but a kind of zonal area that was inhabitable or could not be used due to natural inconveniences. For instance, “ Aboriginal ranges

⁶⁷ As pointed out by Diener and Hagen, the Veddahs carved symbols into tree trunks to mark the border. See Diener & Hagen, *supra*, note 28 at 20.

⁶⁸ *Id.*

⁶⁹ The Kung bands of Southern Africa and Aboriginal groups in Australia shared resources with adjacent kinship provided they sought permission and on the basis of reciprocity. *Id.*

were bordered by buffer areas, which were used infrequently and apparently not claimed by any group.⁷⁰

To sum up, medieval form of boundary setting was different from a kind of boundary that a modern man can fairly imagine. Pre-modern societies “... tended to conceive of these things and arrange social and political space in ways that differ from contemporary ideals and expectations.”⁷¹ The restrictive borders served as “... a means to assign things to a particular spaces and regulate access into and /or out of specific areas. This innately social and political process links to the idea of ownership or rightful and permanent possession of land.”⁷² In the contemporary sense territorial limit of ancient men appears ambiguous and prone to conflict. Personal or communal land boundaries were not precisely set. This however, does entail absence of boundary. Ancient societies knew territories belonged to them though strangers could not easily notice a precise location of the boundary. Moreover boundary setting was subjective as a private person or community unilaterally decided limits of their holding on the basis of sufficiency of resources that the territory could afford or on condition of sheer distance or ability of the person or tribal group to safeguard the territory.

2.3. Terminology and Basic Concepts

2.3.1. Boundary, Border and Frontier: Distinct or Similar?

Words express idea and belief in concise form. Cognizance of an exact meaning of a term, hence, is vital to appreciate an underlying phenomenon. The terms boundary, border, and frontier often appear synonymous, even though they are not identical in all senses. Though the dictionary meaning of the terms is not similar, repeated use of the terms interchangeably has made the distinction “invisible.”⁷³ Synonymous use of terms, which are in fact not identical in all features,

⁷⁰ Diener & Hagen, *supra*, note 28 at 21.

⁷¹ *Id.*

⁷² *Id.* at 6.

⁷³ Prescott & Triggs, *supra*, note 2 at 11.

causes confusion and compounds the complication to already hostile environment in which contesting parties vigorously fight to make use of all possibilities for the purpose of playing a zero sum game.

The meaning afforded to the terms has been changing from time to time depending upon their significance. Francis Ikome attests this view stating, “Like many other social science concepts, the notion of boundary or border has historically shifted in definition.”⁷⁴ Understanding of the terms and their socio-political significance and changing nature appears vital to fully address problems having some kind of nexus to boundary.

In this part we will briefly examine the nature and distinction, if any, and similarity between the words boundary, border and frontier. Ultimately, we will explore the importance of boundary in virtually “borderless world.”

In the technology age, where distance has become immaterial, boundary wall may appear obsolete. Consequently it may seem pointless to explore meaning of words like boundary, border and frontier. However, the growing religious fanatic group and the resultant 9/11 terrorist attack and the web of immigration demanding safe haven and the need to curb unauthorized border crossing has necessitated building new fences and allocation of huge budget for border guarding. The issue of border and bordering has been important more than ever. More ever, an exact territorial limit of most former colonies of Africa is not well settled and some parts of Africa has been experiencing border tension. Colonial treaties and border delineation accords that express the terms boundary, border or frontier are still applicable and may be presented to prove limits of contested territory.

⁷⁴ Ikome, *Supra*, note 18. According to Michele Comelli *et al*, “The Concept of borders has a long history in the social sciences, having been analyzed through historical, socio-economic, anthropological and political lenses.” (Michele Comelli, *et al*. *From Boundary to Borderland: Transforming the Meaning of Borders through the European Neighborhood Policy*. 12 EURO. FOREIGN AFF. REV. 204 (2007).

Ascertaining ambiguities of the terms, therefore, is helpful to find an amicable solution to border issues.

Andrei Cusco portrays terminological perplexities regarding the notion of boundary and related terms as follows:

The conceptual difficulties and terminological confusion reigning within the field of “border studies” are notorious. [...The expressions] borders,” “boundaries” and “frontiers” are often interpreted as nothing more than equivalent designations of limits between states that, though they may convey certain symbolically charged messages, are essentially legal and jurisdictional linear markers of the extent of a state’s territory. Though scholarly debate has generally added useful discriminations and nuances to this undifferentiated “common usage,” the picture is by no means clear in all cases.⁷⁵

Gabriel Popescu notes similarity between the notion of boundary and related terms, apart from taking the words “boundary” and “border” simply to mean territorial lines of division.⁷⁶ This supports Prescott and Triggs who further remark, “The term boundary, frontier and border are often used as synonyms in conversation, in newspapers reports and in television and radio broadcasts.”⁷⁷

In addition to the terminological confusion and ever changing meaning vis-à-vis variable social system, the notion of boundary and related terms had served diverse functions⁷⁸ According to Diener and Hagen, medieval people like nomadic bands, city-states, and empire had varied beliefs and practice in organizing boundary.⁷⁹ The learned authors lucidly put, “ Given differing economic, cultural, political, and environmental contexts, it should not be surprising that groups in

⁷⁵Cusco, *supra*, note 10.

⁷⁶ Gabriel Popescu, *Encyclopedia of Geography*, <http://knowledge.sagepub.com/view/geography/n115.xml> (Accessed: 10/25/14).

⁷⁷ Prescott and Triggs *supra* note 2 at 11. The following excerpt was taken from an online dictionary which purports to define the terms boundary, border and frontier but appears not helpful to distinguish the terms as follows: “...Boundary, in reference to a country, city, state, territory”.... Occasionally, it also refers to a physical feature that marks the agreed upon line separating two political units...Border is more often used than boundary in direct references to a political dividing line; it may also refer to the region (of, for instance, a country) adjoining the actual line of demarcation... Frontier ...denote or describe the portion a country adjoining its border with another country....” (Webster’s College Dictionary, (Random House Inc. 2010), <http://dictionary.reference.com/browse/boundary> Accessed: 11/20/14

different parts of the world and in different times [have] developed varied approaches to territory, borders, and governance”⁸⁰ In the medieval period control aspect of boundary walls as was the main motivating factor to restrain movement of people, as labor was very crucial at the time. As Diener and Hagen put, “.. ancient governments were more focused on controlling the movement of people than controlling actual territory since labor supply was the key factor...”⁸¹ At a time where periodic war with neighboring states had been common, and killer machines were not invented, fighters with their arrow were pivotal. Hence, controlling human movement was critical rather than territorial guarding. Labor supply was also extremely needed for agriculture that was done absolutely with human labor. As a result, walled borders served as important tools for exit and access control. Diener and Hagen, remark that this assumption explains why ancient states, “generally satisfied with the relatively vague borders.”⁸²

Nowadays, the distinction between the terms boundary and frontier is not debatable. Clear distinction between the terms was gradually developed in 19th and 20th century.⁸³ Experts in the field progressively identified the difference between “boundaries and frontiers by distinguishing between a linear and a spatial concept, shifting from place to process and in the meaning and

⁷⁸ See Ikone, *supra* note 18 at 2.

⁷⁹ Prescott & Triggs, *supra*, note 2 at 35.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Diener & Hagen, *supra* note 28 at 35. Prescott also remarks, “ Many states tried to mark their frontier in some way. The Great Wall of China served not only to exclude nomadic barbarians, but also to restrict the number of Chinese who adopted a modified agricultural system that made them are difficult to control from the Chinese Capital...” Romans built Walls in order to exclude barbarians. (Prescott & Triggs, *supra* note 2 at 33). The barbarians north of the Roman wall also built earth works to delimit the edge of their territory. Similarly, walls and ditches formed the first or last line of a system of defense in depth. The counterparts of the Chinese and Roman walls could be found in part of Africa in 19th century. The practice of digging ditches in traditional Ethiopian chiefs was common. The Wolaita Kingdom dag ditch delineating its territory adjacent to Hadya and Sidama land. The borderline, however, was not kept. As a result of continuous clash with Hadya people the Kingdom of Wolayta further went beyond the limits of the initial ditch. As pointed out by Victor Prescott , the Beiber gives the dimensions of the ditches as 6 meters in width and 3 meters in depth; The ditch dag by the Kingdom of Kaffa was used to safeguard the Kingdom against Oromo attack. Prescott & Triggs, *supra*, note 2 at 33.

⁸³ Cusco, *supra* note 10 at n(3).

surmised that the terms boundary and frontier are not synonymous.⁸⁴ In the following Section we will briefly explore meaning and nature of the terms and concepts.

2.3.2. *Boundary: Meaning, Nature and Scope*

In traditional sense, the notion of “boundary” meant a point of limit that one’s freedom of movement may be restricted with a view to safeguard property or other interests of another person or group of persons. The interest holder may use restraining signals (either artificial or natural) to preclude an unauthorized intrusion. Conventionally, thus, the term ‘boundary’ connotes, “ [...] Imaginary or real lines that divide two pieces of land from one another [...]”⁸⁵ It is “a line that marks limit of an area.”⁸⁶

Eminent English international lawyer, Brownlie describes the notion of “boundary” in its functional approach. To Brownlie boundary is “ an alignment, a line described in words, in treaty and/or shown on a map or chart, and/or marked on the ground by physical indicators.”⁸⁷ Brownlie’s approach appears precise and relatively modern style that reveals an operational meaning of the term ‘boundary’. This definition also underpins the processes of making boundary. Black’s Law Dictionary, defines the term boundary as, “ ...every separation, natural or artificial which marks the confines or line of division of two contiguous estates, [in which] trees or hedges may be planted, ditches may be dug, walls or closures may be erected, to serve as boundaries.”⁸⁸ This definition appears to connote the term “boundary” as a line of division of a private property. This line of connotation of the term “boundary’ is not absolutely wrong but confines its contours only to private land boundary. In international Law sense, the notion of boundary is more than a line separating

⁸⁴ Prescott & Triggs *supra*, note 2.

⁸⁵ Francisco N. Ikome. *Africa’s International Borders as Potential Sources of Conflict and Future Threats to Peace and Security*. 233 INST. SEC. STUD. 2(2012).

⁸⁶ Oxford Dictionary, www.oxforddictionaries.com/us/.../boundary last accessed 9/25/14; Prescott and Triggs, *supra* note 2 at 12

⁸⁷ IAN BROWNLIE, *AFRICAN BOUNDRIES – A LEGAL AND DIPLOMATIC ENCYCLOPEDEA* 3 (1979).

private property.

According to Brownie, a boundary line may be “ [...] established by law, treaty, or accord or practice that marks the limit of a political unit’s territory.”⁸⁹ An ordinary legislative act may create a boundary between two or more political entities. For instance, most state boundaries in Ethiopia were created by legislative enactments that were passed by the Ethiopian parliament.⁹⁰

Treaty is the most usual method of creating international boundary. An exact beginning and end of two adjacent territories often described in the treaty. Some colonial era treaties, however, lack precision as the parties may not actually know the limits of spot described in the treaty and facts included in the treaty may no sharply congruent with the actual fact on the ground. Moreover, the balance of power between negotiating parties may not match and a weak party either coerced or consented to an unfavorable terms as a result of some form of vices. A vitiated consent renders the validity and enforceability of the treaty questionable. Ethio-Italian boundary treaties explain how the then Ethiopian tribal chief was ignorant of all the facts while consenting to unfavorable terms of three treaties that never been demarcated or known to the border people for centuries. Though vague and need supplementary agreement or map, three boundary treats were signed between Ethiopia and Italy with regard to Ethiopia and Eritrean boundary. Still now, it is very difficult to implement the treaties as the terms of the treaties did not coincide with physical features of the area described in the treaty, and if implemented could divide families and ethnic groups. Similarly a number of treaties were signed between Ethiopia and Great Britain that were meant to delineate Kenyan and Sudanese boundary. Setting boundary by the instrumentality of treaties is the most

⁸⁸ HENRY CAMPBELL, BLACK’S LAW DICTIONARY 147 (2nd ed. 1910).

⁸⁹ Hunter College, City University of New York, *Frontiers and Boundaries*, (A Power point present (slide show) (2011), <http://www.geo.hunter.cuny.edu/courses/geog334/Frontiers%20and%20boundaries.pdf> (Accessed on 01/27/15)

⁹⁰ *Proclamation No. 7/1992, Negarit Gazeta 51st year, NO 2 (Addis Ababa: Transitional Government of Ethiopia, 1992)*, a Proclamation to provide for the Establishment of National Regional Self –Government, has formed the current Ethiopian regional states and their boundaries.

common and amicable form boundary making.

Boundary line may also be determined by an accord until two or more contesting organs sign a legally binding treaty. An accord is a result of preliminary negotiation by an executive organ to stop a prevailing atrocity until a final action is taken. It is just a simple agreement that may or may not reach to the status of a treaty. Treaty, on the other hand, is a legally binding document that needs ratification in accordance with the law of two political organs.⁹¹ In the medieval period nations had followed some kind of practice in setting boundary line. The most usual method was applying natural features of land to designate the end of territory. Rivers, mountains, march lands, forest are the most usual ways of setting boundary line.

To sum up, the notion of boundary implies limits or confinement beyond which one cannot freely pass. It may be the end of national territory or the last point of private land. The expression, 'boundary' may also connote the limit beyond which another phenomenon commences. Nowadays, the term "boundary" assumed to hold a wider connotation including national and international aspects encompassing all the processes, institutions, and resources that may be categorized as border.

To mark boundary, manmade restraining schemes, such as boundary wall, or natural barriers, like mountains, rivers, lakes, deserts, forests or even big recognizable trees, may be used. Ancient forms of boundary making practices are still applied in some societies in Africa. For instance, some indigenous communities in Ethiopia, plant trees to mark land boundaries. The practice of planting tree that can easily grow on the agree boundary point and cannot dry even in

⁹¹ For instance, Camp David Accord was entered between Israel and Egypt to end atrocities in 1978 and in 1979 a legally binding treaty was signed between two countries. See ENCYCLOPEDEA BRITANNICA, <http://www.britannica.com/EBchecked/topic/91061/Camp-David-Accords> (Accessed 9/29/14).

dry season is a common practice in the Southern Ethiopia.⁹² Use of natural barriers as sign of ones private holding or limits of territory of a given tribe is also so common.

The most common form of natural barrier are: river, mountain, lake, ocean, desert any other point, including big rocks that can be clearly referred and cannot be easily avoided with a view to usurp ones private holding. Before 1920s zones or areas with some sort of width were taken as boundary. Natural zones that are used to delineate limits of territorial holding are known as marchlands. A desert or large area covering forest, desert, huge hills or mountains were used as sign denoting ones limit of territory

2.3.3. *Border*

The terms “boundary” and “border” often viewed synonymous and not easy to distinguish, if not impossible at all. Nowadays, the ongoing trend is to use the terms interchangeably.⁹³ However, some argue that the contour of two notions is not absolutely congruent stating, the notion of “boundary” means a geometric line that separates two or more bounded territories while the term “border” denotes borderland, which includes border regions.⁹⁴ A borderland is a geographic area in close proximity to state border consisting all lands even hold by private person, ethnic, tribal groups

⁹² For example, in Wolayta region of Ethiopia farmers plant a special kind of tree called “Maxua”. The basic purpose of this tree is separating two neighboring land. It is a normally taken as Maxua was planted by two neighboring residents. People of Wolayta never cut or do any thing on this plant if it was planted in the middle of two adjacent land. It is assumed as a curse to misplace or avoid it unless both neighboring residents agree.

⁹³ Gabriel Popescu in his lucidly research book entitled, “*Bordering and Ordering the Twenty – first century: Understanding borders*”, uses the word “border” to mean boundary. Similarly, Comelli, *et al* tend to equate the term “border” with the notion of “boundary” when resident of two bounded territory are really separated and not cooperative or inter dependent. (See Popescu *supra* note 3) As a result, Comelli *et al* tend to define the term border in two senses as follows: “The border can be merely an area of division and demarcation or alternatively of contact, exchange and integration.” If the states of neighboring territories have smooth and cooperative relationship and subjects of both states easily cross line of separation, borders are regarded as points of contact where the line of separation simply serves as barrier, then the nature of border changes into boundary. Thus, the learned authors apply the term “border” in the sense of boundary or in the sense of borderland, which is point of contract. See Comelli *et al*, *supra* note 74.

⁹⁴ Prescott & Triggs, *supra*, note 2 at 12.

or even by regions or state that situated near the boundary.⁹⁵ It appears thus imperative to cognize an exact meaning of critically important words to address border related issues. Are the terms “border” and “boundary” really synonymous, or do they possess some distinguishable features that may be taken vital? For the purpose of clarity and with a view to accurately perceive idea represented by the words, sufficient assessment of, possibly, an exact meaning appears vital.

The International Boundary Commission (IBC) of Canada and United States Boundary Commission remarks the illusiveness of distinction between border and boundary as follows: “*The border is a boundary, and a boundary is a quirky entity. Like an entity out of Flatland, it only exists in two dimensions - it has length and height, but no width.*”⁹⁶ [Emphasis added]. It is true that a border is an area or a spot proximate to the dividing line (the boundary), but that may not necessarily mean the two notions are synonymous. Stephen Okhonminia, expresses the notion of border as “ [...] external [lines] of states which have legal significance [...]”⁹⁷ This assertion is not helpful to distinguish the term “border” from the notion of “boundary”, as boundary also may be taken as an external line having legal effects.

So what is an actual perceivable distinction between the terms border and boundary? If the two terms are one and the same, why we have these two nebulous words? As has been pointed out above, the International Border Commission of Canada and United States takes border as boundary stating, “ The border is a boundary...”⁹⁸ This gives us an impression that the two terms are similar. If border is a boundary, then boundary is also border.

⁹⁵ Stephen Okhonminia, shares this view stating, “ Borders refer to external borders of states which have legal significance...” See Stephen Okhonminia, *States without Borders: Westphalia, Territoriality under Threat*, 24 J. SOC. SCIE.177 (2010). See also Popescu *supra* note 3 at 20.

⁹⁶ Peter Sullivan et al, *The Canada-United States boundary : The next century*, Available at: <http://www.internationalboundarycommission.org/docs/ibc-2009-01-eng.pdf> (Accessed: 01/15/15).

⁹⁷ Okhominia, *supra*, note 95.

⁹⁸ Sullivan *et al supra* note 96.

On the other hand, close reading of some of the literature in the field affords an impression of disparity between the terms “border” and “boundary”. Though Comelli *et al* explicitly define the term “border” in two sense depending upon the nature of relationship between the neighboring states, the distinction between boundary and border can be imagined. To Comelli *et al*, a boundary is a line of separation that serves as barrier. This kind of border delineation is practiced when border crossing is not easy. When the limits of two bounded territories serve as point of contact and free movement of people is unrestricted, it take the form of border. That is why Comelli *et al* suggest transforming EU’s border from boundary to borderland.⁹⁹ The expression “borderland” is not an independent citatory but it is a “gray” area between the two bounded territories, which is more than a line of separation.¹⁰⁰ The expression, “... *EU’s border from boundary to borderland*” thus suggests the quest to transform lines or points that separate EU member States from barrier to points of contact. While the former is a boundary in traditional sense, the later is border or borderland. In a way holding both meanings, Comelli *et al*, regard the term “border” as, “[...] an area of division and demarcation or alternatively of contact, exchange and integration.”¹⁰¹ Henk Van Houtum makes almost an identical observation as follows:

...the balance in the present boundary/border studies, is now leaning towards border studies. More precisely, boundary studies (where the border is) and border studies (how the border is socially constructed) have in fact grown apart, have become detached from each other to become separate subfields [...] There is hardly, and much to my regret, any overlap between the two sub- fields anymore.¹⁰²

Though Houtum, uses the terms boundary/border at the same time, suggesting for change of boundaries studies to border studies which points varied meaning of the terms. Houton further

⁹⁹ Comelli *et al*, *supra* note 74 at 204.

¹⁰⁰ The idea of borderland can easily be perceived after dealing with the meaning of frontier. Michele Comelli *et al* regard the line of separation as boundary or frontier in traditional sense. To Michele and Comelli *et al* the nature of border will be changed from boundary or frontier to borderland. This makes the meaning of boundary and border distinct because boundary can disappear but border will not as its nature will be changed to borderland.

¹⁰¹ Comelli *et al supra*, note 74.

¹⁰² Henk Van Houtum, *The Geopolitics of Borders and Boundaries*, 10 GEOPOLITICS 674(2005).

remarks that the term ‘border’, “ ... has now understood as a verb in the sense of bordering.”¹⁰³ Houtum discloses anthropological distinction between the terms boundary and border stating, “...boundary generally means the social spatially constructed differences between cultures/categories and a border generally stands for a line demarcated in space.”¹⁰⁴ Thus, anthropological sense of the terms “boundary” and “border” is utterly different from political senses.

According to Prescott and Triggs, the expression, “border” or “borderland” denote, “ [...] zones of indeterminate width that form the outermost parts of a country, that are bounded on one side by the national boundary.”¹⁰⁵ The learned authors had ventured to find out meaning of the terms provided by Lapradelle who called zones that are regarded as border or borderland as *le voisinage* which means neighborhood, vicinity, nearness, neighbors.¹⁰⁶ Lapradelle also applies the terms *le territoire limitrophe* which means “neighboring or bordering area.”¹⁰⁷ In this conception the term border does not necessarily mean an area of land or a point dividing neighboring territories but an area near the dividing line (boundary). Supposedly, a bordering area is a territory that belongs to the neighboring states – not an area separating neighboring territories. Thus, both or all the neighboring territories have their own bordering land, which definitely belongs to them.

To political geographers and experts in the field of border sociology, the terms “boundary” and “border” are distinct.¹⁰⁸ The former connotes a line separating two or more territories, while the latter is a gray area adjoining the boundary. In other words, a border is a borderland near the boundary line. For example, an area of land that belongs to United States and controlled by the

¹⁰³ *Id*

¹⁰⁴ *See Id at n (4)*

¹⁰⁵ *Id*

¹⁰⁶ *Id.*

¹⁰⁷ *Id*

¹⁰⁸ Ladis K. D. Kristof, *The Nature of Frontiers and Boundaries*, 49:3 ANNALS OF THE AMERICAN GEOGRAPHERS 269, 269 - 282(1959).

United States border guards is a United States border or borderland as it is situated near to the United States boundary line that may or may not be fenced.

Finally, Professor Pratt, Director of Research, International Boundaries Research Unit, Durham University, makes a vivid distinguishing points stating:

‘Boundary’ is usually used in reference to the line which divides the territory or maritime space of two State, while a ‘border’ is what has to be crossed in order to enter a state. Sometimes they coincide exactly, but it is more common for the border to include infrastructure such as immigration checkpoint, customs facilities fencing and patrol roads which extend beyond the boundary; and in the case of international air-and seaport, the border may be located hundred of kilometers from the boundary. A boundary is essentially a line of definition while a border is usually a more complex entity comprising several lines and /or zones, whose primary function is the regulation of movement of people and goods.¹⁰⁹

According to Professor Pratt, thus, a border is a broad term sometimes comprises of boundary, zones, infrastructure that may be used to regulate movement of goods and person from a given state into another. Where there is no entrance, checkpoint, bridge or barrier of some kind, or a station of border guards, the border is a boundary. Thus, it is possible to distinguish the two terms, “border” and “boundary”, but in practice, the distinction is immaterial as both of the terms used interchangeably in most authorities and there is no clear binding stance. In this work, therefore, unless otherwise, clearly stated, the expression, “border” may be taken to mean “boundary”.

2.3.4. *Frontier*

An unlimited area of land that has served as boundary is termed as frontier. When a frontier was taken as boundary, an exact point of separation of neighboring nations or nationalities were tenuous. Though it may be possible to know the location and direction of nations or nationalities that were divided by a zone called frontier, in the contemporary sense, locating an exact point of

¹⁰⁹ Martin Pratt, *Defining International Boundaries: Concepts, Aims, and Approaches*, Applied Issues In International Land Boundary Delimitation/Demarcation Practices, A Seminar Paper Organized by the OSCE Borders Team in Cooperation with the Lithuanian OSCE Chairmanship, 31 May - 1 June 8(2011).
<http://www.osce.org/cpc/85263?download=true> accessed 02/19/15.

separation is a perplexing task. Confusion regarding the limits of one's possession has been source of conflict, flared up destructive war. Is there any actual and perceivable distinction between the notions of border, boundary and frontier?

In common usage it is not unusual to connote the term, "frontier" to the expressions "boundary or border."¹¹⁰ Andrei Cusco remarks, "As is the case with other similar concepts [...] 'border,' 'boundaries' and 'frontier' are often interpreted as nothing more than equivalent designations of limits between states [...]"¹¹¹ One of the early boundary theorists, Friedrich Ratzel rejects, "[...] the wisdom of drawing a sharp distinction between a linear boundary and a border zone or frontier."¹¹² To Ratzel, a territory can be grouped into three zones: outer, middle and inner zones.¹¹³ He regards the outer and middle zones as frontiers.¹¹⁴

Nowadays it is almost universally accepted (at least by political geographers and international lawyers) that the term "frontier" is undoubtedly distinct from the notions of, "border" or "boundary".¹¹⁵ Prescott and Triggs remark, "A boundary is a line while a frontier and a border are different kinds of areas."¹¹⁶ Thus, it is not hard to discern the exact nature of "frontier" and its distinction from the two interrelated terms: "border" and "boundary". While boundary is a line, border and frontiers are an area of land that separates two territories.

The practice of using "frontier", as a region in between two territories or states was vanished in early 20th century¹¹⁷, but even after origination of the notion of "boundary" – which is a line dividing two territories – the term "frontier" was conceived synonymous to the term "boundary".¹¹⁸

¹¹⁰ Ladis K. D. Kristof, *supra* note 108.

¹¹¹ Cusco, *supra* note 10.

¹¹² Johnston, *supra* note 27 at 292.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Cusco *supra* note 10.

¹¹⁶ Prescott & Triggs, *supra*, note 2 at 12

¹¹⁷ *Id.* at 1.

¹¹⁸ Johnston, *supra* note 27 at 3.

Only in 1920^s a clear distinction between the two expressions was settled.¹¹⁹ Today, “the linear nature of a boundary and zonal character of a frontier “ is almost universally accepted.¹²⁰ Holdich strongly warns against alternate use of the terms “boundary” and “frontier” stating, “ There is no excuse for geographers who use the term “frontier” and “boundary” as synonymous.”¹²¹ The term boundary refers to a line that sharply divides territories, while frontier is more than a point or a line.¹²² Deborah Popper remarks, a frontier as an “outer part of a territory”.¹²³ It is true that a frontier is a region beyond one’s territory, but the expression, “outer part of a territory by itself does not explain the exact nature of the term frontier.

A region or a zone that may be termed as “frontier” may take several forms. It may be a natural barrier having some sort of space and situated in the middle of two disjointed territories. The region or zone may have occurred naturally without deliberate action of two or more neighboring States but simply chosen by the States as a limit of their territory. A frontier, thus, may be any “unfavorable environment, deserts, heavy dissected uplands, thick tropical rain forests and the like.”¹²⁴

Literally, the term frontier suggests what is in the front. Kristoff views the notion of frontier as “an area which was part of a whole [...] area of which was ahead of the hinterland.”¹²⁵ Kristof further remarks that a frontier “[...] often called the foreland or borderland, or march.”¹²⁶ According to Kristof a frontier is an outer-oriented part of a territory.¹²⁷ In this assumption, a frontier is an area of land having width and depth and situated in between two neighboring

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Holdich, *supra* note 46 at 23.

¹²² Cukwurah, *supra* note 20 at 11.

¹²³ Deborah E. Popper, *ENCYCLOPEDIA OF GEOGRAPHY*, <http://knowledge.sagepub.com/view/geography/n115.xml> (Accessed 10/25/14).

¹²⁴ Prescott & Triggs, *supra*, note 2 at 27.

¹²⁵ Ladis K. D. Kristof, *supra* note 108.

¹²⁶ *Id.*

territories having their own political authority. In short, a frontier is a zone or a region separating two states.

A frontier was, technically, a no man's land (*terra nullius*) and it was a territory frequented by bandits who fled strong arms of governments.¹²⁸ It was, supposedly, an area of land that may not be contested or claimed by anyone of the neighboring states. In medieval times, for various reasons, a region between two or more nations, tribes or ethnic groups could be *terra nullius*. The most usual reason was inhospitality of the region for human habitation. Medieval people generally opt out an area or a region if it was a desert with harsh weather condition that could not be endured.¹²⁹ It could also be a region fairly dangerous or impossible to get access or make use of it. Thus, it could be a mountain, lake, or even a thick forest that was considered difficult to make use of it or hard to walk through it. Any unclaimed region (whatever the reason may be), supposedly, regarded as a mark to designate an end of one's territory or a beginning of another territory. A clearly visible, but unclaimed region, had been chosen by states, tribal, ethnic or national groups to signal separation of territorial holding.¹³⁰

Being free from human habitation and government control, a frontier had served as a hiding place for lawbreakers and rebels. As a result, neighboring States commonly negotiated to patrol and expel unauthorized habitation to safeguard their common interest. Though frequent patrol may be conducted in accordance with the terms of negotiation, the region did not formally belong to anyone of the states, nor it was a common territory.

¹²⁷ *Id.* at 271.

¹²⁸ Prescott and Triggs observe, "... frontiers were not controlled by either side. They provided refuges for outlaws. The frontiers might have been patrolled on a irregular roster to ensure that no forces were using them to build camps from which attacks could be launched." (Prescott & Triggs, *supra*, note 2 at 12.

¹²⁹ In absence of a technology that can help to overcome harsh weather condition, it appears a right decision to choose simply a moderate region. On top of this, it was not hard to find out a suitable region at a time where few people possess vast area of land.

¹³⁰ Bakhshab, *supra* note 51.

The other perplexity with regard to the term “frontier” is its double meaning. The term “frontier” may also connote a separating zone of settled and unsettled regions of a territory.¹³¹ Settlement frontier may be further divided into primary and secondary.¹³² According to Prescott and Triggs, “ Primary settlement frontiers exist where a state is taking possession of its territory for the first time.”¹³³ It is a frontier “that represents the zonal limit of political authority.”¹³⁴ It separated the territory that the state has acquired from indigenous people and controlled by the political authority. In secondary settlement frontier sense there could be multiple frontiers in a given state or nation. Zonal nature of frontier, however, makes both senses common.

A political frontier is a region or zone that separates two independent states. This is a region that is situated between two neighboring countries. Lord Curzon identifies political frontiers on the basis of their function. The term, “frontier” in both senses (in the sense of political frontier and settlement frontier) is understood to mean a zone or region that physically separates two different or assumedly different territories.¹³⁵ Simply put, the nature and function of settlement frontiers and political frontiers is almost identical – separating varied space. The obvious difference is the fact that settlement frontiers separate villages or settlement regions while political frontiers divide two or more states.¹³⁶

Some city states, empires or national states had exerted efforts to mark their frontiers by erecting huge walls, in most spots surrounding their territories. The famous Chinese and Roman

¹³¹ Prescott & Triggs, *supra*, note 2 at 23.

¹³² *Id.*

¹³³ *Id.* The learned authors illustrate primary settlement frontier as the westward expansion of American Sovereignty through its territory in North America. Secondary settlement frontier separates settled and uninhabited regions of the state.

¹³⁴ *Id.* at 25.

¹³⁵ Cusco, *supra* note 10 at 2.

¹³⁶ Detailed discussion on settlement frontiers is outside the scope of this study, which primarily ventures with issues involving international boundary.

walls were some of the notorious testimonies.¹³⁷ The Harrar city wall of Ethiopia is a live illustration.

When time goes on the function of frontiers changed from frontiers of separation to frontiers of contact.¹³⁸ If frontiers were set, as a result, of threat of aggression, the end of threat would change the purpose of the frontier; and hence, the separation aspect of frontier changes into point of contact. Contact may be explained in terms of trade relationship between the people of two territories bounded by the frontier. The frontier may serve as site of tourism or cultural exchange point.

Frontiers may also be designed for the sole purpose of military defense. In this case, a certain area of land that is suitable for defense may be used for constructing watchtowers and warning signals and inhabited by frontiersmen. For example, “ The German Kingdom was protected from the Slavs and Magyars by a series of marches stretching from the Baltic Sea to the Adriatic Sea.”¹³⁹ The two contending states may also create a frontier by agreement. The states may create either buffer states or simply buffer zones. A buffer state is an independent political entity situated in between the competing states. In this case a third nation whose boundary is accepted by both of the states as end of their territorial holding. This was practically possible during the era of colonization. For example, Britain and Russia agreed to take an Afghanistan territory as a buffer state that two states overstretch their hands for more territories. Some colonial powers devised another form of frontier called neutral zone. The function of neutral zone was almost identical to the buffer state. It is simply a territory or zone that set by two or more states for the purpose of avoiding dispute. Neutral zone is not *terra nullius*, it is a commonly held territory, and may be

¹³⁷ Prescott & Triggs, *supra*, note 2 at 33.

¹³⁸ *Id.* at 34.

¹³⁹ *Id.* at 36. According to Prescott and Triggs, “ One of the most enduring marches in Europe was created in 1578. After the defeat of the Magyer army by Turkey at the battle of Mohacz in 1526 the Turks controlled most of the

partitioned after the purpose is met or no more security threat.¹⁴⁰ Buffer zones (be it a buffer state or a neutral zone) was a temporary solution to potential threat to peace and stability.

To sum up, a frontier is not simply a line or a point of separation of territories but it is a zone or a region having width and length of its own and commonly practiced centuries ago.¹⁴¹ Border delineation through “frontier” was so common in the medieval times where it was not possible to locate an exact point or to draw a clear line of separation of two neighboring states. Natural zones that are noticeable and can easily signal limits of territory were served as frontiers.

Uncertainty regarding an exact of limits of a frontier and the need for more land for increasing population, coupled with human civilization that enabled use of previously inhospitable region, caused conflict among bordering States. On top of this the yearning for greater power increased the demand for larger territory, as the wider the territory, the greater the scope of power of the sovereign. As Prescott and Triggs confirm this assertion stating, “ The general impression is that as states separated by frontiers extend their territory, the unclaimed land diminishes.” Eventually property disputes [arose]....”¹⁴² The drive for more territory, supposedly, had encouraged powerful nations to wage war against neighboring state, and frontiers served as war fronts or starting points for territorial expansion. This has, presumably called for frequent territorial disputes. Lord Curzon’s notorious statement that has been widely cited in most border related literature illustrates the sensitive nature of frontiers. In the words of Lord Curzon, “*Frontiers are indeed the razor’s edge on which hang suspended the modern issues of war and peace.*”¹⁴³

[Emphasize mine].

Hungarian plain.... As a defense against the Turks Ferdinand of Austria created a march called the *Militaargrenze* (Military Frontier)”

¹⁴⁰ For example, in 1965 and 1973 Kuwait and Saudi Arabia partitioned their former joint neutral zone on land. The resources of the former neutral zone and the marine areas attached to that zone were owned in common. *Id.* at 37.

¹⁴¹ Prescott & Triggs, *supra*, note 2 at 1.

¹⁴² *Id.* at 34

¹⁴³ *Id.* at 5 n (7)

A successive attempt to settle the ever-mounting dispute has necessitated the emergence of delimited boundary with a clearly set and noticeable boundary marks.¹⁴⁴ Moreover, the emerging technological innovation has enabled man to cope with unfavorable environment, be it harsh weather or impenetrable forest to turn an area into “heaven on earth, which in turn outdated the potency of secondary settlement frontier.”¹⁴⁵

2.4. Creation of International Boundary

2.4.1. Brief Overview of Emergence of Borders in the Medieval World

As attempted to pinpoint elsewhere, the origin of boundary system goes back to the moment at which private landholding was began,¹⁴⁶ but international boundary was a later advent. Medieval societies lacked national or international boundary, as there was no government or State.¹⁴⁷ Life was so simple and properties were owned either privately or communally.

The territory of a given tribe or community was simply a set of territories held by individuals and ethnic groups. It appears, therefore, safe to suppose that the beginning and the end of territory of ethnic members was territorial limit (boundary) of tribes constituting the group. When ethnic groups join together (either voluntarily for collective defense or forcefully annexed to the powerful ethnic group) and form a national state that had jurisdiction over all the groups, then

¹⁴⁴ *Id* at 34 . In most cases frontiers normally diminish and turn into point of contact instead of point of separation but at least one situation of frontier ended up with expansion. It occurred in Hashtadan on the borderland of Afghanistan and Persia, southwest of the great northward bend of the Hari Rud of Koshan.

¹⁴⁵ Prescott and Triggs point enormous situations in which technological innovation assisted to turn harsh regions into good settlement regions: For example waterless region of Kalahari sandveld in South Africa were not settled in 1903 but the invention of drilling machines facilitated use of underground water. Similarly the Mallee scrub region of South Australia, Victoria and new South Wales was covered with a hardy eucalypt formed of many branches rising from a mass of hard wood at or just below the surface. After invention of a clearing technology in 1877 the land was cleared and became good farmland for wheat. Prescott & Triggs, *supra*, note 2 at 28.

¹⁴⁶ For instances, “ The Romans taking the idea from private property and the exact knowledge necessary of the confines of the a private holding of land, carried the idea further with reference to longer units. *Id*.

¹⁴⁷ Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT’L ORG. 216, 215 – 250 (2001).

national boundary was created. The emergence of nation states has necessitated the emergence of international boundary, which sets a limit in between two or more nation states. Bakhshab confirms this conception stating, "... early history of boundaries [reveals...] prescriptive limits of various units and these units were unified into national states with known boundaries or transferred by treaty as units from state to state."¹⁴⁸ Though there is no consensus regarding an exact cause and a definite time of the emergence of modern state system, it is largely believed that a centralized state system was appeared in late middle ages.¹⁴⁹

The shifting of hunter-gatherers into farming and permanent settlement demanded leaders who are responsible for the overall governance and security of the medieval people that used to live in group. Productivity and the emerging civilization had enhanced military power of chiefs and kingships that turned hunter-gathers system into city-states relatively with certain territorial limits. "A city-state is a sovereign polity encompassing a relatively small area consisting of an urban core and surrounding farmland."¹⁵⁰

The advancement of agricultural output and the progress in the military capability had enabled stronger city-states to conquer and annex the weaker ones in search for more territory or for collecting taxes. Therefore, the greater the territory of a state, it was assumed that the wealthier the sovereign. The practice of acquisition of territory by conquer had continued until 19th and early 20th century as one of the norms of international law and one of the foreign policies of Europeans.¹⁵¹ As a result, territorial war was a common phenomenon.¹⁵² Moreover, sovereignty over a territory had

¹⁴⁸ Bakhshab, *supra*, note 51 at 31.

¹⁴⁹ Diener and Hagen, *supra* note 28 at 39.

¹⁵⁰ *Id* at 22.

¹⁵¹ This was the period in which most African nations were colonized by the European Super powers in accordance with the terms of negotiated at the Berlin Conference 1884.

¹⁵² Zacher *supra* note 147 at 217.

been changing, as the defeated city-state loses the territory and the winner annexes the defeated one.¹⁵³

“The legitimacy of territorial conquest [...]”¹⁵⁴ as a means of acquiring territory, and the ensuing takeover of weaker city-states and kingdoms created another important institution known as Empire. An Empire was a combination of set of city-states and administrated by a political organ. It is bigger in the scope of territory and comprised more population. According to Diener and Hagen, “An empire is a sovereign political entity usually governed by a hereditary monarch, and spanning several different regions and peoples which had not traditionally been under single ruler.”¹⁵⁵

The Axumite Empire, for example, was so powerful in the northern Ethiopia. It had controlled substantial territories surrounding the city-state irrespective of their continental location. There were several other African empires that had existed in Africa before European colonization. To mention few: Ancient Egypt’s pharaoh Akhenaten whose capital city was Amarna, the Ghana Empire, the Mali Empire, the Songhai Empire, the Aksia dynasty are some of the strong empires in Africa.¹⁵⁶ Territorial limits of almost all the empires were not certainly marked. Nebulous character of territorial limits of Roman Empire caused historian to surmise that Roman Empire had no international boundary.¹⁵⁷ It was supposed that the territorial limit of constituent units (city states that constituted Roman Empire) was taken as territorial limits of the Empire. The territory of the Empire was also so wide and not precisely delineated. “The Roman boundaries were mostly the division of the Roman provinces or of smaller governmental or administrative units of the

¹⁵³ Conquest was one of the ways in which a territory could be acquired legally. In old days, a stronger nation could forcibly annex a territory or the whole nation by subjugating a weaker state. This, presumably, encouraged territorial dispute. Most, if not all, interstate war one way or another related to territory. See Zacher *supra* note 147 at 217.

¹⁵⁴ Zacher *supra* note 147.

¹⁵⁵ *Id* at 24.

¹⁵⁶ Diener & Hagen *supra* note 28 at 23, Prescott and Triggs, *supra* note 2 at 292.

¹⁵⁷ There is conflicting view in this regard.

Empire.”¹⁵⁸ Thus, it appears safe to suggest that the Empire did not manage and control boundary, as it was the power of administrative units. On the other hand, numerous authorities indicate the territorial limits of Roman Empire was precisely delineated. According to Diener & Hagen, “ The Roman Empire appears to embody the ideals of a highly centralized empire with clear external borders.”¹⁵⁹ Precisely noticeable monuments were erected to indicate territorial limit of Roman Empire.¹⁶⁰

Empires, like city-states, were often in the state of war and authority over territories had been shifting, as a defeated empire loses all or a part of its territory and the winner expands bounds of its territory – setting a new boundary. Thus, a powerful empire used to forcefully annex smaller ones with a view to expand its territory thereby expanding its territorial limits or creating a broader tax source and enhancing the scope sovereignty. As a result, authority over a given territory had been shifting.¹⁶¹ Aggression and forceful acquisition of territories of neighboring empire and city-states, whenever needed, rendered delineation of a precise territorial boundary meaningless.

Due to elusive nature of medieval territorial limit (the boundary) and the expansionist policy of powerful city-states, empire and nation states, early interstate territorial limit was vague and “characterized by overlapping jurisdiction.”¹⁶² As a result, it was not simple enough to precisely locate an exact limit of a boundary, and the uncertainty, presumably had generated recurrent civil and international war.

Territorial limit of ancient Axumite Empire (in current Ethiopia), for instance, best explains the elusiveness of medieval territorial limits. As witnessed by historians, ancient Ethiopia was much bigger than the current territorial limit. Various sources indicate that medieval Ethiopia had

¹⁵⁸ Bakhshab, *supra*, note 51 at 29.

¹⁵⁹ Diener & Hagen, *supra* note 8 at 33.

¹⁶⁰ *Id* at 26.

¹⁶¹ Zachar, *supra* note 147.

included the whole Horn of Africa and extended up to the port of Yemen.¹⁶³ The Axumite Empire of Ethiopia had controlled northern Ethiopia, Eritrea, northern Sudan, southern Egypt, Djibouti, Western Yemen, and southern Saudi Arabia, totaling 1.25 million square kilometers, almost half the size of India.¹⁶⁴ Lack of civilization (administration by illiterate tribal chiefs, absence of fast communication channels, outdated transportation system, poverty, ignorance and Christian beliefs that disregarded some parts of the ancient Ethiopian Muslim land) had blinded tribal chiefs not to bother for the then unfavorable regions and desert lands with harsh weather condition when Europeans settled there or when missionaries and explorers paved ways for colonization.¹⁶⁵

European powers apportioned parts of territories of medieval Ethiopia into Italian Eritrea, Djibouti (previously French Somali land), Somalia, Sudan and the current Ethiopia. Though Ethiopia was never formally colonized, apart from the five years of brief Italian occupation, its territorial integrity had been severely inflicted by aggressors. Territorial acquisition, initially, appears to be peaceful with subtle motive and then after building their basis European agents used all means to take territory, including trickery or corrupt tribal chiefs or in case of refusal wage open war against the people that were armed with spear and arrow.¹⁶⁶

¹⁶² *Id.* See also Diener & Hagen *supra* note 28 at 39.

¹⁶³ Historian Jean Doresse comments that, “Ancient Ethiopia was more wider as to incorporate many different people than under the Sabeen hegemony. Ethiopian territory was extended to Sudan. It was large country having international significance.” To Jean Doresse, South of Arabia was part of Axum, which was the then capital of Ethiopia. He further asserts, “the limit of Ethiopia was the whole part of Horn of Africa.” Interview response of Jean Doresse, a French historian who specializes in Ethiopian and Egypt ancient history, http://www.jah-rastafari.com/forum/message-view.asp?message_group=4514&start_row=1 (Accessed: 12/05/14).

¹⁶⁴ ATLANTABLACKSTAR, *7 Medieval African kingdoms everyone should know about*, (Thursday December 11, 2014), <http://atlantablackstar.com/2013/12/05/7-midieval-african-kingdoms/> (Accessed: 12/11/14).

¹⁶⁵ It is generally regarded that tribal chiefs had no interest in desert lands that were not suitable for farming. Supposedly there was no interest for uninhibited desert lands surrounding ocean boundaries. The current Ethiopian border clearly depicts this conception. Italy used all means to convince ignorant uneducated tribal chief of the time and convinced to sign a treaty surrendering all Red Sea coastal land. France leased Djibouti, the remaining portion of the border that could take Ethiopia to Red Sea and Ethiopia remained as landlocked country though Red Sea is situated within 100 miles. This compelled Ethiopia to pay millions of dollars for using the port of Djibouti and other nearby ports. The current and the future Ethiopia generation will always pay cost as a result of ignorance and deceit of the European powers.

¹⁶⁶ Italy for example paid substantial sum of money to Minilik II to get his consent to sign a treaty that granted a portion of contested land to the then Italian colony of Eritrea. The trick during the signature of Wuchale treaty between

In the Ethiopian case, Italian missionaries and merchants acquired a parcel of land from tribal chiefs in Eritrea and latter claimed the whole territory of Eritrea as part of Italian colony. Djibouti was leased to French for 99 years, though never returned back to Ethiopia and practically never considered as part of Ethiopian territory since the lease.

2.4.2. Modern Nation State System and Delineated International Boundary

Nation state is the advanced form of social organization that has emerged as a result of multifaceted economic, social and political progress. Successive socio economic changes such as: increased agricultural output, invention of specialized goods and the provision of efficient services, including long distance trade and social interaction, had fueled advancement of cities, and emergence of powerful craftsmen and merchants.¹⁶⁷ Advancing cities disrupted feudal system thereby creating an opportunity for new political system – nation state.¹⁶⁸ The emergence of nation states has facilitated the creation of a clearly defined boundary among nations.¹⁶⁹ It is generally viewed that, “[t]he modern state system first emerged in Europe and spread to the rest of the world through colonization.”¹⁷⁰

In the feudal Europe, territorial limit (boundary) of constituent nations states was not precisely defined, and authority over the territories had been overlapping.¹⁷¹ The highly centralized

Ethiopia and Italy was a source of war in which white men for the first time in history was defeated by black men. Article 17 of the treaty had varied meaning in the Ethiopian language and in Italy. The Italian version stated that Ethiopia can make any foreign relation through Italy where as (the Amharic) stated that Italy can assist Ethiopia when it makes foreign relation. The Italian version took Ethiopia’s sovereignty in which Ethiopia cannot make relationship with foreign power unless Italy so authorizes. The Amharic version simply stipulates assistance that Ethiopia may not necessarily require.

¹⁶⁷ Diener & Hagen *supra*, note 28 at 39.

¹⁶⁸ James A. Caporaso, *Changes in the Westphalian Order: Territory, Public Authority and Sovereignty*, 2 INT’L STUD. REV. 1(2000).

¹⁶⁹ Thus understanding of the historical background of state formation appears vital for understating boundary related issues and appreciate the role of boundary and territoriality in increasingly global system.

¹⁷⁰ Zaiotti *supra* note 7 at 2. See also Diener & Hagen *supra* a note 28 at 37.

¹⁷¹ Popescu, *supra* note 3 at 32. It is generally believed that due to power and territorial competition, wars and conflict were common and hence the winner takes control of territory and residents until further action was taken either other

feudal system that had controlled several empires, as a result of coercive and recurrent wars, could not meet the demands of the changed socio-economic system. The powerful and ideologically deep rooted feudal system did not simply gave a way for nascent socio political system, but had been forced by the longest and destructive war that Europe endured for 30 years.¹⁷² The war ended as a result of tough and arduous negotiation that was held for years. The negotiation resulted in far reaching consequences that have furthered the progress of international law and rendered significant contribution to the global socio-political movement; *inter alia*, it leveled a ground for clearly defined territorial boundary at which exclusive sovereignty can be exerted.

In Europe, the coming into existence of clearly marked boundary system was an innovative indigenous process.¹⁷³ Other continents, apart from barren land of Antarctica, had their own system of boundary, which was not well defined, but it was disrupted by the European colonization and not developed to the fullest level – “died before maturity.”¹⁷⁴ Therefore, the historical beginning of a clearly defined international boundary and the sovereign nation state system was the 17th century Peace of Westphalia.¹⁷⁵

It is believed that the Accord of Westphalia has contributed to the prevalence of better international peace and introduced mutual co-existence in Europe.¹⁷⁶ With this view in mind, the Congress of the Westphalia relentlessly ventured to devise a precisely defined boundary within which a sovereign power can exercise exclusive authority, as a “a basic rule of co-existence.”¹⁷⁷ Supposedly, the maxim, “Good fence makes good neighbor” had influenced the Westphalian

competitor or by an organ who lost the war. More over, Feudal system had created two layers of authorities: The king and local chiefs. The king controlled territories and ordinary people ordinary while actual administration was left to the local chief who paid allegiance to the king. The day-to-day business and actual control was left to the local chiefs who are either loyal to the king or appointed by the king.

¹⁷² Popescu, *supra* note 3 at 34.

¹⁷³ Prescott & Triggs, *supra*, note 2 at 52.

¹⁷⁴ *Id.*

¹⁷⁵ Diener & Hagen, *supra* note 28 at 37. See also Zacher, *supra* a note 147.

¹⁷⁶ James A. Caporaso, *supra* note 168

Congress as a viable remedy to circumvent recurring conflict for territorial expansion and dominance. In the words of Zacher,

In these early centuries of the Westphalia order territory was the main factor that determined the security and wealth of states, and thus the protection and acquisition of territory were prime motivation of foreign policy. Most wars, in fact, concerned the acquisition of territory, and most of these wars led to exchanges of territory; this practice continued until the middle of the twentieth century. These practices were reflected in the legal norm concerning the legitimacy of conquest.¹⁷⁸

To sum up, the treaty of Westphalia has generated remarkably overwhelming consequences to Europe and offered significant contribution to the global socio-political system in general.¹⁷⁹ It ended one of the longest and destructive wars that perished lives of millions of people and destruction of huge amount of resources.¹⁸⁰ The war was backed by complex motives of enormous actors: religion, power competition, personal fame and the desire to control more territory. It was very costly and the longest war ever held at the time. The treaty of Westphalia that ended the war often praised for fruition of vital international law doctrines such as the principle of sovereignty of states, territoriality, and autonomy of states.

The other glaring consequence of the negotiation was the emergence of new independent states: Netherlands and Swiss. Netherlands got independence from Spain and Swiss gained independence from Austria. Some countries like Sweden gained territories and cash compensation. Most importantly, the treaty resulted in clear boundary between rival European powers. Ultimately,

¹⁷⁷ Zacher, *supra* note 147.

¹⁷⁸ *Id.* at 217

¹⁷⁹ William H. McNeil *The Rise of the West: A History of the Human Community* (1991), 828p.\par <http://histclo.com/essay/war/peace/wp-west.html> Accessed on 7/10/14. The war begin in 1618 in which the Holly Roman Empire rose against France, the German Princes and princes lings against he emperor and each other and the France against the Habsburgs of Spain. The Swedes the Danes the Poles. The Russians the Dutch and the Swiss were all dragged in.

¹⁸⁰ The peace of Westphalia ended 30 years war that began in 1618. Negotiation took extra-ordinary long time. The discussion on participants of congress took two months.

“European states gradually acquired the ability to demarcate the precise limits of their sovereign territories.”¹⁸¹

2.4. 3. *Globalization and Changing Nature of Border: Is Borderless world Possible or Desirable?*

The maxim, “Good fences make good neighbors,”¹⁸² was supposedly coined to illustrate the traditional functions of border walls in which no one can get into a fenced territory without securing consent because unwelcomed intrusion results in legal consequences – trespass which entails criminal and civil consequences. A neighbor cannot trespass into his/her neighbor’s property bypassing a fence. A good neighbor is expected to seek permission before entering into “other’s” land. As a “good fence” bars an illicit crossover into the neighborhood property, the assumption is that the fence has turned all the neighboring people to *good ones*. Put differently, it was assumed that no one can bypass a “good fence”, and hence, everybody around a fenced land/ territory is supposed a *good person*.

In the era of globalization (which may not respect a good fence), the construction of a huge border wall may not necessarily secure a bounded territory and create “good neighborhood”. Tough border walls may impede some form of unauthorized border crossing, traditional border walls are powerless to guard against “invisible intruders” that can easily transcend a well-cemented border wall while the perpetrator hiding at a remote distance. As a result, some argue that in the contemporary world, which is increasingly characterized by global way of life, the traditional function of border wall is on the verge of being obsolete thereby facilitating the emergence of

¹⁸¹ Diener and Hagen, *supra* note 28 at 41.

¹⁸² Robert Frost, in his early 20th century infamous poet, “ Mending Wall” stated the phrase, “Good Fences make good neighbor.” The poet is available at: <http://allpoetry.com/Mending-Wall> (Accessed 01/30/15). The expression “Good fences make good neighbor,” may still be relevant in some cases, generally viewed as impairing intimacy as two neighboring people cannot easily see each other and understand what was going on behind the fence. The fence practically bars closeness and the possibility of being good neighbors is questionable. Were the West and East German good neighbors in the era of Berlin war? North and South Korea, for all practical purposes, are behind a psychological fence. Are they really good neighbors?

borderless world.¹⁸³ If the emergence of borderless world is an inevitable fact, African border issue in general and the border tension between Ethiopian and Eritrea, in particular, will be settled when the global phenomenon eliminates the very border. This Section briefly assesses whether borderless world is really possible and all traditional border walls may be dismantled like the tumbled Berlin wall.

Nowadays, a single company can provide almost identical services (products), in almost all the corners of the globe, introducing similar systems, processes and culture. The proliferation of multinational companies and resultant trans-boundary transaction, coupled with other effects of globalization, has been fueling the widespread speculation of the elimination of borders. Borderless world, in turn means, territorial sovereignty would be insignificant, as global actors appear more powerful and rapidly moving toward controlling the whole global phenomena. This increasingly global way of life has potency to penetrate all forms of boundaries thereby making traditional border functions “out dated.” In other words, traditional border walls may not effectively guard against all forms of external incursion and impede unauthorized contacts and transactions. In the words of Gabriel Popescu, “ [...] globalization related developments have challenged the exclusive bundling of sovereignty, territory, identity, and borders claimed by territorial states.”¹⁸⁴

Several actors and factors are lumped under the rubric of globalization. Global financial services (For instance, Visa, MasterCard), transnational corporations that work around the world, like. Google, Yahoo or e-business corporations like eBay or Amazon can knock all doors (assuming in a democratic nation internet censorship is unconstitutional) bypassing the restraining barriers of border walls offering identical products and services throughout the globe. Similarly, the ever-

¹⁸³ John Akokpari, *You Don't Belong Here, Citizenship, the state & Africa's Conflict (Reflections on Ivory Coast)*, in *THE ROOT OF AFRICAN CONFLICT, THE CAUSE AND COST* 96 (Alred Nhema & Paul T. Zeleza (ed) 2008). See also Miles Kahler, *Territoriality and Conflict in an era of Globalization*, <http://irps.ucsd.edu/assets/014/6738.pdf> (Accessed: 02/10/15).

changing communication and transportation technology has avoided barriers of distance thereby making the world reachable to all at a given time.

Global economic institutions like IBRD (the World Bank), IMF, UNDP, WTO are most powerful international organizations that can subtly dictate territorially sovereign states to act in some way.¹⁸⁵ Though most developing nations consider these mighty institutions as promoters of western ideology, they have no better choice other than complying with their demands thereby making sovereignty at stake. Environmental issue is another case that concerns everyone for acts and facts happen everywhere. Global community cannot keep quiet while a given nation or company disrupting nature by polluting the earth, as climate change has impact on life of everyone. Concerned international agencies, thus, can ignore well-fenced boundary, and indirectly dictate the perpetrator to stop environmentally destructive acts or require the victims to be compensated.¹⁸⁶

Now a day, gross human rights violations and genocide are viewed as international crimes conferring universal jurisdiction that can supersede the protection of sovereignty and territorial boundary.¹⁸⁷ The doctrine of universal jurisdiction entitles every nation that has incorporated

¹⁸⁴ Popescu *supra* note 3 at 47.

¹⁸⁵ David Held and Anthony McGrew, *Globalization*, <http://www.polity.co.uk/global/globalization-oxford.asp> (Accessed on 02/10/15).

¹⁸⁶ Take for example the case of International Boundary Association or the Oakland Institute that has “waged war” against Ethiopia with a motive to stop Ethiopia dam construction on Omo river arguing the construction would have negative effect on the only desert lake - Lake Rudolf (aka Lake Turkana) and would destroy some native plants and reduce the level of water to the indigenous South Omo people who depend on the River Omo. Initially, the African Development Bank promised to finance the project but due to active battle waged by the international NGO, the Bank finally changed its plan and refused to grant funding. Now the project on last phase of completion by the Ethiopian government budget and getting some help from China, it took long time than previously planned. For details see International Rivers, *Ethiopian Dam Threaten to Turn Lake Turkana into “ East Africa’s Aral Sea ”* January 9, 2013; Available at: <http://www.internationalrivers.org/resources/ethiopian-dam-threatens-to-turn-lake-turkana-into-east-africa-s-aral-sea-7786> last visited 02/06/15.

¹⁸⁷ NATO and multinational involvement of during the so called Arab Spring in Libya to oust the long time dictator, Mohamed Gadhafi, has supersede territorial boundaries of Libya and pierced the veil of sovereignty under the guise of protecting the people of Libya for humanitarian reasons or curbing the widespread violation of human rights as the Gadhafi regime bombed the protesting its own citizens near Benghazi

human rights norms into national law to prosecute a person suspected of grave human right violation anywhere in the globe posing a threat to state sovereignty and national borders.¹⁸⁸

African states consider International Criminal Court as a threat to national sovereignty and attempted for mass withdrawal from its membership.¹⁸⁹ The International Criminal Court is a multinational organization having universal jurisdiction to punish perpetrators of crimes against humanity such as genocide. Territorial sovereignty or national borders cannot impede ICC prosecutor to indict suspected persons including top public officials of member nations or anyone including residents of non-member states if the case is referred by the Security Council.¹⁹⁰

On top of these global phenomena, the issue of transnational terrorism has been a notorious challenge to state border and sovereignty. Al-Qaida neither respects state boundary nor its sovereignty. Its very motive was to remove sovereign states and establish its own state, which is ruled by a strict version of Sharia law. For instance, Al-Qaida in Afghanistan frequently ignores Afghan-Pakistan boundary and terrorize civilian and challenge efforts of government of Pakistan and allies including United States. In Afghanistan Al-Qaida appears more powerful than the formal elected government. In Somalia, the Al- Qaida affiliated group – the al-Shabaab – controls substantial portion of Southern Somalia and act as a *defacto* government having its sown court, police and public administration. Al-Shabaab, not only terrorizes Somali people, but also has built a terrorist cell in Kenya and frequently repeated disregarded Kenyan border and violated state

¹⁸⁸ Popsecu, *supra* note 3 at 57.

¹⁸⁹ See Jacey Fortin, *The Continent Versus The Court: African Union Deliberates Withdrawal From The ICC*, International Business Times, October 11, 2013 <http://www.ibtimes.com/continent-versus-court-african-union-deliberates-withdrawal-icc-1422434> (Accessed: 02/06/15).

¹⁹⁰ ICC, however, openly challenged in Africa as it is viewed as pursuing only against Africans. The indictment of Sudanese president, did not work as most African nations were not willing to apprehend him. ICC does not have its own police force that can enter into Sudan and arrest President Al Bashir. The Indictment of Kenyan President Uhuru Kenyatta is finally dismissed due to mounting pressure from African States and difficulty of collecting evidence.

sovereignty.¹⁹¹ It carried out the act of terrorism in Uganda killing more than 70 civilians in revenge of Ugandan government for sending peacekeepers to Somalia though subsequent attempts were foiled.¹⁹² Other neighboring countries, including Ethiopia and Djibouti are always in target, as the terrorist group can easily bypass the porous border and commit the act of terrorism.¹⁹³ Al-Shabaab made several attempts in Ethiopia dispatching suicide bombers. Similarly, currently, Boko Haram has been a great challenge, not only to Nigeria, but also to other neighboring nations like Cameroon, Chad and Niger. It carried out the act of terrorism in Cameroon and Niger defying sanctity of borders and state sovereignty. Boko Haram may not stop the act of terror in the West Africa but viewed as a challenge to the whole Africa. That is why the African Union has decided to send 7500 strongly armed personnel to battle Boko Haram in its session in Addis Ababa.¹⁹⁴

As succinctly put by one author, “Al-Qaida is commonly described as a network of networks formed by loosely associated groups, dispersed, decentralized and without a clear hierarchy of command.”¹⁹⁵ The emergence of terrorist groups inflicts boundary system in two ways. First the terrorist group infringes the inviolability of borders by disregarding its sanctity by “jumping “over the fence. The other effect of terrorism is the action states take on boundary. With a view to tackle the act of terrorism states tighten borders by deploying more aggressive border guards and reforming immigration laws and allocating huge budget for border protection. After

¹⁹¹ For instance, “Al-Shabaab warns tourists to stay away from Kenya as it claims responsibility for deaths.” See *The Telegraph*, June 16, 2014. The terrorist group declared that Kenya was a war zone and tourists visiting Kenya were in peril.

¹⁹² Eastern Africa Center for Constitutional Development, *A Preview of key Events across the region*. (KCK Annual Report 11(2011). Available at: www.kituoachakatiba.org/.../kituo%20ch... last visited 02/02/15).

¹⁹³ Aaron Maasho, *Suicide bombers die in the failed plot at Ethiopia football match*, REUTERS, October 14, 2013. Available at: uk.reuters.com/.../uk-Ethiopia-bomb-idU... last accessed 02/03/15. According to Reuters, the Two al-Shabaab agents were died while getting prepared to explode bomb in the Addis Ababa Stadium during soccer game between Ethiopian and Nigerian national teams. The bomb went off and killed the two agents at the residence where they stayed before the agents able to kill mass number of people in the stadium. Had their plan succeeded it would have been a devastating tragedy.

¹⁹⁴ Vincent Nwanma, *Africa troops to join Boko haram fight. Is Nigeria’s army all in?* CHRISTIAN SCIENCE MONITOR, February 2, 2015.

¹⁹⁵ Popescu *supra* note 3 at 6.

9/11 most nations including United States have declared stringent procedures for issuing entry visa and have been conducting aggressive check up in the airport. Gabriel Popescu states:

U.S. response to al-Qaida has been marked by an inability to think outside the framework of state borders. Not accidentally, the first actions taken after September 11, 2001, has been the *closing of the U.S. borders* implying that these territorial lines could restore the violated sense of security many people felt.¹⁹⁶ [Emphasis added]

Tightening border security or closing borders has been creating burden to legitimate travellers and people in general by inflicting huge impact on privacy, as border guards have to check all items and personality using modern scanners. The reliance on border as a best solution to guard nation against the threat of terrorism has necessitated the construction of border wall more than ever and allocation of huge budget for border protection and border law enforcement.

Cyber crime is another transnational issue that cannot be protected by well-guarded borders. Nowadays, it is not impossible to attack vital resources situated in San Francisco without the perpetrator's physical presence in the United States or in the nearby regions. A terrorist, hiding elsewhere in the globe, can stretch destructive hands that may not be easily detected by border guards or curtailed by border walls. Similarly, a cyber-thief, residing at a far distance, can get access to bank accounts without physically crossing borders, or a terrorist at a remote location can disrupt utility plants at any part of the world. Therefore, it appears logically correct to suppose that traditional border walls are being obsolete as "*bad neighbors*" are emerging despite well-built border walls.

Nowadays, it is not uncommon to hear cyber attack and data breach or identity theft ranging from retail stores like target to highly protected banks to government database. The current cyber attack on computers of Sony Entertainment depicts the potential of remote attack, which can bypass any form of fence. Hackers, allegedly from North Korea, have disrupted Sony Film show (The

Interview) in the holiday season sending threatening warnings which prompted investigation by FBI and close attention by high ranking authorities of United States, including the President.¹⁹⁷ Sony's PlayStation was also attacked in August 2014 and "forced offline by a cyber attack..."¹⁹⁸ Though no evidence is publicly available, and repeatedly denied, it is generally speculated that North Korea was behind the attack.¹⁹⁹ It has also been usual to notice a threat or actually cyber attack from a group known as Anonymous. There is a sense of insecurity on information on the net. In most cases, it is not simple enough to notice an exact venue from which the attack springs or the actual perpetrator, though some perpetrators disclose their identity under the cover of *pseudo* names.

It is also believed that due to the evolving modern communication and transportation technology, the world is getting closer by diminishing the traditional barriers of distance. This appears introducing culture mingling, which would destroy culture-based boundary. If the shield of "otherness" is pierced through "closeness" and "oneness" that may emerge as a result of high interaction and culture blend, the purpose and likelihood of separation by a boundary seems unlikely while "otherness" has effectively faded. Put other way, it is hard to draw a line that can successfully divide an emerging cultural similarity. As a result, " Many scholars, politicians,

¹⁹⁶ *Id* at 60.

¹⁹⁷ On Nov. 24 Hackers, known as "#GOP.", or "The Guardians of peace, " allegedly beached Sony Pictures Computer Network. They threatened Sony Entertainment Network posting warning message on the company's computers. FBI launched investigation and claimed North Korea was behind the attack. United States, as a result, threatened to take retaliatory measures against North Korea ,which denied the allegation. As reported on BBC, " A skull appeared on commuter screens along with a message threatening to release data "secrets" if undisclosed demands wee not met." BBC News, Nov. 25, 2014, www.bbc.com (Accessed 4/21/16). The hacking scandal will cost the studio at least \$200 million. The attackers further stated, " Warning: We 've already warned you, and this is just the beginning."

¹⁹⁸ British Broadcasting Corporation *News, Technology*, Nov. 25, 2014, <http://www.bbc.com/news/technology-28925052> (Accessed on 02/11/15).

¹⁹⁹ Tal Kopan, *US. Says North Korea behind Sony hack*, Politico, (Dec. 12, 1994), <http://www.politico.com/story/2014/12/fbi-north-korea-sony-cyberattack-113703.html> (Accessed 02/11/15). See also Jonathan Aberman, *Commentary: Lessons in national security from the Cyber attack on Sony and The Interview*, The Washington Post, (Dec. 23, 2014), http://www.washingtonpost.com/business/capitalbusiness/lessons-in-national-security-from-the-cyber-attack-on-sony-and-the-interview/2014/12/23/3a2913b6-8a26-11e4-8ff4-fb93129c9c8b_story.html (Accessed 02/11/15).

business leaders, and activists believe that globalization's promotion of interaction and integration is rapidly eroding the importance of nation-states and their borders."²⁰⁰

Thus, if the purpose of border wall was simply to serve as barrier, the evolving globalization seems to render border walls out-of-date. This entails the emergence of borderless world as a factual necessity. Thus, it seems not completely wrong to surmise the fact that globalization will eventually cause, "[...] deterritorialization of the system of territorially sovereign states, which in turn will lead to the fading away of state borders."²⁰¹ Can we thus conclude that in the era of globalization and technology age, the deliberations of Westphalian Congress²⁰² will virtually faded away?

Despite trans – border effects of globalization, states, rely on borders and border walls to guard the bounded territory against extra-territorial effects that may be viewed as threat to national security. Enormous nations have been constructing strong border walls and watch towers that are equipped with modern surveillance equipment with a view to curb terrorism, unauthorized extra-territorial transactions, and control illegal human mobility. Since the emergence of Muslim fundamentalist group, and the 2001 terrorist attack of United States, global powers have been bolstering border protection; have reformed immigration laws and have strongly armed border guards and/or have enhanced institutional capacity of border protection agencies. This includes the strict control of immigration which in turn demands the need to build strong border fences, training and deploying powerful border guards, intensifying air and sea port control, promoting and

²⁰⁰ Diener & Hagen, *supra* note 28 at 60

²⁰¹ Popescu, *supra* note 3 at 25.

²⁰² It is pointed out somewhere else above that state sovereignty and clearly defined boundary are the most important findings of the Westphalian Congress.

deploying consular persons, visa restriction, and enactment of stringent immigration legislations, strict immigration procedures and control²⁰³, building huge controlling towers, and so forth.

United States has been erecting a huge border wall in Mexico border since 1990s.²⁰⁴ Frank Clifford observes, “The fence along the U.S.–Mexico boundary has helped reduce the flow of [undocumented] immigrants, but the human and environmental toll has been enormous.”²⁰⁵ The 2006 Secure Fence Act has authorized United States to construct modern and very expensive border wall with a view to curb unauthorized border crossing, foiling terrorist acts and preventing drug trafficking. The fence covers 1/3 of United States – Mexico Border across California, Arizona, New Mexico and Texas.²⁰⁶ Several immigrants have lost their life while attempting to jump over the fence. Despite human, environmental and economic cost, the Fence has been hampering easy border crossing. Secure Fence Act of 2006 clearly reveals the significance of border fences and downplays the assumption of fading away of territoriality and sovereignty.²⁰⁷

²⁰³ Since 9/11 United States enacted several immigration legislations and strengthened institutional set up. For instance, in 2002 President Bush passed Homeland Security Act with a view to make United States safe from terrorists using Homeland Security as watchdog, which costed United States more than \$589 billions since 2001. Ted Hesson, *Five Ways the Immigration System Changed After 9/11*, Abc New Sep 13, 2012. Most nations including developing world have enacted anti terrorist acts and all border guards are in high alert. Some of the developing nations, allegedly miss using antiterrorist legislations for stifling dissent. “Others” has been emerging as foreigners, especially people having Arab background or those who adhere strict version of Islamic system watched and followed by intelligence and law enforcement.

²⁰⁴ Frank Clifford. *The Border Effect*, THE AMERICAN PROSPECT, (September 18, 2012)

²⁰⁵ *Id.*

²⁰⁶ *Id.* See also Stephen Dinan, *Border Fence in the eye of the beholder*, THE WASHINGTON TIMES (June 24, 2013). Available at: <http://www.washingtontimes.com/news/2013/jun/24/border-fence-eye-beholder/?page=all> last accessed 01/30/15.

²⁰⁷ The General Section of Secure Fence Act of 2006 states as follows. “Not later than 18 months after the date of the enactment of this Act, the Secretary of Homeland Security shall take all actions the Secretary determines necessary and appropriate to achieve and maintain operational control over the entire international land and maritime borders of the United States, to include the following— (1) systematic surveillance of the international land and maritime borders of the United States through more effective use of personnel and technology, such as unmanned aerial vehicles, ground-based sensors, satellites, radar coverage, and cameras; and (2) physical infrastructure enhancements to prevent unlawful entry by aliens into the United States and facilitate access to the international land and maritime borders by United States Customs and Border Protection, such as additional checkpoints, all weather access roads, and vehicle barriers. [...] In this section, the term “operational control” means the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.” (Section 2 of Secure Fence Act of 2006 H.R. 6061).

The Secure Fence Act of 2006 supposedly has attracted Saudi Arabia to take the same measure of border fencing. The initial plan was to fence only the Iraq border to control the movement of Islamic militant around Saudi –Iraq border but the late king Abdulla changed the plan to cover the whole Saudi Arabia border. As reported on Aljazeera, “In 2009, Riyadh signed a deal with European aerospace and defence contractors EADS to secure the Iraq border, but with increasing fears over infiltration by anti-government groups and al-Qaeda, the interior ministry expanded the scope to cover all the country's borders.”²⁰⁸

It is not only United States or Saudi Arabia, but also several other nations have either reformed their immigration systems or built border walls with a view to curb dangerous effects of terrorism. According to Prescott and Triggs, India has been fencing its border with Bangladesh and Pakistan; Pakistan, similarly has started to close its border with Afghanistan by a huge border wall; Iran has been constructing a border wall on Pakistan border. The border between Israel and neighboring nations has been source of clash between Israeli security forces and Palestinians. To mitigate security problem, Israel has either constructed border walls either in the West Bank, Gaza and Egypt. China, Greece, Kuwait, Morocco, Spain, Thailand, Uzbekistan and United Arab Emirates have started walling their border. Some of these borders, especially Israel borders walled before 9/11 but border constructing and wiring has been intensified since the 2001 terror act.²⁰⁹

Thus, despite the mounting pressure and uncontrollable effects of globalization, the objective reality on the ground proves the “inviolability” of the traditional boundary system. Gabriel Popescu, shares this view stating, “The borderless-world thesis [...] presents a simplistic

²⁰⁸ Aljazeera, *Saudi unveils 900Km fence on Iraq border*, September 6, 2014, <http://www.aljazeera.com/news/middleeast/2014/09/saudi-unveils-900km-fence-along-iraq-border-201496154458789238.html> (Accessed on 01/30/15).

²⁰⁹ Prescott & Triggs, *supra*, note 2; Ruben Zaiotti also suggests that, “Events such as the terrorist attacks of September 11, 2001, in the United States and long term trends such as the growth in “unmanaged” flows of people and goods worldwide, have drawn attention to the vulnerability of the current international system based on territorially

and idealized vision of globalization[...][f]ar from fading away, [...] more territorial borders fall apart, the more various groups around the world cling to places, nations, and religion as markers of their identity.”²¹⁰ Similarly, Ruben Zaiotti, remarks that a “ [...] discussion about a “borderless world” brought about by globalization have *turned out to be premature.*”²¹¹ [Emphasis added]. Our national identity, values and culture, common resources are territorial in nature and cannot be easily altered with the advance of digital technology. Zaiott further remarks, “ While globalization processes might have rendered [borders] less visible and politically salient, borders have maintained a pivotal role in defining who can move what, where and when around the world...[b]orders thus *still matter*”²¹² [Emphasis added].

Hence, boundary walls, coupled with other forms of protective measures, can still serve the function of filtering “others.” Global responses to the deadly disease, Ebola, in West Africa, for instance, appear to suggest how states quickly resort to borders to exclude “others” with a view to guard their subjects. In fear of effects of tragic disease, Ebla in West Africa, most nations including some African states have closed their border to the people and extra-territorial transactions from three West African nations – Liberia, Seirra Leone, and Guinea. Australia declared visa denial to people from Ebola affected nations. Canada followed the Australian stand. Some African countries were also quick enough to stop flight to or from Liberia, Guinea and Sierra Leone. . This is a recent happening that depicts the impracticability of borderless utopia.

With regard to borders and border walls the world is experiencing two conflicting situations. The uncontrollable nature of globalization that appears to make traditional border functions meaningless and the interests of territorial states and governments to protect their subjects against

defined political units.... highlighted the lasting relevance of borders in the system’s management and protection.” (Zoiatti, *supra*, note 7 at preface).

²¹⁰ Popescu, *supra* note 3 at 25.

²¹¹ *Id.*

invisible intruders by closing borders or restricting border contacts and mobility are the two conflicting realities that the modern socio-political system has to tackle. As pinpointed above, states strongly rely on borders walls to control extra-territorial threats and human mobility. Reliance on border walls and widespread construction and border guarding indicates the continued significance of borders and border wall. Equally important is, the effect of globalization on borders. It is not simply pointless to reconsider the efficacy of borders and border walls to resist the threat of globalization and global actors that can easily bypass well cemented border wall. In keeping national and international peace and security, thus, the contemporary world is confronted with two contradictory situations. Now the question is how to reconcile these conflicting realities?

The three international relation theories would be of some help to the changing global situation and interest of territorial states to address these conflicting facts. The most important international relation *paradigmatic approaches* that often cited in dealing with changing global phenomena vis-à-vis security and sovereignty are: realist, globalist and constructive approaches.²¹³ Realist approaches basis its approach on state security and sovereignty over other competing powers. Realist approaches is built by Hobbesian approach, which considers everyone as a threat, and the best solution for survival is to gain more power than rival power.²¹⁴ Thus, realists believe that greater power is necessary to maintain peace and security and survive as a sovereign entity.²¹⁵ Routke remarks, “ Each state must rely on its own resources to survive and flourish....There is no

²¹² *Id.*

²¹³ Ann – Maire Slaughter, *International Relations Principal Theories*, https://www.princeton.edu/~slaughtr/Articles/722_IntlRelPrincipalTheories_Slaughter_20110509zG.pdf (Accessed 02/07/15). See also Ambersagen, *Realism, Liberalism and Constructivism in International Relations*, <http://ambersagen.hubpages.com/hub/Realism-Liberalism-and-Constructivism-in-International-Relations> Accessed on 02/07/15.

²¹⁴ Ambersagen *supra* note 211.

²¹⁵ Ahmet Kaya, *The Impact of EU Securitization Process on the Border Framework of Turkey*, PhD Dissertation, Graduate School, the State University of New Jersey, 41 (2012).

authoritative impartial method of settling ... dispute – i.e. no world government – states are there own judges, juries, and hangmen and often resort to force to achieve their security interests.”²¹⁶

Liberalist approach (aka globalist approach)²¹⁷ on the other hand builds its theory on cooperation and interdependence of global actors for common good. Thus, foreign policy should be designed centering cooperation and altruism.²¹⁸ For Liberals global peace and security depends upon the extent of collaboration and global alliance prevailing among states. According to this approach thus, “... common ideas can lead states into interdependence and to remove [...] threat to sovereignty.”²¹⁹ It proclaims unity and cooperation the only ways for peaceful co-existence. International agencies, like United Nations, regional organizations like European Union, African Union and so forth facilitate the common bond beyond narrow territorial limits. Liberalists believe that the world is complexly interdependent and tied through international trade, economic, social and moral interconnections that are regulated by international law.²²⁰ In a cooperative work, while keeping individuality of states, there is no *zero sum game*. This is a win-win approach that considers all thoughts and interests based on common deliberations that involve all global actors “working through international organizations and according to international law.”²²¹

The third *paradigmatic approach* is constructivism. Some scholars argue this is not a theory by itself, like Realities and Liberal approach, but ontology.²²² It considers *social situations* to derive conclusions governing world phenomena. Social situations, like societal history, norms, beliefs are important tools to explain state behavior. Constructivism appears in midway between the two

²¹⁶ John T. Rourke, *International Politics on the World Stage*, 21 (12th ed. 2007)

²¹⁷ Ahmet *supra* note 213.

²¹⁸ *Id.*

²¹⁹ Ambersagen *supra* note 211.

https://www.princeton.edu/~slaughtr/Articles/722_IntlRelPrincipalTheories_Slaughter_20110509zG.pdf (Accessed 02/07/15).

²²⁰ John, *supra* note 214 at 23.

²²¹ *Id.*

²²² Ambersagen *supra* note 211.

former approaches. Like Realism it recognizes state sovereignty. According to this approach, “State sovereignty has profound influence that precedes any cost- benefit analysis that states may undertake.” Like liberalism it regards the role of non-state actors in global phenomenon.

Constructivist approach affords greater autonomy and independence to international institutions stating that they can act in their own right without the influence of sovereign states. To constructivism, transnational institutions not merely serve as tools for dissemination of state ideology but they act even against the state that created them or to which they belong. According to Rourke, constructivist approach is an interactive process between various actors including states, international agencies, individuals and groups.²²³ To constructivism, thus, international actors and their mindset is the most important. They decide who they are, insiders, outsider (others), their political identity and their spatial border and their state. The actors have inherent power to select who may associate with them or who cannot, being enemy or strange.²²⁴ This paradigmic approach appears to cure the “flaws” of realist and liberal or globalist approaches – the two extreme ends.

Constructivist’s mixed approach appears helpful to redress the apparent contradiction in effects of globalization on borders and interest of territorial states to keep security by relying on border walls.²²⁵ While states have high interest to maintain territorial sovereignty and security (realist theory) relying on border walls, globalization appears to ignore it (globalist or constructivism paradigm). Total closure of borders and the emergence of borderless world (absolutely open borders) are neither desirable, nor feasible scenarios. This demands a middle line

²²³ Rourke, *supra* note 214 at 30.

²²⁴ Ahmet, *supra* note 213.

²²⁵ Constructivist approach reconciled the two extreme ends by holding some important points from realist paradigm and liberal/globalist paradigm. It accommodates both concepts and designed its own separate approach. The current territorial state tendency to bar mobility via huge border wall barrier and invisible intruders that can bypass the border wall or other global actors, like multinational companies that abhor border wall can be solved by designing a working solution to address the contradictory global reality *vis-à-vis* borders.

approach that can mitigate undesirable effects of the two extreme ends by mixing important points from both approaches and design an independent theory (paradigm).

Sociologists and border experts, accordingly, suggest for the transformation of borders from barriers to bridges, from line of separation to the point of contact, and from scene of antagonism to the zone of cooperation.²²⁶

The transformation of borders from barriers to bridges makes the notion of “border” more than a physical mark or barriers that signal the end or beginning of a territory. Borders are supposed to play a greater role by serving as bridges or linking channels that facilitate mobility. In this regard, borders can stimulate cooperation and mutual co-existence instead separating.²²⁷ The term “border” thus involves: processes, institutions, resources that meant to regulate and promote cross-border transactions and relationships. It encompasses the entire processes vis-à-vis a boundary. Gavrilis confirms this view stating: “On maps, boundaries appear as static legal divisions between sovereign states. In reality, they are complex institutions that make political claims about who and what may cross the line.”²²⁸ A mixed approach does not absolutely eliminate borders as globalist paradigm claims or does not close borders for security causes but the existing borders will be rebordered (changed into channels of interaction, cooperation and integration).²²⁹ The change in the nature and function of border, thus, cannot be termed as its demise.

As the prevailing global reality is not sharply uniform, the nature and kind of border may change with the change of “mishap” that a border wall is expected to tackle, or rebordering may

²²⁶ Illidio do Amaral, *New Reflections on the Theme of International Boundaries*, IN Clive H. Schofield (ed). WORLD BOUNDARIES: 1 GLOBAL BOUNDARIES, 16 (1994).

²²⁷ Separated people cannot be genuinely “good neighbors”. They are aliens having no contact at all. Co-existence and friendship avoids differences and it makes easy to find out solution even difference happen during the contact.

²²⁸ Gavrilis, *supra* note 185 at 14.

²²⁹ Take, for instance, the Ethio-Kenya border. The border at Moyale connects the Ethiopian city of Moyale with Kenyan counterpart. There was no impediment for nationals of both countries. In some cases, either Ethiopians or Kenyans don’t understand being Kenyan or Ethiopia. Of course both are brotherly people who were parted by a

depend upon the nature and kind of global actors and factors that the new border has to accommodate. In this regard Martinez remarks, “Conditions in borderlands worldwide vary considerably because of profound difference in the size of nations-states, their political relationships, their level of development, and their ethnic, cultural and linguistic configurations.”²³⁰ To accommodate varied situations borders may be classed into different categories. Borders may be grouped on the basis of political situation, the level of economic development or ideological disparity among the neighboring nations. The border between United States and Mexico reveals socio-political disparity between the two neighboring states. The prevalence of a huge economic gap between United States and the neighboring Latin America has attracted influx of immigration for better way of life in the United States. This undoubtedly creates enormous economic burden and security threat to the people of United States, which demands multidimensional efforts to restrain unauthorized border crossing.

Categorization of borders demands thorough borderland study that will enable states to design an appropriate border that would suit to the prevailing socio-economic and political situation. With this view in mind Martinez proposes four possible models of borders.²³¹ The first model is alienated borderland. It is strictly controlled and generally closed kind of boundary. Crossing this kind of boundary is almost impossible for some category of people due to political, religious or cultural animosity prevailing between neighboring nations. The current Ethio-Eritrean boundary falls under this category. No Ethiopian or an Eritrean is legally permitted to cross the Ethio-Eritrean boundaries. Despite tight control, Eritrean refugees bypass the perilous border that could possibly cost life. As United Nations report reveals, “Over 200 Eritrean refugees are crossing

border. The border between two countries is well settled and demarcated. No confusion or contest. Both Ethiopia and Kenya now working in the same project like road construction, power sharing and peacekeeping.

²³⁰ Martinez, *supra* note 63 at 1.

²³¹ *Id.* at 2.

the heavily fortified and dangerous border into neighbouring Ethiopia daily....”²³² As Martinez illustrates, “ Warfare, political disputes, intense nationalism, ideological animosity, religious enmity, cultural dissimilarity, and ethnic rivalry constitute major causes of alienation.”²³³

The second category of border is co-existent borderland. This is a kind of border in which “ stability is an on and off proposition.”²³⁴ Thus, it is not actually closed, but its openness depends upon situation. However, until some restraining situation happens, borderland people of both states can cross the border as long as co-existence is not hampered. The third category is interdependent borderland. This is substantially an open border having no cause for imminent closure, or openness is not attached to any known condition that may happen subsequently. Thus, “stability prevails most of the time.”²³⁵ This is a kind of border between two friendly nations, which are economically or culturally interdependent. Subjects of both nations can cross boundary without any barrier, in some cases just by simply proving their identity. The Ethiopian, and the Republic of Djibouti border appears the kind of interdependent border. Ethiopians can enter Djibouti without the need to get visa.

The fourth and final category is integrated borderland. This is a kind of border in which the bordering people are functionally merged though they are subjected to distinct political sovereign. Borderlands may merge without serious economic restrictions. The strong relationship between Ethiopia and the Republic of Djibouti appears moving toward economic integration. Bordering people both in Djibouti and Ethiopia can own properties in either of the counties. Bordering people are ethnically and culturally similar. In most cases, borderland people speak the same language and experience identical way of life. Daily mobility of goods and people from one country to the other

²³² Aljazeera, October 29, 2014, Available at: <http://www.aljazeera.com/news/africa/2014/10/spike-eritreans-fleeing-into-ethiopia-20141029101248192297.html> (Accessed 01/27/15).

²³³ *Id.*

²³⁴ See *Id* at 3.

is so high.²³⁶ Simple peaceful co-existence, free mobility of border people and economic cooperation by itself is not enough to pronounce full merger of two nations. In the words of Martinez, “Integration between two closely allied nations is most conducive when both are politically stable, militarily secure, and economically strong. Ideally the level of development is similar in both societies.”²³⁷

Finally, borders cannot simply remain stagnant as “bounded territorial containers” while their very purpose keeps on changing.²³⁸ The meaning, nature, and significance of border has been changing to cope with the changing world.²³⁹ The conception “borders as lines of separation or barriers” appears giving way to borders as processes and institutions comprising various factors and actors. As George Gavrils succinctly put in his book *The Dynamics of Interstate Boundaries*, “Borders are institutional zones, not lines of separation between states.”²⁴⁰ To Gavrils, borders are complex institutions that comprise various actors and processes that involve in managing borderline transactions and contacts.²⁴¹

The current European Union border illustrates varied border culture as the old national border was rebordered without affecting territorial sovereignty and security. Nowadays, EU members and some non-members experience two kinds of borders: an internal border that allows free mobility (internal border) without the need to show passports, and a border serving as barrier (the external border). The internal border effectively serves as bridge by facilitating free movement of persons and goods. The external border is a traditional form of border that requires stringent security checkup and visa requirement.

²³⁵ *Id.*

²³⁶ The president of Republic of Djibouti expressly stated for both political and economic integration of two countries though full integration not yet took place.

²³⁷ Martinez *supra* note 63 at 5.

²³⁸ Diener & Hagen, *supra*, note 28 at 59.

²³⁹ Zaiotti, *supra* note 7 at preface.

²⁴⁰ GEORGE GAVRILIS, *THE DYNAMICS OF INTERSTATE BOUNDARIES* 5(2008).

Ruben Zaiotti highlights the evolution of European border cultures from Westphalia to Schengen.²⁴² We have seen the historical emergence of Westphalian border culture that is credited for innovation of clearly defined border system. Schengen initially was started by bilateral agreement between few European states, but now incorporated into the EU and all member states apart from United Kingdom and Ireland are party to the treaty that adopted Schengen to EU border policy. Currently Schengen has 26 members. Most of the signatories to Schengen are EU member state apart from few non-EU member states. The rationale behind Schengen is allowing free movement of goods and services – just like a single nation.²⁴³ The adoption of Schengen into EU has created two border systems.

In conclusion, in the technology age, it is not uncommon to notice the “fiction “of vanishing nature of borders and lessened effects of state sovereignty. A number of states, on the contrary, have been erecting huge border walls and/or have reformed or working to reform restrictive immigration laws and boost institutional capability that can withstand extra-territorial effects of globalization. These are the two conflicting scenarios that call for an effective solution. It is practically impossible to eliminate all forms of borders with a view to facilitate free mobility of all categories of people and goods without any form restriction. Unfiltered mobility would enable free movement “enemies”, unchecked entry of destructive goods like explosives, bombs, guns, and so forth. Unrestricted access would jeopardize security, and make state sovereignty practically meaningless as it cannot control and guard its subjects and things in the territory (after all there will be no limit on territorial space).

Therefore, a theory suggesting for the possible emergence of borderless world appears simply a utopia that can never happen. Various research works and the prevailing national and

²⁴¹ *Id.* at 14.

²⁴² See Zaiotti, *supra* note at 26.

international reality simply prove the possibility of reterritORIZATION and rebordering – changing the existing borders with a view to accommodate all interests and tackle threats. According to Popescu, “ Globalization can be understood in terms of reterritorialization and rebordering dynamics.”²⁴⁴ In reterritORIZATION and resultant rebordering, geographical locations may be restructured, and borders will have new importance and role.²⁴⁵ This may seem by itself a challenging solution but it is feasible and desirable. The new border walls will be designed in a way it would allow free mobility of friendly (good) people by filtering terrorists (the enemy, strangers or others). It is true terrorist are also human beings having no special mark that can facilitate filtering as “terrorists” but close global cooperation and information exchange among states would assist to tackle “bad people”.²⁴⁶

Globalization and resultant global interdependence provides solutions to tackle its evils. Take, for example, the case of Boston Marathon bombers. Russia had information about the bombers and their link to possible terrorists groups and passed the information to CIA²⁴⁷. In the words of Cartalucci:

...Russian investigators contacted the FBI at least as early as 2011 in regards to Boston Marathon bombing suspect Tamerlan Tsarnaev, and again just 6 months before the Boston attacks. Additionally, it is now revealed that both the FBI and CIA had Tsarnaev on at least 2 terrorist watch lists, contradicting previous FBI statements that the case was “closed” after not finding “any terrorism activity, domestic or foreign.”²⁴⁸

²⁴³ *Id.* at 68.

²⁴⁴ Popescu, *supra* note 3 at 73.

²⁴⁵ *Id.*

²⁴⁶ one of the basic features of globalization is interconnecting global phenomenon. Interdependence, cooperation and information sharing and having common database will prevail in the era of globalization. In current European situation, for instance, various forms of information sharing channels were devised by the European Union with a view to secure European internal and external borders. Schengen Information System, Visa Information System, Eurodac, and The European Border Surveillance System are the new technologies that were devised for European border securitization. Using these technologies, a nation that has discovered some kind of unwanted attempt to get access to the territory will inform the other who will be vigilante in case the other makes another attempt in another location. Ahmet *supra* note 213 at 60.

²⁴⁷ For a reason no well documented CIA did not tackle the terrorists. We don't really know the kind of information passed to CIA or the way it was transmitted or the weight given by both intelligence groups.

²⁴⁸ Tony Cartalucci, *Boston Truth: Both FBI and CIA watched Boston Bombing Suspects For Years*, Center for Global Research, <http://www.globalresearch.ca/boston-truth-both-fbi-cia-watched-boston-bombing-suspects-for-years/5332942> accessed 02/09/15. See also Greg Miller, *CIA Pushed to add Boston bomber to terror watch list*, The Washington Post, http://www.washingtonpost.com/world/national-security/cia-pushed-to-add-boston-bomber-to-terror-watch-list/2013/04/24/cf02b43c-ad10-11e2-a8b9-2a63d75b5459_story.html accessed 02/09/15.

Different theories indicate the fact that globalization creates strong global alliance among states.²⁴⁹ This strong global alliance and cooperation would facilitate information exchange or travel data access which will allow border guards to filter people that may be grouped under “enemy” or “others”. In Boston case, for instance, the Russian information assisted, at least, to make the Suspects in the watch list though both FBI and CIA did not stop happening of the destructive incident. This supposedly happened because of the current weak alliance between Russian intelligence and United States counter parts. It is rumored that Russia did not reveal some vital text messages that would have enabled FBI and CIA to restrain the suspects.²⁵⁰ But in fully globalized system, greater alliance, cooperation and friendly environment will prevail thereby facilitate free flow of information to facilitate the free mobility of people and goods.

This approach mixes both Realist and Globalist (Liberal) paradigmic approaches of international relation. In line with the Realist theory, territorial sovereignty and security will be respected though a new type of border system will be “built” to fence changing territories.

It seems a perplexing task to filter “others”, but it is possible. Trained border guards that are armed with latest technology can filter unauthorized persons and goods from global database and information available from other friendly nations, and close border walls to harmful people and transactions. This is an emerging phenomenon that is not widely practiced in all corners of the globe, and may look like the already existing border. But the new border (rebordered border) is well tailored to suit varied territories in a given state. For instance, cyber borders are completely different from borders baring physical mobility of goods and services, as cyber territory is not physically visible, as its global actors are also not visible when they cross the border. It is just a

²⁴⁹ Liberal or globalist theory indicates possible global link and interdependence thereby facilitating ground for cooperation, information exchange granting global database.

mental imagination and psychological border that has ability to curtail unwanted invisible mobility (the Others).

The current territory will be reterritorized depending upon the nature of mobility and the kind of border that can effectively guard the territory. The main distinction between the rebordered border and the old one is that the new border will allow free and quick mobility of most people “the insiders” which are normally regarded as “good people”. It will allow also quick and free mobility of allowable goods and services. The new border thus requires some kind of information or a list of exceptional category of unallowable kind of the people, goods and services.

With regard to cyber border, the current Chinese government practice is a good illustration. China negotiated with Internet giants, Google and Yahoo and opened its borders on condition that it can control certain information and key words including e-mail addresses of dissents.²⁵¹ Lyombe Eko *et al* remark: “Google and other US Companies have ... *to satisfy local political exigencies, obey national rules, abide by cultural expectations* and yet remain good US Corporate citizens.”²⁵² (Emphasis added). Google and Yahoo have developed a software (Firewall) that can filter unwanted data from Internet flow to China on condition to enter into Chinese cyber territory. As China control its space and technologically can close its border to Google and Yahoo, it is publicly regarded the two global giants bent their knees to China with objective of getting access to huge Chinese market trading off privacy of Chinese clients and closed the cyber border of China to

²⁵⁰ Daniesl Politi, *Russia Withhold “Crucial Information on Boston Bomb Suspects From FBI and CIA, SLATEST* http://www.slate.com/blogs/the_slatest/2013/05/11/boston_marathon_bombing_russia_withheld_tamerlan_tsarnaev_text_messages.html accessed 02/09/15.

²⁵¹ Lukas Feiler, *Outages of Critical Information Infrastructure Under EU and US law, Transparency Versus Secrecy*, 15 *Journal of Internet Law* (3) 1(2011). http://www.academia.edu/5589741/Google_This_The_Great_Firewall_of_China_and_the_IT_Wheel_of_India accessed 02/09/15.

²⁵² Lyombe Eko *et al*, *Google is the Great Firwall of China, the IT Wheel of India, Google Inc., and the Regulation*, 15 *J. INT'L. Journal* 1(2011). http://www.academia.edu/5589741/Google_This_The_Great_Firewall_of_China_and_the_IT_Wheel_of_India (Accessed 02/09/15).

“undesired” channels. The Chinese government is a gatekeeper of Chinese cyber border. According to Eko and et al, “ The Chinese government has created a closed national internet that it protects with censorious architecture of information technology, regulatory agencies, internet Service Providers, and an internet police squad.”²⁵³ Therefore, by prescribing conditions, China reborderd its Internet space. Though it is not a good experience, Ethiopia followed Chinese footsteps and banned some Internet sites that were designed by dissents and Ethiopian diaspora. One can view opposition sites like “Ethiopian Review, Ethiomedia, ESAT TV and so forth outside Ethiopia but the sites are blocked in Ethiopian cyber territory. Thus, Ethiopia has also reborderd its old border to suit the changing global phenomenon. The same rule can be used to cyber crimes, cyber terrorists and unwanted cyber transactions.

Cyber territory illustrates how states can deterritorize the traditional territory due to globalization and reterritorize and reborder it to facilitate quick mobility and control unauthorized or undesired person, transaction or activity. Cyber territorization does not, however, mean simply internet censorship or implemented only in dictatorial regimes or developing economies, but it can be used anywhere to control any kind of social evil like terrorism, tax evasion or cyber crime. States can also reterritorize their territories and reborder it depending upon global phenomenon and societal objectives. Terrorist may be denied access to a territory or denied visa or may be detained and deported on the basis of available information.²⁵⁴ As globalization presumes friendship, collaboration and border interaction, though some may still cross borders, there will be ample

²⁵³ *Id.*

²⁵⁴ In EU, for instance, if undesired person who attempted to get access to the territory, the information will be available on Schengen Information Systems databases and all the member nations will be alerted. According to Ahmet, “*Schengen Information System (SIS)* is an information-exchange system that allows competent judicial, border, consular, customs, and police authorities of Member States to obtain and share “alerts” on certain categories of people or objects crossing their external borders.” Ahmet, *supra* at 213 at 60.

possibility for apprehension assuming globalization will create friendship and peaceful coexistence that will facilitate information exchange.

Thus, in the era of globalization either borders or territorial state will not vanish, but the prevailing territories may be deterritorialized and reterritorized into new shape depending upon compelling effects of globalization to allow quick and free mobility while controlling (filtering) unauthorized persons, goods and transactions. The control aspect is an exception whereas, the general rule is free and quick mobility of goods and services. The new border will facilitate high interaction among bordered people thereby transforming borders from barriers to bridges.

CHAPTER THREE

International Law and Territorial Boundary Delineation Norms

3.1. Introduction

States are the most important subjects of international law, and it is inconceivable to imagine the existence of a State without some form of territory, as “[t]erritoriality is one of the fundamental tenets of sovereign statehood.”¹ In a way of manifestation of sovereignty, a state exercises control over people and activities in a defined territory.² Thus, territoriality and boundaries are “[...] the key element[s] how states are defined [...]”³ As international law, basically comprises of rules and principles governing the conduct and relationship of States, regulating territorial relationship of States is one of the primary objectives of the international law.⁴

It is generally viewed, and experience so far proves, that conflict over territory and boundary takes lion’s share of international conflicts.⁵ As states and territorially are so intertwined,

¹ Tomas Bartos, *Uti Possidetis, Quo Vadis?* 18 AUST. YBIL 43, 37-68 (1997); See also P.K. Menon, *The Acquisition of Territory in International Law: A traditional Perspective*, 22 KOREAN J. COMP. L. 125, 125 - 181(1994). Summer rightly summarizes that “In international law and relations, ownership of territory is significant because sovereignty over land defines what constitutes a state” See Briatn Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L. J. 1779, 1779 – 1811 (2004).

² Garth Abraham, “*Lines Upon Maps’: Africa and the Sanctity of African Boundaries*”, 15 AFR. J. INT’L COMP. L. 72, 61 – 84 (2007).

³ Robert McCorquodale & Raul Pangalangan, *Pushing Back the Limitations of Territorial Boundaries*, 12:15 EJIL 868, 867 – 888 (2001).

⁴ One of such rules is Art. 2(4) of the UN Charter that requires States in their international relations to refrain from threat or use of force against territorial integrity or political independence of any State. (Art. 2 of the United Nations Charter) Constitutions of regional organizations of States have also designed provisions prohibiting use of force, sovereignty and territorial integrity of member States, For instance, Art. 21 of Organization of American States Charter which proclaims that territory of a state is inviolable, it may not object to occupation by force; as stated in Art. 3(b) of the Constitutive Act of African Union, defending sovereignty, territorial integrity and independence of member states is one of he primary of objectives of AU. The Act in Art. 4(b) expressly declares that borders existed on achievement of independence shall be respected. Art. V of League of Arab Sates Charter prohibits use of force and requires member states to respect territorial integrity of member States.

⁵ SUZANNE LALONDE, DETERMINING BOUDNARIES IN A CONFLICTED WORLD THE ROLE OF UTI POSSIDETIS, 3(2002). Mark Zacher also witnesses this point quoting John Vasquez who says, “ Of all the issues over which wars could logically be fought, territorial issues seem to be the ones most often associated with wars. Few interstate wars are fought without any territorial issues being involved in one way or another.” See Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55:2 INT’L ORG. 216, 215 – 250 (2001).

the former often aspire to expand its territory to assert more power by expanding the playground.⁶ This often generates conflict that international law has to address. It is also a proven fact, especially in Africa, that a simple territorial or boundary disagreement can quickly flare up into armed confrontation.⁷ The case of Ethiopia and Eritrea attests this assertion. The two nations were so close before the sudden eruption of the boundary conflict and things turned down overnight. In the short span of time, the Ethio-Eritrea war consumed tens of thousands of lives, destroyed enormous resources and spoiled, not only peaceful coo-existence, but also disturbed regional peace and stability. Therefore, by creating a smooth territorial or boundary relationships, among states, international law endeavors to play a significant role in global peace building and peace keeping.⁸

The right to territory arises either from “legally significant acts” that are recognized by the international law or treaties concluded by states.⁹ International law not only sets requirements for the creation of nation states and describes the scope of their authority over a territory, but also it serves as an authoritative tool for resolving actual or potential international disputes. Moreover, international law doctrines and practices play a pivotal role in the interpretation of bilateral treaties, if dispute arises on the title to territory or in defining a precise limit of territory.

This Chapter reviews some significant international law principles that are central in the determination of territorial boundary dispute, or that can guide resolution of border disputes. Before dealing with issues involving boundary or attempting to resolve boundary conflicts, we have to ascertain whether a state claiming sovereignty over a given territory bounded by the contested border has some kind of control or has title to the main land (the territory) that it desires to set a boundary. With this view in mind, this Chapter explores a brief overview of some of the relevant

⁶ SURYA PARKASH SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW, 2(1997).

⁷ Lalonde, *supra* note 5.

international law norms and practices of delineating territorial land boundaries. Accordingly, this chapter briefly assesses some specific international law doctrines relating to territoriality, sovereignty, acquisition of title to territory, the stages of boundary making, the principles of *uti possidetis juris*, territorial integrity norm that may often invoked in resolving international territorial and boundary disputes.

3.2. Territoriality and State Sovereignty

As has been briefly pointed out in the preceding chapter, territorial boundary signifies the extent of the sovereignty of a state, as a sovereign power can exercise its exclusive authority within the bounds of a defined territory. The concept of exclusive territorial sovereignty, a defined territory and equality of nation states, are international law norms that are contributed to the world by the Westphalian Congress of 1648. In spite of mounting assertion that territoriality, territorial sovereignty and even if the nation state are fading away and giving way to uncontrollable effects globalization and global actors, this assertion cannot hold ground for various causes and reasons. It is true that global actors can transcend traditional border walls without being detected by border guards or cannot be contained by huge and wired border walls, but the changing nature of borders from barrier to bridges and building a strong global cooperation can filter network of powerful extra-territorial or intra - territorial forces and contain them while facilitating free global mobility in line with the dictates of globalization.

In the era of globalization, states will still remain sovereign in their defined territory, safeguard the people in the territory they control, and maintain territorial integrity against an “unregulated global actors”, like terrorists, cybercriminals or external aggression. States will have

⁸ Abdul G. Koroma, *The Binding Nature of the Decisions of the ICJ* in Marcelo Kohen and Laurence Boisson de Chazourmes (eds.) *INTERNATIOANL LAW AND THE QEUST FOR ITS IMPLEMENTAITON*, 431, 439 (2010).

⁹ JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 218 (8th ed. 2012).

power to restrain global activities that can pass their borders by filtering unauthorized actors and illegal transactions while facilitating mobility of acceptable persons and transactions. Globalization creates interdependence and necessitates collaboration among nations. The cooperation would enable states in their endeavor to filter undesired persons and contain harmful acts and transactions.

There is no legal obligation to cooperate, but it is a necessary consequence of globalization to maintain peace and stability while facilitating modern life. For instance, Russia has cooperated with United States by informing terror tendencies of Boston Marathon bombing suspects. On the basis of the information FBI and followed up the suspects and blacklisted them by listing the suspects in the terror database though mere blacklisting did not restrain the bombers. For a reason not known United States agencies failed to contain the suspects by they inflict the act of terrorism. No one has dictated Russia to supply the crucial information, but it did by its own volition with the interest to follow up and contain potential terrorists. Recently a suspected terrorist who attempted to hurt passengers on high-speed Thalys train was known to Spanish intelligence and was tipped to France even before the actual commission of the act of terrorism, though the terrorist was not restrained before attempting to carryout the terror act.¹⁰ But the most important point here is global cooperation can thwart or mitigate adverse effects of globalization and protect sovereignty and keep territorial integrity. United States has been aggressively assessing potential terror act either in African or elsewhere and has been issuing possible terror act warning to alert states with a view to avert terrorism. Kenya, Uganda, Ethiopia, and Tanzania have been using information supplied by United States. Each State needs to cooperate to fight the global evil.

Global cooperation, therefore, does not tarnish sovereignty, nor eliminates boundary or renders the concept of territoriality nonsense. States are always at liberty to close their borders for

¹⁰ Mark Townsend and Kim Willsher, *France train shooting: Europe on high alert after attack by armed gunman*, THE GAURDAIN, Aug 23 2015,

any length of time with a view to contain an act specifically relevant to individual nation. For example, in early September 2015, some EU members decided to reinstitute border control with a view to mitigate illegal migration. Hungary has been busy in constructing new fences and has enhanced institutional and legal authority of border guards. Similar actions are being taken by other European Union Member States to curb migration influx. The migration influx has posed a great threat on Schengen, as there is fear that all EU member States would close their border moving back to the pre-Schengen era. “Chancellor Angela Merkel of German has warned that Schengen would fall apart if Europe cannot agree how to manage migrant crisis.”¹¹ Thus, globalization and transnational nature of global actors cannot change territoriality, border, and state sovereignty in a defined portion of global space, or abolish international law. The effects of globalization, however, will change the nature of borders, which in turn, will enhance cooperation between states, thereby redefine the contours of international law. Contrary to the speculation regarding falling nature of some of the important international law principles that were passed by the Peace Accord of Westphalia like nation state, territorial sovereignty, and equality of states will remain intact *albeit* transformation of borders to suit the changing transnational situation.

As sovereignty, principally, can be invoked within the limits of defined territory, territoriality and sovereignty are strongly interrelated.¹² Territorial sovereignty, however, does not simply mean power over land or space within the limits of a defined boundary, but it has strong nexus to the people within the territory, their relationship, interaction, and needs, as territory defines and shapes peoples identity, culture and values.¹³ Consequently, a sovereign organ is not only

<http://www.theguardian.com/world/2015/aug/22/europe-high-alert-french-train-attack> (Accessed: Sep. 16, 2015).

¹¹ See Patrick J. Lyons, *Explaining the Rules for Migrants: Schengen & the Dublin Regulations*, N.Y. Times, Sep. 17, 2015. Also Available at, http://www.nytimes.com/2015/09/17/world/europe/europe-refugees-migrants-rules.html?_r=0; (Accessed 4/21/16). For detailed discussion on effect of globalization, sovereignty and boundary see Chapter two of this work.

¹² II.R.Y JENNINGS, ACQUISITION OF TERRITORY IN LAW, 2(1963).

¹³ Sharma *supra* note 6 at 4.

vested with an exclusive right and power over territory and people in it, but also has to discharge duties to the people in the territory.

A sovereign states has duty to “to protect the rights of other states.”¹⁴ ICJ while addressing the issue of legal ties of sovereignty between Western Sahara, the Kingdom of Morocco and Mauritania has stressed the legal ties between State sovereignty and people in the territory in which sovereignty can be claimed.¹⁵ The State has an exclusive authority to make laws, adjudicate disputes, or punish violations with a view to discharge its traditional function of statehood. Therefore, the notion of sovereignty is conferred not only to reap its benefits (power and rights), but also has to discharge its responsibility to the people in the geographic area where sovereignty can be exercised.

After brief overview of the issue of state sovereignty, territoriality, and globalization, now we will explore the determination of the scope of territory and boundary. In order to study the correct territorial edge (the boundary) the study of international legal norm involving territoriality appears pivotal.

3.3. Determining Title to Territory

As has been pointed out above, any issue over boundary or a territory is very sensitive, as territoriality defines one’s identity and values. In conflict over territory, where the disputants contest for a given tract of land, one can also notice tension as a result of strong public pressure, animosity, and mistrust among citizens of both contesting nations who have been enduring unsettled conflict. In an endeavor to resolve territorial dispute the first crucial step is determination of title to territory. A tribunal or arbitration team to which settlement of territorial conflict was entrusted should take time to investigate evidences, and has to make a thorough field research to

¹⁴ MALCOLM N. SHAW, INTERNATIONAL LAW, 279(1991).

find out an actual titleholder. Contest to title of a territory or conflict over the precise limits of neighboring territory is a regular proceeding of international tribunals. About one-third of cases disposed by international tribunals including International Court of Justice (ICJ), one way or the other, deal with territorial or boundary dispute.¹⁶

Claim over boundary line, and dispute over title to territory are not exactly identical issues though in some cases both of the issues may overlap. For instance, the dispute over *Badme* between Ethiopia and Eritrea appear to involve both issues, *albeit*, often the conflict is labeled as boundary dispute. The expression, boundary, connotes a line of separation of two or more sovereign states, whereas, territory implies a space different from a line having its length and width. The village of *Badme* is not simply a line. It is a small town or a village in which thousands of residents dwell. Thus, it is a territory. The initial issue was title over the town of *Badme*. Then the issue of unsettled boundary over the entire Ethio-Eritrea borderland arose. The Ethio-Eritrea conflict, thus, involves conflict over boundary and territory.

Determination of legal holder of title to a territory, therefore, is a central inquiry in resolving territorial dispute. In old days it was believed that title to territory acquired in a way similar to acquisition of title to private properties. The assumption of territories as properties has facilitated transactions involving territories. A sovereign power that had title to territory used to dispose it in a way similar to private properties. Tribal chiefs in Africa used to sell, donate or lease territories to anyone that had fulfilled demands of the chief.¹⁷ As a monarch was considered as an “elect of God” to have power over every thing in the State; he/she was considered as the ultimate owner of the

¹⁵ Sharma *supra* note 6 at 4.

¹⁶ *Id.*

¹⁷ For example, Italian missionaries and traders bought land from tribal chief before capturing the whole territory of Eritrea. Almost an identical system was employed by France to hold Djibouti in a lease for 99 years. To avoid colonization, the 19th century Ethiopian government did not allow foreigners to own land and other immovable properties in Ethiopia. Still now in Ethiopia, foreigners cannot own land and buildings in their own name.

State territory and things found therein. Practically, therefore, there was no basic difference between the monarch's private property and State property, including territory.

Later on, some distinctions were made in personal property of monarch and state properties including territorial land. Prominent international lawyer and author, Lasa Oppenheim, remarks, "State territory is territorial property of a State."¹⁸ Thus, to Oppenheim, it was not the monarch, but the State that included organs other than the monarch was "proprietor" of the territory.¹⁹ In other words, "The territory of a State is not the property of the monarch, or the Government, [...] it is the country which is subjected to territorial supremacy of the imperium of a State."²⁰ This is a great deviation of the medieval view of ownership of territory. Even in 20th century, however, some traditional monarchs in Africa, like of kings of Ethiopia, stuck to the old view and considered the Ethiopian territory as property of the king and freely donated land to anyone he liked. In those days, there was no basic difference in property ownership of the king and the State. This assumption was changed immediately after removal of the monarch and change of its regime.

Thus, in old days, as a 'proprietor', a State, could sale, lease, bequest, or transfer the territory in any way, legally possible, irrespective of the interest of people on the territory.²¹ Thus, a territory, like any commodity, passed through different 'hands' that directly or indirectly involved in ownership or possession. When dispute arises over title of a territory the tribunal has to ascertain an actual titleholder at the time of the dispute by assessing how the current title was obtained, as a transferee can acquire exactly the title of the transferor (*the principle of nemo dat quod non habet*).

The judicial organ before which a territorial or boundary case is lodged, at the outset, will ascertain how opposing parties have acquired ownership or possession of the territory. If a party

¹⁸ I L. OPPENHEIM, INTERNATIONAL LAW, A TREATISE 217 (1905).

¹⁹ Crawford *supra* note 9 at 216.

²⁰ Oppenheim, *supra* note 18 at 218.

²¹ Crawford *supra* note 9.

proves its title over the claimed territory the next issue will be defining the limits of territory and emplacing marks on the ground (delimitation and demarcation). Now the issue is how title to a territory can be legally acquired and how it is possible to prove ones territorial title? Because of the traditional assumption of a territory as property, the Roman law doctrine of acquisition of title to private property can be analogized to acquisition of title to territory. Shaw confirms this view stating:

The international rules regarding territorial sovereignty are rooted in the Roman law provisions governing ownership and possession, and the classification of the different methods of acquiring territory is direct descendant of the Roman rules dealing with property.²²

Thus, the traditional modes of acquisition of title to territory are, "... stereotyped way[s] reflecting those of Roman law,"²³ which prescribes five prominent modes of acquiring title to a property, viz: occupation, accretion, cession, conquest, and prescription. Now it appears fairly correct to sum that the traditional modes of acquisition of title to territory, with all the defects and critiques, have got the status of customary international law.²⁴

Though some modes of acquisition of title to territory in 21st century are viewed as outdated and practically irrelevant, understanding of the historical background of acquisition of territory may make some help in resolving the rampant territorial or boundary conflict almost all over the globe. Due to time and space limitation, merely a Birdseye view of each of the modes of acquisition is briefly stated herein under.

²² Shaw *supra* note 14.

²³ Crawford *supra* note 9.

²⁴ Lee *supra* note 22.

3.3.1. Occupation

Occupation is the oldest form of acquisition of title to territory that was never been under sovereignty of another state, or occupation of an abandoned territory.²⁵ The occupant to a valid title the territory has to be *terra nullius*. The expression *terra nullius* may be understood in different senses depending upon the interest of European powers. First, literally the expression *terra nullius* meant an unoccupied (uninhabited) territory. In this sense, a state had an unlimited right to occupy a virgin land which never been under sovereignty of another state. In the *Eastern Greenland Case*,²⁶ for example, Denmark exercised sovereignty over unoccupied and uninhabited Eastern Greenland. Danish people settled in the Eastern Greenland in 1894 and since then Denmark continuously and peacefully exercised its sovereignty by issuing various legislations to resolve issues involving *Eastern Greenland*.²⁷ It granted concession and issued hunting and mining permits over Eastern Greenland. The Permanent Court of International Justice held that Denmark acquired title to *Eastern Greenland* by occupation.²⁸ Norway's contention of proximity of the land to its territory did not prevail over Denmark's occupation and effective control of the territory.

Second, a newly formed land (territory) may also be occupied as master less. Though it may not be a usual phenomenon, there is a possibility that a new land may emerge in the high sea (*res communis*) when the sea dries up or a hill uncovered by water emerges as a result of volcanic eruption. The first occupier of a territory that emerges in high seas may acquire title to the territory by occupation. This is almost identical with occupation of *terra nullius* after first discovery of a territory.

²⁵ Monon *supra* note 1 at 134.

²⁶ Charles Cheney Hyde, *The Case Concerning the Legal Status of Eastern Greenland*, 27 AM. J. INT'L L. 732 -738 (1933); see also *Denmark v. Norway*, 3 P.C.I.J. REPORTS 148(1938).

²⁷ *Id*, see also J.KT. Chao, *The Legal Status of Eastern Greenland Case: a Note on its Legal Aspects*, <http://nccur.lib.nccu.edu.tw/bitstream/140.119/11287/1/Greenland.63> accessed 4/30/15

²⁸ *Eastern Greenland Case*, 3 P.C.I. J. REPORTS 148 (1938),

Thirdly, a territory inhabited by politically unorganized aboriginal people had been subject of occupation, as a “sovereign-less” territory.²⁹ Put simply, a territory occupied by disorganized indigenous people was considered as *terra nullius* and subjected to occupation. In twenty first century, this assumption is awkward, but was applied even in United States. The following statement of Winston Churchill reveals the assumption territories occupied by indigenous people was *terra nullius*.

I do not agree that the dog in a manger has the final right to the manger even though he may have lain there for a very long time. I do not admit that right. I do not admit for instance, that a great wrong as been done to the Red Indians of America or the black people of Australia. I do not admit that a wrong has been done to these people by the fact that a stranger race, a higher-grade race, a more worldly wise race to put it that way, has come in and taken their place.³⁰

History has to be understood by the time, but in current state of mind, Churchill’s statements are racially biased and offensive. All humans including Native Americans and Black People of Australia or Africa got their own share of earth on which they were created. They are the original occupiers of their land and they had their own indigenous type of political system and political organization that may not be congruent with the political systems of Europe, but often disregarded. Therefore, it is absurd to disregard a non-European form of organization of people and consider traditional people that get order from their ethnic elite, as politically unorganized. This expansionist policy had initiated the Berlin Conference of 1884 – 1885 to partition Africa among the European powers. European powers disregarded traditional African political system and governance, which was different from European system and viewed Africa as *terra nullius* and subjected to appropriation. Professor Menon concludes:

The concept that a territory not possessed by a community having a united political organization [...was] subject to effective occupation by a foreign power appeared to be dominant thought the later part of the nineteenth century in the contest of the African Continent. The inhabitants of the

²⁹ Joshua Castellino, *Territorial Integrity and the “right” to self-Determination: An examination of the Conceptual Tools*, 33 BROOK. J. INT’L 512, 503-568 (2008).

³⁰ *Id.* note 46 Winston Churchill’s Statement as quoted by Anindhil Roy in Lannan reading and Conversion: September (Sept. 18, 1937).

territory were considered factually, but not legally, in occupation of the territory. [Consequently...] occupation of [fictionally] an inhabited territory was possible according to the then prevalent legal order which was predominantly Eurocentric.³¹

In *Western Sahara Case*, Spain argued that Western Sahara was *terra nullius* though indigenous people inhabited in it.³² Morocco and Mauritania vigorously opposed Spain's assertion and convinced the ICJ panel that Western Sahara was not *terra nullius* at the time of occupation by Spain.³³ The World Court in its advisory opinion summed that, at the time of colonization, Western Sahara was inhabited by politically and socially organized people and cannot be viewed as *terra nullius*.³⁴ Spain's argument was awkward as it occupied the territory by concluding treaty with local chief, but not by mere occupation.³⁵

In medieval society, there were also other uncommon specific situations in which an occupied territory had been viewed as *terra nullius* because the residents were "different people". In Roman antiquity, for instance, "... any territory which did not belong to a Christian sovereign was *terra nullius*, and later in the nineteenth century, any territory which did not belong to a civilized State was *terra nullius*."³⁶

In conclusion, to get sovereignty over territory by occupation international tribunals consider certain minimum conditions. First, the territory has to be *terra nullius*. As has been pointed out above the meaning of the expression, *terra nullius* has changed from time to time and depend on socio political system.³⁷ Second the intention of the occupier (*animus occupandi*) to exercise sovereignty over the territory. The intention to exercise sovereignty over the occupied

³¹ Menon *supra* note 1 at 136

³² Senors Crc-Salgado Gonzalez campos, caro and Laclea who represented Spain before International Court of Justice when it heard the statements from all the concerned parties for giving advisory opinion to the United Nations, argued that Western Sahara was *terra nullius* at the time colonization. Frank Wooldridge, *The Advisory Opinion of the International Court of Justice in the Western Sahara case*, 8 ANGLO-AM L. REV. 97 (1979).

³³ *Id.* at 93.

³⁴ *Id.* at 102

³⁵ *Id.* at 108; see also Lee *supra* note 23 at 8.

³⁶ *Id.* at 137

territory can be understood by the activities the State carries out and the administration of the territory.³⁸ The intention to occupy a territory has to be permanent. Finally, there should be continuous and peaceful exercise or display of sovereignty³⁹. Unwarranted interruption and protest from the beginning may spoil the legality of the occupation.⁴⁰ Nowadays, there is no unoccupied land; all the vicinities of earth are occupied. Thus, there is no territory that can satisfy anyone of the grounds for acquisition of territorial title by occupation, and hence in modern days, occupation as a mode of acquisition of title to territory is obsolete.

3.3.2. Accretion

The second mode of acquisition of title to a territory is accretion. This is an unplanned natural addition to a territory that has already been held by a sovereign State. Traditionally, "... a State has the right of sovereignty over any natural addition, made to its existing territory." For example, a border river may divert its route annexing a chunk of land to one of the neighboring state, or an ocean or a sea may dry up or diminish its size by increasing territorial land uncovered by water. With regard to ocean and sea it may be argued that territorial water is already under sovereignty of the State and any addition of land cannot be viewed as a new acquisition of territory, but the beginning of territorial water is the shore and the expansion of shore pushes outward to the

³⁷ This assumption was implicit in *Eastern Greenland Case*, 3 P.C.I. J. REPORTS 148 1938, see also *Western Sahara Case* 8 ANGLO-AM. L. REV. 86 919790.

³⁸ In *Minquiers and Ecrehos case*, and *The Minquiers and Ecrehos Case*, (France /United Kingdom) Judgment of November 17th, (1953) ICJ held that exercise of jurisdiction, issuing legislation and effective administration and prove the *animus occupandi*., Similarly, in *Clipperton Island case*, the arbitrator King Victor Emmanuel III of Italy said that the regulatory acts that were carried out by France in 1858 prove in clearly that France expressed its intention to occupy Island as her territory. See Menon *supra* note 1 at 138; See also D. H. N. Johnson, *Minquiers and Ecrehos case*, 3 INT'L & COMP. L. Q. 189 (1954).

³⁹ In *Eastern Greenland Case*, just after occupation of the uninhibited eastern part of Greenland, though Norwegians held the Western part, Denmark exercised noticeable acts displaying the exercise of sovereignty. Mining and hunting Danish companies had been working in territory. See Charles Cheny Hyde, *The Case Concerning the Legal Status of Eastern Greenland*, 27 (4) AM. J. INT'L. L. 732 - 738 (1933); see also *Denmark v. Norway*, 3 P.C.I.J. Reports 148(1938).

⁴⁰ The *Island of Palmas case* often cited in this situation. In this case, the first discoverer was Spain but Netherlands effectively controlled the Island peacefully without any form of protest. Spain ceded the Island to Netherlands, but Spain already lost occupation, the acquirer cannot be an owner by operation of *nemo dat quod non habet* principle.

territorial water deep into the sea. In the case of high seas Exclusive Economic Zone will be pushed into the sea forthwith.

Nowadays, the traditional rule of accretion as a mode of acquisition of territory when a river diverts its direction or dries up appears doubtful. A State that has bordered by a diverted or dried up river may not be willing to lose a portion of territory it held. The old river line may still continue to be considered as a land boundary line or the two neighboring States may, by agreement, mark their line of separation as it is usually done in land boundary. If the river that has diverted its direction was a navigable one, the middle of the navigable point (thalweg) will be taken as a critical point. In other cases, the center of riverbank is the point of dividing line of two neighboring states.⁴¹

3.3.3. Cession

Two or more sovereign states may transfer all or a portion of their territory for consideration or for any cause. This is known as cession. According to Menon, “Cession without a *quid pro quo* has been by far the largest group of transfer of territory because most cessions were imposed upon a vanquished State by its victor or upon an unwilling State by an international Congress.”⁴² For instance, Eritrea was federated to Ethiopia by the decision of the winners of WWII and later approved by the General Assembly though after ten years of cession to the Ethiopian sovereignty, the monarchy merged Eritrea to one of the provinces, which later resulted in armed rebellion. Similarly, the Somali region of Ethiopia was ceded to Ethiopia after decolonization. Numerous such cases have appeared, especially after the two world wars. Cession, thus, is a peaceful method of transfer of territory from one sovereign to another. It is a “... renunciation made by one State in

⁴¹ Shaw *supra* note 14 at 285.

⁴² Menon *supra* note 1 at 151.

favour of another of the rights and title which the former may have to the territory in question.”⁴³ Cession may also be for consideration. A State may transfer sovereignty of a portion of territory or some limited instances the whole territory to another sovereign in *quid pro quo* basis. In old days states used to sell a part or all of territory for money, just like any property. For instance, in 1803 France ceded Louisiana to United States for consideration just like sale of land in traditional sense.⁴⁴ Similarly, Mexico ceded Texas, New Mexico, and Northern California to the United States for \$7.2 million. United States also took sovereignty of several territories, *hitherto* been under the sovereignty of Denmark under the doctrine of cession.⁴⁵ A territory may also be leased for certain defined period of time or for indefinite time for consideration. For instance, United States leased Guantanamo Bay from Cuba in 1903, after seizing it at the end of Spanish war. United States assisted Cuba to get independence from Spain and stayed there holding the territory as naval base.⁴⁶ Cuba signed a treaty that has authorized United States for use as naval station *as far as it is necessary*. If these terms are respected, Guantanamo will be necessary for unlimited number of years and will be held permanently. Now a days Cuba has been protesting against the lease, but there is no way out, unless United States by its own free will relinquishes possession. This will never happen. Similarly a tribal chief who had been in control of territories Djibouti lease it to France. Finally, Djibouti got independence in 1977.

Before commencement of the formal colonization, European powers were able to step in African through missionaries and merchants who bought land from local chiefs, and later facilitated taking of the whole territory by their governments. Then European States either held the whole

⁴³ See *Id* at 150. Quoted from *Reparation Commission v. German Government*, ANNUAL DIGEST OF INT’L L. CASES 199(1923 – 24).

⁴⁴ *Id* at 151.

⁴⁵ *Id* at 1.

⁴⁶ Jonathan M. Mansen, *Give Guantanamo Back to Cuba*, N. Y. TIMES, Jan. 10, 2012, http://www.nytimes.com/2012/01/11/opinion/give-guantanamo-back-to-cuba.html?_r=0 (last visited Sep. 16, 2015 at 4:28 PM).

territory by force (which is conquest) or bribe tribal chiefs or trick them to sign a treaty legalizing transfer of title to territory. For instance, Italy before invading Ethiopia had attempted either to bribe or trick the then Ethiopian king. One of the tricks was wrong translation of the treaty. The Wuchale Treaty that the Ethiopian king assumed to be a treaty for cooperation, stated in its Italian version that Ethiopia can make external relationship only through Italy. After learning the trick, the Ethiopian King protested to the treaty and a war broke out in which Italy suffered a great loss and finally recognized Ethiopia's sovereign existence before it finally invaded again and occupied the whole country for five years until driven out by the assistance of Great Britain.

3.3.4. Conquest (Annexation)

Conquest or annexation is another mode of acquisition of title to territory. In old days, conquest was the most common form of acquisition of title to a territory. Powerful neighbors or a state with superior military power used to invade a weaker nation and annex either the whole territory or portion of it into its territory or dominion. Traditionally the loser of war loses sovereignty to territory and the winner acquires title over territory.⁴⁷ The need for more territory and subjects who may be forced to pay tax or render other crucial service like serving in the military inspired states to conquer weaker states.

Acquisition of territory by conquest was lawful until the formation of League of Nations. The first formal prohibition of invasion for territorial acquisition as declared by the League of Nations.

Art. 10 of the Covenant of League of Nations states:

The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.⁴⁸

⁴⁷ The view was changed since WWI. The winner of WWI agreed to hold the loser states temporarily with ultimate goal of enabling them for self-determination.

⁴⁸ League of Nations. *Covenant of League of Nations*. Art. 10. (April 28, 1919), <http://www.refworld.org/docid/3dd8b9854.html> (Accessed 4/20/16).

The Covenant of League of Nations may be praised for attempting to prohibit invasion for the sole reason of expanding territory, it failed to stop conquest practically because did not prescribe possible consequences of aggression. The expression, “In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise...” appears simply a political commitment which can easily be ignored by powerful nations. It was practically impossible for weaker nations to stop aggression by peaceful means. Ethiopia was the only African country that signed the Covenant without any form of Western affiliation, but it was invaded by Italy in disregard of the Convention. Ethiopia invoked the provision and sought restraint but the Council could not help. Surprisingly, the Council advised Italy to get certain portion of Ethiopian territory and stop invasion. Italy, however, disregarded the advice aiming to occupy the whole territories of Ethiopia. As a result, Ethiopia suffered huge loss and faced massacre by Italian fascist. Finally, the invaders were expelled during WWII by the Ethiopian resistance army with the help of Great Britain. Article 11 of the Covenant states that all members of the League will react if any member states were invaded but no action was taken against Italy.

Art. 2 (4) of the United Nations Charter prohibits threat or use force, unless it is to avert an invasion. The Provision is the successor of Art. 10 of Covenant of League of Nations, which states, “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 Purpose of the United Nations.”⁴⁹ Though the Security Council is relatively stronger and effective when compared to League Council, the prohibitory wordings of both Art. 10 of the Covenant and Art. 2 Paragraph 4 of the Charter stipulate weak enforcement mechanism in case of

⁴⁹ U.N. *Charter of United Nations*. Art. 2(4). 1UNTS XVI. (Oct. 24, 1945), <http://www.refworld.org/docid/3ae6b3930.html> (Accessed: 4/20/16).

aggression. Several instances of collective measures against invasion were taken, but in numerous other cases of violations, the Security Council could not restrain use of force that is contrary to the Charter owing to veto or ideological interests of Permanent Members.

In the Ethiopia/Eritrea cases, the Security Council passed Resolutions No. 1297 which simply requested for cessation of military actions, and prohibited further use of force and demanded withdrawal of troops from the illegally held territories.⁵⁰ In Eritrea's refusal to maintain *status quo ante bellum*, a destructive war that claimed lives of tens of thousands broke out. Finally, Ethiopia was able to liberate the occupied territories. In the words of Marc Von Boemchen, "Having suffered a major defeat, Eritrea eventually accepted to redeploy its forces from all positions held after May 6, 1998 thereby fulfilling Ethiopian demands."⁵¹ After defeat, Eritrea expressed its intent to abide by the Resolution No. 1297, which Ethiopia refused to comply with. To deter Ethiopia, United States sponsored a harsher resolution, which imposed arms embargo on both Ethiopia and Eritrea and travel ban on Ethiopian officials. Russia objected to the indefinite travel ban and arms embargo, contending open Arms Embargo did not work in Iraq. Finally, accepting Russia's suggestion, the Security Council unanimously passed Resolution No. 1298 which imposed Arms Embargo on Ethiopia and Eritrea for 12 months. Ethiopia objected to the Sanction claiming it was unfair while the country was invaded.⁵²

⁵⁰ Resolutions 1297 (2000) and Resolution 1298 (2000),

⁵¹ Marc Von Boemcken, *Arms Embargo Against Eritrea and Ethiopia*, in *PUTTING TEETH IN THE TIGER: IMPROVING THE EFFECTIVENESS OF ARMS EMBARGO*, 189 – 204 (Michael Brozoska & George A. Lopez ed. 2009). <https://www.bicc.de/publications/by-category/all-issues/category/other-publications/> (last visited Sep. 16, 2015 4:36 PM).

⁵² Barbara Crossette, *Arms Embargo for Eritrea and Ethiopia*, *The N. Y. Times*, May 19, 2000, <http://www.nytimes.com/2000/05/19/world/arms-embargo-ordered-for-eritrea-and-ethiopia.html> 4/21/15 10:18 PM; Also See Marc Von Boemcken, *Arms Embargo Against Eritrea and Ethiopia*, 10 *Conflict Management, Peace Economics and Development (Putting Teeth in the Tiger: Improving Effectiveness of Arms Embargo)* 196 – 201 (Michael Brozoska & George A. Lopez ed. 2009).

Nowadays, therefore, there is no way to acquire title to a territory by conquest. The Charter prohibits conquest in any form. Apart from certain Balkan States that were annexed to U.S.S.R, no other winner of WWII has retained title to territories of loser States. Israel's occupation of territories that were acquired by war has been frequently condemned.⁵³ Iraq's temporarily occupation Kuwait resulted in collective action that forcefully driven out the occupiers. A state cannot acquire title to territory even if it acted in self-defense. At the end of Ethio-Eritrea war, Ethiopian troops entered deep into Eritrean territory, but immediately withdrew after ceasefire agreement was reached. In other words, self-defense cannot be ground to acquire title of a territory.

3.3.5. Prescription

A State may also acquire title to territory by acquisitive prescription. The possibility of acquisition of territorial title by prescription in international law, however, is arguable.⁵⁴ According to Jennings and Watt, "There has always been some opposition to prescription as a mode of acquiring territory."⁵⁵ Though there is unanimity, some still show the possibility of acquisition of title to territory after prolonged possession. In this case, prescription as a mode of acquisition of title to territory is similar to adverse possession as a mode of transfer of ownership in private property. In adverse possession, states prescribe time limit within which an original titleholder may lose ownership. International law does not prescribe a defined time limit, but possession of territory fairly for long period of time coupled with fulfillment of other requirements may confer title to the possessor by operation of law.

The length of time need not be immemorial, but some length of time together with peaceful possession of the territory and actual and open exercise of sovereignty in exclusion of other states,

⁵³ It has been repeatedly declared by the General Assembly and Security Council that Israel's occupation of certain territories that were occupied by the 1967 war invalid. Menon *supra* note 1 at 162.

⁵⁴ 1 ROBERT JENNINGS AND ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW, 706(1992).

⁵⁵ *Id.*

may confer title to the territory.⁵⁶ The State claiming acquisition of title to territory by prescription should prove, among others, the acquiescence of the original titleholder. If the original title holder keeps quiet for long period of time while understanding another states openly exercises sovereignty, it is fairly justifiable to transfer title in order to keep international peace and security.

3.3.6. The Contemporary Approach

Eminent international lawyers, Malcolm Shaw and Ian Brownlie, vigorously argue against the analogy of Roman law modes of acquisition of title to private property to acquisition of title to territory. Ian Brownlie, persuasively summarizes the inadequacy of orthodox modes of acquisition of title to territory.⁵⁷ To Brownlie, when a new state acquires independence and gets statehood, it acquires title to the territory without fulfillment of any of the traditional modes. Similarly, acquisition of title of a territory by acquiescence, and acquisition of territorial title by recognition do not fall in anyone of the traditional modes of acquisition of title to property.⁵⁸

The orthodox modes do not give room for adjudicator to consider better title (relative title) in ambiguous situation. When contesting parties furnish confusing evidence, the tribunal may decide on the basis of preponderance of evidence and confer title of contested territory depending on weight of evidence. In the words of Brownlie, “ The importance of showing a better right in contentious cases [may be]obscured if too much credit is given to the five ‘modes’.”⁵⁹ Similarly, Malcom Shaw observes, “[... Roman rules dealing with property] has resulted in some confusion... Law, being so attached to contemporary life, cannot be easily transposed into a different cultural

⁵⁶ *Id.*

⁵⁷ Crawford *supra* note 9 at 220.

⁵⁸ *Id.* at 221.

⁵⁹ *Id.*

milieu.”⁶⁰ Thus, in twenty first century there is no way to acquire title by the application of traditional modes.⁶¹

Shaw and Brownlie agree on the significance of factual and legal conditions under which title of a territory belong to particular state.⁶² To Shaw, “ The essence of territorial sovereignty is contained in the notion of title.”⁶³ To Brownlie, “[...] title is a by-product of the events leading to the creation of a state as a new source of territorial sovereignty.”⁶⁴ An international tribunal in addition to traditional modes of acquisition of territory may require proof of fulfillment of factual and legal conditions such as the exercise of sovereignty over the territory by conduct, a *titre de souverain* before the date in question.⁶⁵ The issue of sovereignty carries complex legal questions including “prohibition” in acquiring the territory and the right to seek invalidity of former coercive treaties that were entered without the state giving free consent.⁶⁶

Factual and legal conditions are facts proving that the territory belonged to one or more of the claimants. After ascertaining the fulfillment of conditions, the tribunal will decide on the issue. Thus, “[...] the existence of those factors is [is] required under international law to entail the legal consequences of a change in the juridical status of a particular territory.”⁶⁷ In a way different from the conventional methods, proof of title to territory need not necessarily be absolute; it is based on preponderance of evidence. This means the international tribunals will decide on relative weight of the evidence presented by the contending parties. The tribunal thus “[...] will consider all the

⁶⁰ Shaw *supra* note 14.

⁶¹ Crawford *supra* note 9 at 216; See also Shaw who remarks, “ ... the Roman method of categorizing the different methods of acquiring territory faces difficulties when applied in international law.” Shaw *supra* note 14.

⁶² Shaw *supra* note 14.

⁶³ *Id.*

⁶⁴ Crawford *supra* note 9 at 221.

⁶⁵ *Id.*

⁶⁶ See *Id.*

⁶⁷ Shaw *supra* note 14

relevant arguments and will award the land to the state which relatively speaking puts forward the better ... legal case.”⁶⁸

As declared in the *Frontier Dispute Case, (Burkina Faso v. Mali)*,⁶⁹ contemporary rules of international law gives preference to title than other rights and privileges over a territory. The titleholder is presumed to be a sovereign over the territory even if the territory is under possession of a different organ for whatever reason or cause. The superiority of title over effective control accords with the doctrine of *uti possidetis juris*⁷⁰. In *Frontier Dispute Case* ICJ remarked, “ The principle of *uti possidetis jurs* accords *pre-eminence to legal title over effective possession* as a basis of sovereignty.” [Emphasis added]. Shaw shares this view stating, “ Where the act does correspond to the law, where the territory which the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title.”⁷¹

The question is how to prove title? In private property holding title to a property is established by registration of the property. In absence of international registry system, how can a State purporting titleholder prove its status? Ian Brownlie enumerates possibilities one can prove title to a territory. To Brownlie, “ unquestioned title is a contingency arising from history, general recognition, and the absence of an other claimant.”⁷²

Title to territory may also depend upon other factors. The private property law maxim of *nemodat quod non habet*, may be applicable to acquisition of territorial tile. A state acquiring title to a territory cannot acquire a better title than the transferor. Thus, a state with a defective title can transfer only a defective title. Other factors like judicial decision, recognition from some states, ,

⁶⁸ *Id.*

⁶⁹ Case Concerning The Frontier Dispute (Burkina Faso /Republic of Mali), ICJ Reports (1986), <http://www.icj-cij.org>.

⁷⁰ For detailed discussion of the doctrine of *uti possidetis juris* see. 3.3 of this work.

⁷¹ Crawford *supra* note 9 at 216.

and compromise on territorial title can affect title on territory. Competing claims for title to territory often resolved in adjudication by international tribunals. In *Island of Palmas and Minquieers* and *Ecrehos*,⁷³ it was remarked that title to territory could be conferred to one of the contending parties in spite of the fact that there was reason to believe the territory was *terra nullius* at a given point of time. In *Eastern Greenland case* Danish activity in the disputed area had been intensive, but the Court did not consider the area *terra nullius* though Danish sovereignty was formally declared on another ground. Finally, where it is too ambiguous to arrive a given conclusion the court may simply weigh a given title with another.⁷⁴

In modern times, most of the traditional modes of acquisition of title to territory are practically obsolete. As pointed out above, there is no way to occupy a territory, as the earth's entire surface has been occupied.⁷⁵ Consequently Ian Borwnlie suggests the following methods that may prove title to territory as a matter of convenience.⁷⁶ *First*, original and historic title: Possession of a territory from the time immemorial may be a ground for getting title to territory. This may appear similar to the traditional modes of occupation, but it need not be occupation of master less territory. It may include possessing a territory for long period of time without objection or formal transfer. Titleholder may invoke "... an ancient, original or historic title."⁷⁷ To prove title the titleholder may furnish evidences of "general repute or opinion as to matters of historical fact." This method of acquiring title to territory may be relevant to some Asian states in which traditional boundaries

⁷² *Id* at 217.

⁷³ 1953 I.C.J 47-52 cited by Crawford p. 217

⁷⁴ Crawford *supra* note 9 at 217.

⁷⁵ High sea with its appur tenant beyond territorial water is held *res communes*; Antarctica is reserved for scientific research as *res commune*. Greenland is already occupied. Moon and other stars and plants belong to everyone on earth.

⁷⁶ Crawford *supra* note 9 at 221.

⁷⁷ *Id*.

were recognized.⁷⁸ In some cases, depending upon facts and evidences presented, “ International tribunals have recognized the concept of ancient or original title [...]”⁷⁹

Second, effective control may be a ground to acquire title to territory. In absence of registration of title to territory, treaty or judicial decisions conferring title a territory by effective control is an effective legal possibility. In *Eastern Greenland, (Denmark v. Norway)*⁸⁰ the Permanent Court remarked:

“[...] Sovereignty based not upon some particular act or title such as treaty of cession but merely upon continued display of authority involves two elements such of which must be shown to exit the intention and will to ac as sovereign, and some actual exercise of display of such authority”⁸¹

Professor Menon expounds the requirements for effective control into three parts⁸². First, there should be appropriable *terra nullius*. It is to mean the territory to be controlled should satisfy anyone of the requirements of *terra nullius*. Second, there should be a permanent intention (*animus occupandi*) to hold sovereignty over the territory, and lastly, the state should display continuous display of authority (*corpus occupandi*).⁸³

While continuous display of authority is observable and tangible, as the State has to effectively control the territory establishing its administration, but the intention to act as sovereign appears subjective, which may be inferred from actual exercise of sovereignty. This means, unless the State expressly declares otherwise, permanent intention to hold the territory as a sovereign power can be presumed from ‘actual control and display of authority’.⁸⁴ The issue of effective control arises where the actual holder of the territory lacks proof of original or derivative title. An uninterrupted control of territory is necessary to prove effective control. The requirement of

⁷⁸ See *Id.*

⁷⁹ *Id.*

⁸⁰ 1933 P.C.I.J. (ser.A/B/) No. 53 (Apr. 5).

⁸¹ Crawford *supra* note 9 at 222.

⁸² Menon *supra* note 1 at 135.

⁸³ *Id.*

continued display of authority is reiterated in *Eritrea/Yemen Case*,⁸⁵ territorial conflict over Hannish Island, which was awarded to Yemen. Thus, intentional display of authority is the contemporary rule of proving effective control of a territory in dispute. Exercise of criminal jurisdiction over wrongs committed in the territory, for example may be an instance of exercise of authority. Similarly, normal and peaceful administration also proves effective control.

Effective control was also an important procedural requirement when occupation served as mode of acquisition of title to territory. Discovery of a territory, by itself, was not enough to confer title to territory. A discovered territory should be effectively controlled. The old rule of mere settlement and close physical possession of the territory is not 'enough. The current view is effective control, which demands administration with continuous display of authority. The notion of 'discovery' entail previously unknown land that never been inhabited by humans. In old time (fifteenth and sixteenth century) a mere discover was sufficient to confer title.⁸⁶ Later it was held that a title acquired by mere discovery was "inchoate". An inchoate title is a defective one that can be disregarded by states unless effectively controlled in a reasonable period of time. In *Island of Palmas case*, United States, as a successor to Spain, invoked title by mere discovery of the island by Spain. This assertion was not accepted, as 19th century law required a discovered territory to be effectively occupied within a reasonable time of discovery. Ultimately, as a result, United States took a position that discovery alone cannot confer any form of title.⁸⁷

Territory may be controlled directly or indirectly via representation. An effective control through representation has to be approved to constitute a legal title and confer sovereignty. This is

⁸⁴ Crawford *supra* note 9 at 222.

⁸⁵ Award of the Arbitral Tribunal in the First Stage of the Proceedings between Eritrea and Yemen (9 Oct. 1998) http://legal.un.org/riaa/cases/vol_XXII/209-332.pdf (last visited Sep. 16, 2015 5:21 PM).

⁸⁶ Crawford *supra* note 9 at 223.

⁸⁷ *Id.* at 218.

called symbolic annexation.⁸⁸ In *Clipperton Island Case*, a French man who was authorized by French government to hold a territory on its behalf occupied the Clipperton Island. The French Consulate notified the occupation to the government of Hawaii. Later Mexican authorities claimed title by Spanish discovery of Island,⁸⁹ but the Island was awarded to France by a binding arbitration agreement that was entered between Mexico and France.

To sum up, in accordance with the current international law, title to territory prevails over effective control. Unchallenged title can be acquired by initial occupation and continuous exercise of sovereignty over the territory peacefully. While this is the usual form, a State with unchallenged title can transfer its title to another State. The transferee acquires all the rights and the privileges of the transferor (*nomo dat quod non habet*). This requires a valid treaty between the transferor and transferee. The date of coming into force of a ratified treaty is deemed as the date of transfer of title and sovereignty. This form of acquisition of title is known as cession. A state may transfer the sovereignty over territory to another state for consideration or other causes. States may simply recognize the sovereignty of a given territory in consideration of recognition of its own sovereignty over another territory. This kind of arrangement may be made with a view to settle boundary dispute between two or more neighboring states. In medieval times, it was common to conclude treaty with tribal chiefs to take possession of territory. For example, France concluded a treaty with tribal chief of Afar to take possession of land surrounded by Red Sea and later took sovereignty of over Djibouti renaming the territory as French Somali land.⁹⁰ As cited by Brownlie, Judge Huber in *Island of Palmas* remarks, “ In substance, it is not an agreement between equals; it is rather a form of internal organization of a colonial territory, on the basis of autonomy of the natives... And thus

⁸⁸ *Id.* See also Ivan L. Head, *Canadian Claims to Territorial Sovereignty in the Arctic Regions*, 9 MCG.L. J. 202, 200 – 226 (1963).

⁸⁹ Crawford *supra* note 9 at 223.

sovereignty over native States becomes the basis of territorial sovereignty as toward other members of the community of nations.”⁹¹

3.4. The Doctrine of *Uti Possiditis*

3.4.1. Nature and Origin

Uti Possidits, is a concept of international law that may be used in making territorial limits of states when new states get independence form colonial yoke.⁹² *Uti possidetis*, as a norm of boundary delineation, was first applied in Spanish Latin America. After getting political independence from Spain, the Latin American Republics, were confronted with a perplexing task of settling territorial limits.⁹³ At the time the easiest possible solution to obviate a looming border conflict was taking colonial administrative boundaries as international boundaries between the newly emerged republics. Accordingly, the new Republics agreed to honor pre-independence colonial administrative subdivisions as international boundary defining the jurisdictional limits of their sovereignty in accordance with the Roman law principles of *uti possidetis*.⁹⁴ Given shortage of resources to redraw a new international boundary, in conflicting situation, the agreement to employ *uti possidetis* as a guiding doctrine was a sensible decision. The doctrine of *uti possidetis*, “[...] posits that title to the colonial territory devolves to the local authorities and prevails over any competing claims based on occupation.”⁹⁵

⁹⁰ JOHN E. JESSUP, AN ENCYCLOPEDIA OF CONFLICT AND CONFLICT RESOLUTION, 1945-1996 162(1998).

⁹¹ Crawford *supra* note 9 at 228.

⁹² Enver Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, 27 FLETCHER F. WORLD AFF. 85, 85 – 97 (2003). South America got independence in 1810 while Central America followed in 1821.

⁹³ Suzanne Lalonde, *Uti Possidetis: Its Colonial Past Revisited*, 34 REV. BDI 28, 23 – 99 (2001).

⁹⁴ Constantine Antonopoulos, *The Principle of Uti Possidetis in Contemporary International Law*, 49 RHD 29, 29 - 88 (1996).

⁹⁵ Sumner *supra* note 1; See also *Bartos*, *supra* note 1 at 37.

Thus, even though the doctrine of *uti possidetis* was first applied as a rule of international boundary defining norm in Spanish Latin America, its origin was the classical Roman edict.⁹⁶ Suzanne Lalonde remarks, “[...] *uti possidetis* principle [was] originated in Latin America, in fact *uti possidetis* is a principle bequeathed to international law by the Roman Empire.”⁹⁷ In accordance with Roman law edict, “[...] the Praetor forbade the disturbance of the existing state of possession of immovable as between two individuals.”⁹⁸ The principle of *uti possidetis* derived from the Latin expressions, “*uti possidetis ita possideatis*,” which means, “As you possess, so you may possess.”⁹⁹

The application of the doctrine of *Uti possidetis* in Roman law as a safeguarding rule of peaceful enjoyment of property, and as a rule of boundary delimitation norm in Latin America, is not alike; but the ultimate goal appears same. In both cases, rights already possessed should be kept intact. The Roman law doctrine affords temporary protection while action for dispossession pending.¹⁰⁰ Authorization of continuity of possession is a common element of both way of application of *uti possidetis*. The Roman law edict had the objective of keeping peaceful possession and enjoyment of rights on immovable property, as a temporary remedy, until a final decision declared by court.¹⁰¹ Thus, even a person claiming, “to be an owner” cannot disturb a good faith possessor until the court so decides.¹⁰² In Roman civil law tradition, thus, the expression, *uti possideatis*, confers a temporary right to use the property peacefully until contrary court order.¹⁰³ The good faith possessor may only be challenged by a person claiming to be an owner peacefully

⁹⁶ Bartos *supra* note 1 at 37.

⁹⁷ Lalonde *supra* note 93 at 23.

⁹⁸ *Id.*

⁹⁹ Paul Hensel, et al, *Territorial Integrity Treaties, Uti Possidetis, Armed Conflict over Territory*, A Paper presented at 2006 Shmbaugh Conference, “Building Institutions and Cooperation in World Politics,” University of Iowa 13, Oct. 2006. <http://www.paulhensel.org/Research/iowa06.pdf> (last visited Jul.14, 2015).

¹⁰⁰ *Id.* at 27.

¹⁰¹ Bartos, *supra* note 1 at 40.

¹⁰² A.O.CUKWURAH, *THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW*, 113 (1967).

¹⁰³ Art. 1148 of the Ethiopian Civil Code, which is based on civil law tradition sets forth rules for acquisition of title by good faith possessor after passage of ten years period of limitation. The Ethiopian law, restricts good faith acquisition

through action for dispossession and the possessor cannot be forced to vacate until final judgment.¹⁰⁴

Unlike the Roman law doctrine of *uti possidetis* that protects actual physical possession, the international law principle shields juridical title. Thus, in international law, actual possessor of a territory may be forced to surrender the territory to the titleholder. In both cases, however, the claimant cannot physically force the actual possessor to surrender possession.¹⁰⁵ Needless, to say the claimant should not take law by its own hand – there should be court order or arbitral award. The other basic distinction between application of *uti possidetis* in Roman law and Spanish Latin America is the object of the right. In international law the principle of *uti possidetis* governs territorial possession, while Roman law edict deals with private property. The other glaring distinction is in international law, the principle creates a definite status unlike temporary protection of Roman law.¹⁰⁶

The Roman Law expressions, “ [...] *uti possidetis, ita possideatis* (“as you possess, so may you possess”), indicates the significance of factual possession.”¹⁰⁷ Derivatively, in international law, the notion of *uti possidetis*, refers to legal right to possess as you possess.¹⁰⁸ In relation to territory, it means possessor of a right over a given territory will continue possessing in the same way even after the old regime is gone by whatever cause. By doing so, the rule of *uti possidetis* has maintained peace among the newly liberated nations. Technically the principle of *uti possidetis* keeps territorial integrity, as no boundary or territorial change is expected. Thus, there is nexus between the doctrine of *uti possidetis* and the doctrine of territorial integrity norm. Founders of the

only to movable properties. As movable properties require registration for valid transfer of title, the doctrine of good faith acquisition is not applicable. This is contrary to the Roman law doctrine of *uti possidetis*.

¹⁰⁴ Bartos *supra* note 1 at 40.

¹⁰⁵ As a result, there is a conflicting view regarding the source of the principle. See Lalonde *supra* note 5 at 24

¹⁰⁶ Hasani *supra* note 92 at 86.

¹⁰⁷ Bartos *supra* note 1 at 40.

¹⁰⁸ *Id.*

new republics of Latin America were inspired by the old Roman law as a guiding principle to keep territorial integrity as defined by the colonial Spain.¹⁰⁹

As a concept of defining international boundary, legal history has recorded two forms of *uti possidetis*.¹¹⁰ The oldest form of *uti possidetis* was based on the actual possession of immovable property. This version of *uti possidetis* is known as *uti possidetis de facto*. The actual possessor of a property may not necessarily be an owner, or the possession need not be backed by title, or approved by authorities.¹¹¹ The other proper version of *uti possidetis* is *uti possidetis juris*. In this case, the claimant of a property may be taken as a legal owner of the property who may or may not necessarily be in actual possession, but cannot lose the ownership simply because s/he is not in possession. In Roman law titleholder of a property who temporarily parted the property, either by some kind of arrangement or by involuntarily means may not lose ownership of the property and assumed constructive possessor of the property. Constructive possession is a legal assumption that empowers an actual titleholder to retake the property. The actual holder cannot refuse to give the property when the court so orders.

In Roman civil law tradition, the expression, *uti possideits*, confers a *prima facie* title to the good faith possessor. The good faith possessor of an immovable property is presumed an owner by mere possession, unless some one with a better title challenges it. This rule of civil law is still a binding law in civil law tradition. In Ethiopia, for instance, good faith possessor of a movable property is presumed as titleholder.¹¹² The presumption is rebuttable by contrary evidence. Under

¹⁰⁹ Antonopoulos *supra* note 94 at 175.

¹¹⁰ As Hasani remarks, “The Praetorian edicts of Republic Rome, which regulated private property made distinction between possession and ownership.”. Hasani *supra* note 92 at 173.

¹¹¹ In Roman law, a property holds bundle of rights (*usus, fructus and abusus*). The rank of each right and fruits it bears to a particular right holder is different. A mere possessor actually possessing the property may enjoy its fruits until dispossessed by the holder of a greater right (*abusus*). The mere possessor cannot transfer the property or sell it.

¹¹² Art. 1148 of the Ethiopian Civil Code, which is based on civil law tradition sets forth rules for acquisition of title by good faith possessor after passage of ten years period of limitation. The Ethiopian law, restricts good faith

the Ethiopian Civil Code, after lapse of certain limited period of time, a good faith possessor acquires ownership of the property by virtue of law. In Roman law, however, the rule of *uti possidetis* governs transfer of title of immovable properties to the good faith possessor. The good possessor may be challenged by contrary evidence.¹¹³ The Roman law doctrine of *good faith* possession is equivalent to the common law doctrine of “adverse possession”.¹¹⁴

The Roman Law expressions, “ [...] *uti possidetis, ita possideatis* (‘as you possess, so may you possess’), indicates the significance of factual possession.”¹¹⁵ Derivatively, in international law, the notion of *uti possidetis* refers to legal right to possess as one possessed.¹¹⁶ In relation to territory, thus, it means possessor of a right over a given territory will continue possessing in the same way after decolonization. By doing so, the rule of *uti possidetis* has contributed to maintain peace among the newly liberated nations. Technically the principle of *uti possidetis* keeps territorial integrity, as no boundary or territorial change is expected.

Thus, each republic was allowed to continue possessing a territory that the colonial power had allocated as administrative subdivision. The doctrine of *uti possidetis*, “[...] assumes that internal administrative boundaries are functionally equivalent to international boundaries.”¹¹⁷ At a time where there was no better option to avert a looming boundary conflict, other than resorting to colonial boundaries by the authority of principles of *uti possidetis* was a very apposite stand.¹¹⁸

In early 19th century after decolonization in South and Central America (Latin America), the Roman law of private property norm was transformed into a principle defining international

acquisition only to movable properties. As movable properties require registration for valid transfer of title, the doctrine of good faith acquisition is not applicable. This is contrary to the Roman law doctrine of *uti possidetis*.

¹¹³ Bartos, *supra* 1 note at 40.

¹¹⁴ *Id.*

¹¹⁵ *Id.* See Report by the British Institute of International and Comparative Law for her Majesty’s Court, Sep. 2006, http://www.biiicl.org/files/2350_advposs_sep_ftnsv3.pdf

¹¹⁶ *Id.* see also Hasani *supra* note 92 at 86

¹¹⁷ Sumner *supra* note 1 at 163.

¹¹⁸ Hensel, et al, *supra* note 99.

boundary.¹¹⁹ The two version of *uti possidetis* were invoked in different sense, *albeit, uti possidetis de facto* did not win international recognition as a doctrine of delineating international boundary. It was only Brazil that claimed the application of *ut possidetis de facto* as a norm of defining international boundary. Brazil had the ambition of expanding territory. Its very aim was to extend its territorial possession to the unoccupied regions under the guise of occupation of *terra nullius*. Consequently, “ Brazil generally rejected the application of *uti possidetis de jure* (legal possession) in favor of *uti possidetis de facto* (effective possession) an alternative doctrine that determines ownership of territory based on physical occupation rather than colonial title.”¹²⁰ Brazil’s expansionist policy to go beyond the supposed 1810 legal border was opposed by all former Spanish colonies.¹²¹ Consequently, Spanish colonies never took *uti possidetis de facto* as a governing principle. Swiss Federal Council in arbitral award of territorial dispute between Colombia and Venezuela briefly elaborated *uti possidentis de jure* vis-à-vis territorial boundary as follows:

When the Spanish Colonies of Central and South America proclaimed themselves independent in the second decade of the nineteenth century, they adopted a principle of constitutional and international law which they gave the name *uti possidetis juris* of 1810, with the effect of laying down the rule that bounds of newly created Republics should be the frontiers of the Spanish provinces to which they were substituted. The general principle afforded the advantage of establishing an absolute rule that there was no in law the old Spanish America any territory without a master.¹²²

¹¹⁹ Paul R. Hensel *et al*, *The Colonial Legacy and Border Stability, Uti Possidetis and Territorial Claims in the Americas*, A Paper Presented at the 37 Annual Meetings of the Peace Sceince Society (International) Ann Arbor, Nov. 2003 and 45th Annual meeting of the International Studies Association Montreal, 3(March 2004). Available , <http://www.paulhensel.org/Research/io05.pdf>

¹²⁰ *Id.*

¹²¹ *Id.* See also Bartos *supra* note 1 at 47.

¹²² J.R.V. PRESCOTT, POLITAL FRONTEIRS AND BOUDNAREIS, 199-200(1987) noted from Scott, J.B. *The Swiss decision in the boundary dispute between Colombia and Venezuela*, 16 AME. J. INT’L L., 438, 31 (1922).

Thus, the *de facto* version never been taken as a governing norm for defining international boundary. In the words of Bartos, “ [...] once the principle became relevant in international law, its emphasis apparently shifted towards a legal right to possess.”¹²³

3.4.2. Contributions of the Principle

Soon after getting out of colonial yoke, there was no better option to avert territorial and boundary conflict other than resorting to the doctrine of *uti possidetis*. It was the easiest and the cheapest option to create a mutually acceptable boundary line in short period of time.¹²⁴ This principle has saved time and resources by a mere recognition of already functional colonial administrative boundaries as international boundary line.¹²⁵ In other words, colonial administrative boundary lines that had separated colonial administrative subdivisions were taken as international boundary.

As colonial administrative boundaries largely known to the public, unless otherwise agreed, there was no need for further delimitation or demarcation. Negotiation to extend pre-existing colonial administrative boundaries into international boundary may not take long time nor require highly skilled boundary experts or boundary engineers. As pre-independence boundaries are already known and accepted by the local people, the boundary may be stable and permanent. Boundary making on the basis of the doctrine of *uti possidetis* is not hard and is not time consuming. It may also be negotiated on phone or may be deliberated on decolonization document or by national congresses of respective newly constituted States.

¹²³ Bartos *supra* note 1.

¹²⁴ As Hensel *et al* point out, “Given immense geographic spaces, seemingly insurmountable barriers such as the Andan mountains or the extensive dense tropical forests that filled much Central and South America, states leaders with limited resources found it cost effective to honor and rely on *uti possidetis* [...]” Hensel et al, *supra* note 119 at 15.

¹²⁵ Sumner *supra* note 1.

The process was acclaimed as, “[...] a proscription against the violent acquisition of territory.”¹²⁶ Any attempt to redraw territorial limits would generate unending destructive war. As

Edwards remarks:

Already frontier questions were beginning to appear and in order to prevent the conflicts to which they might give rise, it was decided that in the absence of special stipulation the boundaries of the various states should be those existing at the time of their emancipation from the Spanish rule.¹²⁷

With a view to subdue the possibility of costly border conflict, at a time the newly emerged republics could not bear it, accepting pre-independence territorial limit was the best political decision that has been exemplary global practice and has made tremendous contribution to the international peace and stability.

To avoid foreign aggression or further colonization under the guise of occupation of *terra nullius*, the young republics were guarded by the principle of *uti possidetis* that conferred constructive possession of all territories including unsettled barren lands on the new republics. In the words of Bartos, “This convenient legal fiction of constructive possession was peculiarly adapted to a continent which was, sparsely populated.”¹²⁸ Thus, “It scotched the designs of competing colonial powers who may have made claims to territory on the basis of *terra nullius* [...]”¹²⁹ According to old Spanish law in Latin America, there was no territory without an owner. All territories including unsettled regions were assumed owned. This has established a constructive possession rule barring an alien to create ownership by occupation. Under *uti possidetis jurs*, an alien actually possessing anyone or more of the unsettled territories that were previously presumed to be under Spanish control cannot claim title simply by virtue of actual possession. The new Republics, therefore, deemed by law occupying all the former Spanish Latin America territories as

¹²⁶ Hensel, et al, *supra* note 99.

¹²⁷ *Id.*

¹²⁸ Bartos *supra* note 1 at 44.

¹²⁹ *Id.*

it was assumed that there was no Spanish American territory without an owner.¹³⁰ Put otherwise, in accordance with the old Spanish colonial rule, all the Latin American territories were occupied, albeit, not settled by residents or frequently used. By virtue of the doctrine of *uti possidetis*, the new Republics were conferred with automatic transfer of legal title to the entire territory belonged to them during colonial time and they will be conferred with title to some unoccupied regions. As there was no *terra nullius* in Spanish American, the same rule was applicable to the new republics. This ownership over unoccupied territory is known as constructive possession. Pursuant to the doctrine of *uti possidetis juris*, the actual possessor may be dispossessed at any time if the titleholder wishes to exercise its legal right of ownership. Brazil's contention of *uti possiditis defacto*, which confers title by actual possession, did not prevail, as the contemporary rule is based on *uti possidetis juris*.

Though later territorial conflicts were surfaced in Latin America, at the foundational stage of application of the principles of *uti possidetis juris* curbed possibilities of territorial or boundary conflict. As Hensel remarks, “[...] *uti possidetis* norm constituted a proscription against the violent acquisition of territory [...]”¹³¹ The principle also effectively reduced the possibility of forceful annexation of territories. Application of the principle has also proved the possibility of territorial change through peaceful means.¹³² For instance, some Central America States merged to constitute a single strong nation but later disintegrated peacefully.¹³³ Thus, the “[...] application of *uti possidetis* left open the possibility of peaceful territorial change by mutual agreement, only opposing the threat or use of force for the acquisition of territory.”¹³⁴

¹³⁰ *Id.* at 44. For detailed discussion of historical background territorial ownership of Spanish Latin American, see also Lalonde *supra* note 5 at 28 - 29

¹³¹ Hensel *et al*, *supra* note 99.

¹³² *Id.*

¹³³ Venezuela, Honduras, Guatemala, El Salvador were reemerged as a single state. (See Lalonde *supra* note 5.

¹³⁴ Hensel *et al supra* note 99.

Though it is arguable, the principle has impressed founding fathers of Organization of African Unity to take “existing” boundaries as binding international boundaries in Africa. There are also wide spread assumption that the principle of *uti possidits juris* has guided during disintegration of nations like U.S.S.R or other former communist States like Yugoslavia and Czechoslovakia.

3.4.3. Limitations of the Principle

Since its inception, application of the principle of *uti possidetis* has been “[...] plagued by a number of problems.”¹³⁵ The most obvious short comings of the principle of *Uti possidetis vis-à-vis* international territorial delimitation was its reliance on pre-independence colonial boundaries that were set in a way meeting colonial interests that often disregarded geographic and human conditions of local people. As Hensel *et al* attest, “ The Spanish often changed the border of their administrative units over time though seemingly arbitrary royal decrees or cédulas from Madrid.”¹³⁶ The principle of *uti possidetis* thus keeps colonial ‘evils’ vis-à-vis territorial division to continue even after getting freedom from the old colonial yoke. McCorquodale and Pangalangan, remark:

“ [T]he consequences of adopting [the principle of *uti possidetis*] is that territorial boundaries operate inequitably and in favour of the colonial power’s division of territory [...] [S]o the rule developed by the international legal system to deal with boundaries are affirming of the state structure of that system.”¹³⁷

On top of this, boundary makers had little or no empirical facts before crafting colonial boundaries. As Suzanne Lalonde observes, “ The lack of trustworthy information during the colonial period with respect to large sections of the continent created serious difficulties.”¹³⁸ The continent was not fully explored and not known even to the local people. Colonial legislations often ignored geographic facts and maps were imperfect. Natural features of land that were referred either

¹³⁵ *Id.* at 15.

¹³⁶ *Id.*

disfigured or could not be located.¹³⁹ This is a crucial problem and [...] often criticized for being source of conflict. Most territorial conflicts stem from disputes “[...] the location of old colonial boundaries.”¹⁴⁰ Though founding fathers of OAU have decided to honor pre-existing African boundaries, which are largely defined by colonial powers, colonial boundaries have created permanent scars that cannot heal at all. Colonial boundaries in Africa have disintegrated closely associated ethnic groups, caused animosity among the brotherly people that had been coexisted peacefully before colonial boots landed in Africa. Some neighboring states currently have been enduring unsolvable boundary issues due to the complicated colonial boundary delimitation.¹⁴¹ These borderland people often disregard the boundary line if they need to use resources such as grazing land or hunting on the other side of the territory.

The Principle of *uti possidetis*, has suffered interpretational problems, which resulted in confusion and conflict in Latin America.¹⁴² Interpretational issues evolved as a result of perceived and actual possession of territories during colonial times. During colonial times, administrative units had exercised jurisdiction beyond the actual possession. The provincial administration supposedly acted in good faith without any evil intent of usurpation.¹⁴³ As the administrative units were controlled by the colonial power, internal boundaries were not strictly adhered to like international boundaries and hence the units did not regard actions beyond formal lines as an issue. According to Lalonde, “[...] at the time of independence the colonial administrative authorities of a given territorial unit had in fact been exercising civil jurisdiction beyond the line designated as the limit of

¹³⁷ Mccorquodale & Pangalangau, *supra* note 3 at 874.

¹³⁸ Lalonde *supra* note 93 at 31.

¹³⁹ *Id.*

¹⁴⁰ Lalonde, *supra* note 5 at 139.

¹⁴¹ Abdulla Bujra, *African Conflicts: Their Causes and Their Political and Social Environment*, DPMF OCCASIONAL PAPER No. 4, Addis Ababa, Ethiopia 5(2002), available at <http://www.dpmf.org/images/occasionalpaper4.pdf>

¹⁴² Prescott *supra* note 122 at 105.

¹⁴³ Cukwurah *supra* note 101 at 114.

their territorial jurisdiction.”¹⁴⁴ The issue surfaced after administrative units got independence and their common command of chain was lapsed.

The new independence States that have got freedom from colonial Spain and Brazil, wrangled over interpretation of *uti possidetis*. While the Republics wished to draw international boundary line beyond the actual possession including all the territories perceived by colonial rule invoked *uti possidetis juris* (legal possession), Brazil invoked *uti possidetis de facto* (actual effective possession). Lalonde terms the two forms of *uti possidetis* as “ Rival Version of the *Uti Possidetis* principle.”¹⁴⁵ Prescott expounds competing versions of *uti possidetis* as follows:

Some states regarded the rule as applying to the limits legally in force when the act of decolonization occurred. Others believed that the rule was concerned with the boundaries observed for practical administration by the colonial authorities. These two lines did not always coincide and competing states would urge the interpretation, which suited themselves best.¹⁴⁶

As has been pointed at the outset, Brazil asserted for definition of *uti possidetis* on the basis of effective possession while rejecting the application of *uti possidetis de jure*. But the new republics contested for legal possessions (*uti possidetis de jure*).¹⁴⁷ Proponents of both forms of *uti possidetis* were able to produce evidences proving their respective position. But there was no document proving equal application of both categories of *uti possidetis* at the same time.¹⁴⁸ The dispute between Bolivia and Paraguay over the Chaco Boreal territory illustrates interpretational fight between the two former Spanish administrative units.¹⁴⁹ In this case, Bolivia and Paraguay invoked a version of *uti possidetis*, supporting their position. While Bolivia invoked *uti possidetis juris* of

¹⁴⁴ Lalonde *supra* note 93 at 32.

¹⁴⁵ *Id.*

¹⁴⁶ Prescott *supra* note 122.

¹⁴⁷ Hensel et al, *supra* note 99 at 14.

¹⁴⁸ Cukwurah *supra* note 101 at 115.

¹⁴⁹ Dispute between Bolivia and Paraguay, Report as provided for under article 15, Paragraph 4 of the Covenant, adopted by the Assembly of the League of Nations, Nov. 24, 1934, Doc. A . (Extr.).5.1934.VII. 2 DIG. INT’L L. 1086 (1963).

1810 “[...] appealing to her status, as successor to the Royal Audiencia of Charcas [...]”¹⁵⁰ Paraguay relied on *uti possidetis* both *de jure* and *de facto*” arguing that it was successor to the old colonial province of Paraguay and considered that Chaco belonged to her on the basis of afore stated principle.¹⁵¹ It was finally held that “*de facto* occupation became ineffective and of no legal consequence.”¹⁵²

Brazil has rejected the application of *uti possidetis juris* regarding it alien to the original Roman law principle of *uti possidetis*. It views the Spanish republics attempt to “inject into the Roman formula a meaning entirely alien to its origin, namely the right to possess independent of effective possession,” beyond the spirit of original Roman law.¹⁵³ Brazil contends that *uti possidetis* principle was based on real and ‘effective possession independent of title’.¹⁵⁴ Building its position on the basis of actual possession at the critical date of independence, Brazil’s ultimate aim was expanding its territory to disregarding the rule of constructive possession.¹⁵⁵ By doing so, Brazil has defended Portuguese expansion during the colonial time and attempted to protect her own interest for further expansion into the unoccupied territories of Spanish Latin America territories. Spanish America Republics, however, disregarded Brazilian version of *uti possidetis de facto* favoring to *uti possidetis jurs.* which incorporates both actual and constructive possessions. Constructive possession (Juridical title) on the basis of title granted by the colonial decree. Thus the republics were entitled to the territory they had actually possessed at the time independence, and territories that they were entitled by “[...] the decrees of the sovereign they had had a right to possess.”¹⁵⁶

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1087, Regarding inconsistent state practice vis-à-vis the principle of *uti possidetis* see Lalonde *supra* note 5 at 34.

¹⁵² *Id.*

¹⁵³ Lalonde *supra* note 5 at 33

¹⁵⁴ *Id.*

¹⁵⁵ Bartos *supra* note 1 at 47.

¹⁵⁶ Lalonde *supra* note 5 at 32

The problem of interpretation of the Principle not only limited to the creation of rival doctrines, but also dwells in the meaning of a single version had surfaced. Though Dominican Republic and Haiti agreed to be bound by *uti possidetis juris* in the delimitation of their boundary, they were unable to agree on the exact meaning of the term. They submitted their dispute over terminology to an arbitrator.¹⁵⁷ Abdelhamid El Quali plausibly argues that “[...] the inconsistency of the *uti possidetis* [...] raised serious doubts on the legal character of [the principle of *uti possidetis*.]”¹⁵⁸

Though the doctrine of *uti possidetis*, made a great contribution in curbing disputes among the emerging nations, it did not stop territorial or boundary dispute as it was initially thought. As Cukwurah, remarks:

It was widely anticipated that the doctrine would do away with boundary dispute between the new States of Latin America. But, as experience has shown, the facts confounded people’s expectations as indeed, such disputes occurred¹⁵⁹

Thus, in fact, the principle of *uti possidetis* has merely postponed potential disputes, but not completely stopped them.¹⁶⁰ After decolonization a number of territorial and boundary disputes have surfaced. According to Bartos, more than 30 boundary disputes, some of which lasted more than a century, were erupted in Latin America.¹⁶¹ Recognition of a defective colonial border as a territorial limit binding the new independent States, therefore, may not build a stable boundary.

Though the application of principle of *uti possidetis* in Africa is arguable, application of colonial boundaries in Africa has been source of most of interstate conflicts. The founding fathers of OAU have affirmed to respect pre-independence boundaries with a view to avoid unmanageable boundary conflicts, as a result of poor delineation of pre-existing boundary, clashes were

¹⁵⁷ *Id.* at 41

¹⁵⁸ ABDULHAMID EL QUALI, TERRITORIAL INTERGIRY IN A GLOBALIZING WORLD: INTERNATIONAL LAW & STATUTES 133 (2012).

¹⁵⁹ Cukwurah *supra* note 101 at 114.

rampant.¹⁶² The Cairo resolution of July 1964 was actually reaffirmation of respect to colonial boundaries.¹⁶³ Most inter-state African conflicts were one way or the other related to colonial boundaries.¹⁶⁴ Territorial and boundary conflict, in Africa, has been incurable disease that consumes lives of huge number of Africans and no viable solution yet devised.¹⁶⁵

With a view to get relief from actual and presumed boundary conflict, founding fathers of African Union (OAU) in the Cairo Summit of 1964 decided to honor boundaries existing at the date of acquiring independence.¹⁶⁶ The Cairo Resolution was a response to the on going boundary and territorial disputes. Morocco was in war with Algeria and Somalia lodged a case against Ethiopia and Kenya. The dispute between Dahomey and Nigeron, the border dispute between Ghana and Upper Volta were some of the ongoing territorial and border disputes that the First Ordinary Summit of OAU had to resolve. The Cairo Resolution thus, was not only preventive but also a kind of judgment that was meant to solve actual boundary disputes. In this stressing situation, the Assembly almost unanimously decided to abide by boundaries existed on the date of independence. Only Morocco and Somalia objected, asserting to redraw boundaries on the basis of cultural, ethnic and historic basis. Prime Minster of Kenya proposed for a specific and strong continental charter that explicitly declares the preservation of territorial *status quo*.¹⁶⁷ Emperor Haile Selassie of

¹⁶⁰ Lalonde *supra* note 5 at 30.

¹⁶¹ Bartos *supra* note 1 at n51.

¹⁶² Founding fathers of Organization of African Union (OAU), now African Union (AU) have formally recognized boundaries existing on the critical date of independence as international boundary. The objective of this stand appear similar to the motives of Spanish Latin American republics, but its highly improbable that the African leaders have endorsed the principle of *uti possidetis*. Though the founding fathers did not mention the application of the principle of *uti possidetis* in Africa, most commentators, and tribunals took the African position as endorsement of the principle of *uti possidetis*. This is arguable and will be assessed in Chapter four this Dissertation.

¹⁶³ Art. 3(3) of OA U “Charter affirmed every member’s adherence to respect for sovereignty and territorial integrity of each State and for its inalienable right to independent existence.”

¹⁶⁴ According to Burja, “ [In Africa] almost all inter -state conflicts were caused by claims over borders.” (*See* Burja *supra* note 141.

¹⁶⁵ *Id.*

¹⁶⁶ O.A.U. *Doc* AHG/Res 16(1) of 1964. The Resolution did not stop boundary conflict. On the same year a destructive war broke out between Algeria and Morocco.

¹⁶⁷ Lalonde *supra* note 5 at 119.

Ethiopia remarked, “ [A]cceptance of colonial boundaries was necessary for Africa’s safety [...]”¹⁶⁸ Incorporating these strong suggestions posed by the prominent founding fathers of the continental organization and the consideration of ongoing territorial and boundary disputes culminated at express restatement of sanctity of pre-existing boundaries. Apart from Somalia and Morocco overwhelming majority adopted the Resolution, but it did not stop territorial or boundary conflict. Since the adoption of OAU Charter or the Cairo Resolution of 1964, Africans have been enduring frequent border related wars.

To sum up, though the principle of *uti possidetis* calmed boundary or territorial conflict in formative stage of Spanish Latin America republics, in fact it did not resolve territorial or boundary conflict. During Spanish rule some areas were never been clearly marked due to ignorance of local geography.¹⁶⁹ Vaguely defined boundary was inadequate to govern international relationship. The porous provincial boundary has not only caused serious conflict, but also frustrated the newly independent Republics. For example, the incomplete or vaguely defined Bolivia-Chile and Bolivia-Paraguay border raised the issue of territorial expansion beyond the presumptive border.¹⁷⁰ Thus, even if the principle *uti possidetis* temporarily suspended a looming territorial conflict, actually it “ [...] did not solve the problem of delimitation, to which it was meant to apply.”¹⁷¹ Commentators suggest that reliance on the principle of *uti possidetis* has caused territorial and boundary dispute more than it initial benefits.¹⁷²

¹⁶⁸ *Id.*

¹⁶⁹ Hensel et al *supra* note 99 at 16

¹⁷⁰ *Id.*

¹⁷¹ Cukuwrah, *supra* note 101 at 114.

¹⁷² Sumner *supra* note 1 at 1791.

3.4.4. The Status of Doctrine of *Uti Possidetis* in International Law

Even though the principle of *uti possidetis*, is a Roman law advent, its approach as a doctrine of determination of international boundary, is a Spanish Latin America formulation. Soon after decolonization, the new Republics attempted to avoid impending territorial and boundary conflict by applying the principle of *uti possidetis* modifying its traditional sense as applied in the Roman law. The principle of *uti possidetis* helped the Republics to tackle imminent boundary conflicts that thought endangered their very survival as independent political entities. With a view to evade a looming conflict the Republics decided to abide by the pre-existing colonial administrative divisions as international boundary lines. The principle of *uti possidetis* has also shielded the Republics from further colonization through the Spanish colonial law that regarded the entire territory, be it occupied or unoccupied, as already owned. The principle of *uti possidetis* was overwhelmingly accepted by the Republics to govern their territorial relationship. Since its inception in 19th century, the principle of *uti possidetis* has attracted international law scholars and tribunals to resolve a number of boundary disputes.¹⁷³

Though the principle *uti possidetis* is one of the oldest and widely invoked to resolve territorial limits of emerging states, it is still not free from confusion and misconstruction.¹⁷⁴ Regarding the scope, relevance and binding nature of the principle of *uti possidetis*, we have diverging views among international law scholars and international tribunals, including International Court of Justice (ICJ). Some scholars and tribunal offer a broader scope to the

¹⁷³ Prominent international law scholar, Brownlie, the former OAU high executive, Boutros-Ghali, Bourjorl fecher, and Cukwura, are some of the scholars who acclaim the principle of *uti possidetis*.

¹⁷⁴ The equation of all colonial boundary was *uti possidetis* appears the source of confusion. The application of the principle of *uti possidetis* by the Spanish Latin American Republics to take colonial administrative boundary as newly emerged States, does not mean the same idea should govern all states emerging from colonial yoke. The principle can be applied only when there is consent by the States or tribunals can use them only when referred by the contesting parties. More over, the principle can be applied only when the new independent states here under the same common colonial power.

Principle with the intention to apply it in all situations of territorial dispute whenever a territory is inherited from colonial power.¹⁷⁵

Some commentators suggest the application of the Principle in all situations of acquiring independence including disintegration of States like the former U.S.S.R or Yugoslavia. During formal disintegration of U.S.S.R, the Heads of State of the Russian Federation, Belarus and Ukraine, proclaimed a declaration akin to the territorial integrity resolution as enshrined in the Charter of the African Union. It stated, “ The High Contracting Parties acknowledge and respect each others territorial integrity and the inviolability of the existing borders within the common wealth.”¹⁷⁶ This bilateral resolution does not expressly mention the principle of *uti possidetis*, but any attempt to import application of the principle of *uti possidetis* is based on assumption. Suzanne Lalonde who thorough researched the role of *uti possidetis*, questions whether the international law has to rely on a principle when its basis are ‘shaky’ and unsettled to extend application of the principle to non-colonial situations.¹⁷⁷

The *Frontier Dispute Case (Burkina Faso/Republic of Mali)* takes forefront among the attempts to afford a general scope to the Principle. The Chamber of Frontier Dispute case bids to expand the contours of the Principle and extends its applicability in all situations wherever “independence occurs.”¹⁷⁸ This appears a “novel” idea, but it goes beyond the imagination of the original crafters of the principle. As pointed out in Paragraph 20 of the Judgment, ICJ has disclosed

¹⁷⁵ Prominent international law scholars have commented in favor of application of *uti possidetis* in all cases of colonial boundaries. Similarly, Cukwura, Boutros-Ghali, Bourjorl Flecher accept the equation of African colonial status quo policy with the principle of *uti possidetis*. See also Lalonde pl 129. Attempting to apply the principle of *uti possidetis* to territorial dispute in Africa falls under this categories. Apart from some areas of West Africa, most African States were colonized by different European powers. In Some area a given ethnic group, say for example, Somali ethnic group was partitioned among Italy, Great Britain and France. Any attempt to apply the principle of *uti possidetis* to resolve territorial dispute by applying this principle in this region appears contrary to the original scope of the Principle. There is no doubt disputants in all cases may choose a governing law. If *uti possidetis* principle chosen as the governing law, then it is possible to import the original Spanish Latin America principle in its original nature.

¹⁷⁶ 31 ILM 138 (1992) noted in Antonopoulos *supra* note 94 at n(39).

¹⁷⁷ Lalonde, *supra* note 5 at 6.

that disputants have agreed their boundary dispute to be resolved in accordance with the “[...] principle of the intangibility of frontiers inherited from colonization.”¹⁷⁹ There is no doubt that Burkina Faso and Mali, who have inherited territory from common colonial power – France, empowered the tribunal to decide their dispute in accordance with the pre-existing boundaries that aligns with the Cairo declaration of July 1964.

The Chamber of Frontier Dispute (Burkina Faso/Mali) Case has attempted to make the principle of *uti possidetis* as a general principle of international law and ultimately to build its binding nature as customary international law.¹⁸⁰ This appears unsubstantiated and unpersuasive conclusion that may easily be challenged, as the principle of *uti possidetis* is not a universally binding norm even in Latin American.

Paragraph 20 of the Frontier Dispute Judgment reveals the chamber’s unsuccessful attempt to afford a wider global status to the principle *uti possidetis*. The Chamber concludes:

[...] the Chamber cannot disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers. It emphasizes the general scope of the Principle in matters of decolonization and its exceptional importance for the African continent, including the two Parties to this case. Although this principle was invoked for the first time in Spanish America, it is not a rule pertaining solely to one specific system of international law. It is a principle of general scope, logically *connected with the phenomenon of the obtaining of independence, wherever it occurs*. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power. The fact that the new African States have respected the territorial *status quo* which existed when they obtained independence must therefore be seen not as a mere practice but as the application in Africa of a rule of general scope which is fairly established in matters of decolonization [...] The principle of *uti possidetis juris* accords pre-eminence to legal title over effective possession as a basis of sovereignty. Its primary aim is to secure respect for the territorial boundaries which existed at the time when independent was achieved.”¹⁸¹ (Emphasis added).

¹⁷⁸ *Frontier Dispute Case*, I.C.J. Reports 554, 565(1986) *Para.* 20.

¹⁷⁹ *Id.*

¹⁸⁰ The Chamber did not explicitly state that the principle of *uti possidetis* has reached the status of international customary law as there no general state practice and *opinio juris* at present. But the Chamber rather used general terms implying that the principle of *uti possidetis* is general principle of international law, which is also not supported by evidence. In general state practice regarding *uti possidetis* is not constant and uniform.

¹⁸¹ *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* Dec. 22, 1986, (Paras, 20 -0 26) <http://www.icj-cij.org/docket/index.php?sum=359&p1=3&p2=3&case=69&p3=5>

This decision thought to be game changing, as it appears to make the principle of *uti possidetis* generally applicable in all situations whenever new States get independence either as a result of decolonization, or disintegration, no matter what cause triggers the independence. The expression, “ “It is a principle of general scope, logically connected with the phenomenon of obtaining of independence, wherever it occurs,”¹⁸² reveals the Chambers intended to extend the scope of the Principle to govern all cases of getting independence irrespective of the cause of independence and intention of the parties. The Frontiers Dispute (Burkina Faso/Mali) Case was inspired by the *Guine/Guinea Bissau Maritime Delimitation Case*, in which the arbitration tribunal has considered the African colonial *status quo* policy was equivalent to the Latin American principle of *uti possidetis*.¹⁸³ This assumption does not align with the original meaning of the Principle in Latin America. Whenever boundary dispute surfaces in Spanish America, the disputants often make express agreement to abide by the principles of *uti possidetis*.¹⁸⁴ Moreover, the principle of *uti possidetis* is irrelevant when boundary of neighboring States is defined by treaty.¹⁸⁵ It is, therefore, fallacious to apply the principle of *uti possidetis* in all cases of independence or in all situations of boundary conflict in Africa or elsewhere.

The principle of *uti possidetis* is consensual in nature.¹⁸⁶ Baratos in his inspiring article confirms this view stating, “ *The principle has never been applied by a tribunal in the absence of specific compromise or direction by the disputants to that effect.*”¹⁸⁷ (Emphasis added). The arbitration tribunal of *Dubai-Sharjah Border Arbitration* declares that states are in liberty to reject

¹⁸² *Id.* at Para. 20.

¹⁸³ Lalonde *supra* note 5 at 127.

¹⁸⁴ For instance, on 25 January 1860, Peru concluded a Treaty of Peace, Friendship and Alliance with Ecuador referring to the *uti possidetis juris*. Similarly the preamble of the 1881 treaty concluded between Venezuela and Colombia refers to the *uti possidetis juris* of 1880 while Article VIII of the Geranial Arbitration treaty between Bolivia and Peru instructed Arbitrator to resolve the dispute in strict obedience with the principles of *uti possidetis* of 1810. In Latin America the principle was meant to be applicable to Spanish colonies. (See Lalonde *supra* note 5 at 127.)

¹⁸⁵ Lalonde *supra* note 5 at 127.

¹⁸⁶ Antonopoulos *supra* note 94 at 44. See also *Dubai-Sharjah Border Arbitration* Lalonde *supra* note 94 at 124.

determination of case in accordance with principle of *uti possidetis* and adopt a different approach.¹⁸⁸ The earliest and most cited authority was, the *Swiss Federal Council in a Dispute between Colombia and Venezuela*, the contested consented to be bound by the colonial boundary lines.¹⁸⁹ Thus, the principle of *uti possidetis* cannot step in the litigation, unless parties express their consent to abide by the principles of *uti possidetis*. Parties to the *Frontier Dispute Case* (Burkina Faso and Mali) never requested the tribunal to decide their dispute in accordance with the principle of *uti possidetis juris*. They have requested the tribunal to decide the Case on the basis of the boundary existing at the time of independence which accords with the Cairo Resolution of July 1964, but ICJ implausibly assumed the demand of the Parties to mean *uti possidetis*.

Similarly, in *Guinea – Guinea-Bissau Maritime Delimitation case*, an arbitration tribunal consisting of three judges of ICJ took a similar stand. The Parties to the case requested their boundary dispute to be resolved in accordance with 1886 convention of France and Portugal, the tribunal did not find boundary delimitation in the convention as requested by the Parties and resorted to the *uti possidetis* stating it as one of the relevant rule of international law.¹⁹⁰

The tribunals in both of the cases went beyond the mandate granted by the Parties. The Parties of both cases did not take *uti posseditis* as a governing law. In a situation where the parities never referred to or the African continental organization never formally recognized, why the tribunals of *Frontier Dispute Case* or *Guinea- Guinea-Bissau Maritime Delimitation Case* relied on the principles of *uti possidetis*? The founding fathers of African continental organization (OAU) did not directly import the Latin American principle; rather they have declared a different approach.¹⁹¹ In a situation where the real ‘owners’ of the boundary have opted for a different alternative while

¹⁸⁷ Bartos *supra* note 1 at 59.

¹⁸⁸ Antonopoulos *supra* note 94 at 44

¹⁸⁹ *Id.* at 30.

¹⁹⁰ Lalonde *supra* note 5 at 126.

they had a possibility to explicitly state the principle either in the constitutive document or in the Cairo Resolution, can ICJ make a binding law that changes the Cairo Declaration of 1964? Bartos strongly disagrees with the assumption stating, “ Equation of the preservation of colonial boundaries with *uti possidetis* is “both false and misleading in an African context.¹⁹²

In Latin America, as has been pinpointed elsewhere, the application of the principle of *uti possidetis juris* was legally confined to the former Spanish colonies (Spanish Latin America). Brazil explicitly disregarded the Principle contending it encompasses rights constructively possessed, which Brazil views contrary to the original Roman law. To Brazil *uti possidetis de facto* accords with Roman law doctrine of *uti possidetis*, that shields peaceful enjoyment of immovable property that was actually possessed. Brazil’s motive was to expand its territory into the unoccupied territories.¹⁹³ Even some of the new Republics were not consistent enough in applying the principle of *uti possidetis*. Susan Lalonde confirms this view stating:

In addition to the various and often conflicting versions of the *uti possidetis* principle, there was also inconsistent State practice in the particular version adopted from one treaty to another.¹⁹⁴

Moreover, Some Republics disclosed the tendency to recognize actual possession rule contracting with Brazil. For instance, Peru, Venezuela and Bolivia concluded a treaty with Brazil in accordance with *uti possidetis de facto*.¹⁹⁵ There also instances in which Latin American Republics set boundary inconsistent with the principle of *uti possidetis*.¹⁹⁶ The establishment of big union of States (Central American Republic) was not in line with the Latin American principle of *uti possidetis*.

¹⁹¹ Although the Cairo Congress did not expressly state a reason to ignore half a century old doctrine that that was accepted in Spanish Latin America, century old no clear reason to ignore the principle of *uti possidetis* in Cairo

¹⁹² Bartos *supra* note 1 at 60.

¹⁹³ As Lalonde asserts, Brazil by relying on the “[...] *de facto* version of the principle, [...] was able to defend not only Portuguese expansion during colonial times, but also her own expansion during the post- colonial era.” Lalonde *supra* note 93 at 32.

¹⁹⁴ *Id.* at 36

¹⁹⁵ *Id.*

In a situation where original architects of the principle not consistently adopted binding role *uti possidetis juris*, it appears implausible to confer international sense of obligation by recognizing the Principle as a universal binding norm thereby extend its role beyond the expectation of the original designers. Thus, in spite of the fact that the principle of *uti possidetis* has got some general recognition in the former Spanish Latin America, “[...] it has no validity in universal international law.”¹⁹⁷ (Emphasis added). As vividly stated in Beagles Channel Case, “[*Uti possidetis*] is peculiar to the field of the Spanish –American States whose territories were formerly under the rule of the Spanish Crown.”¹⁹⁸ A quote from Whiteman by Bloomfield in an article regarding Egypt, Israel and the Gulf of Aqaba regarding status of *uti possidetis* as follows:

[...] in no case has the International Community recognized [the Principle of *Uti Possidetis*] as an institution of international law [...] It remains, just like Bull of Pope Alexander VI wherein it originates, derogatory to general international law, which insist on occupation as a basis for sovereignty. A rule derogating to generally accepted customary international law is binding only on those persons which have, by convention, expressly agreed to it.¹⁹⁹

The principle of *uti possidetis* temporarily shielded the Spanish Latin America Republics from a destructive territorial and boundary conflict, it did not win universal acceptance even in Latin America, as there was inconsistency in state practice concerning the application and binding effect of the norm. The principle did not get constitutional protection, nor clearly stated in treaties. In this unsettled situation it is too early to regard the principle of *uti possidetis* as a binding international norm.

¹⁹⁶ Lalonde *supra* note 5 at 34.

¹⁹⁷ Bartos *supra* note 1 at 58.

¹⁹⁸ Beagles Channel Arbitration (*Argentina v. Chile*) 52 I.L.R 93, 125 (1979).

¹⁹⁹ L.M. BLOOMFIELD, EGYPT, ISRAEL AND THE GULF OF AQABA IN INTERNATIONAL LAW, 107 – 108 (1957) quoted in M. Whiteman 2 DIGEST OF INTERNATIONAL LAW 1086 (1963).

3.5. The Principle of Territorial Integrity

3.5.1. *Obsolescence of Conquest as Mode of Acquisition of Territory*

In contemporary world there is no vacant territory. Thus, occupation as mode of acquisition of new territory practically obsolete, and before outlawed, the only possible way to expand territory was conquest. Before use of force as a means of acquiring territory was formally rendered illegal, conquest was a legitimate mode of acquisition of territory though it could be carried out at the cost of the actual possessors. In pre-modern era, therefore, conquest became “the law of necessity” and it was “universally acknowledged.”²⁰⁰ Before coercive use of force was legally banned, it had been a normal practice to invade a weaker nation in search for more territory with a view to expand the scope of sovereignty, and in quest for more people that served in the imperial army.²⁰¹ Territorial expansion was considered as a way of making wealth²⁰², as prosperity of an empire was measured by the territorial possession. It was also viewed as a method of strengthening security of an empire by pushing external security threat away from the power center. As a result, protection and acquisition of territory was one of the guiding directives of foreign policy of medieval States.²⁰³

At a time invasion for territorial occupation was a permissible norm, the competition to acquire more territory generated frequent territorial dispute and war.²⁰⁴ As John Vasquez rightly remarks, “Of all the issues over which wars could logically be sought, territorial issues seem to be

²⁰⁰ See WILBER F. GORDY, THE CAUSE AND MEANING OF GREAT WAR 33 (1910).

²⁰¹ According to Wilber F Gordy, ancient Prussian was guided by the premises, “war pays.” At the time, “War was regarded as the national industry of Prussia.” (See *Id.* at 26. Bismarck and subsequent rules pursued the same coercive approach and expanded contours of territory and wealth. For instance, in Franco – Prussian war Germany benefited 2000%. *Id.* As a result, Germany even before Hitler regime relied on “power to take whatever wanted by force. “*Id.* Even at the end of WWI, some of the powerful States “supported the right of victorious states to realize territorial gains, this was reflected in their secret treaties concerning territorial exchanges at the end of the war.” Zacher, *supra* note 1.

²⁰² For instance, in Franco – Prussian war Germany benefited 2000%. See Gordy *supra* note 200.

²⁰³ Zacher, *supra* note 5 at 217.

²⁰⁴ As Marck Zacher points out of 119 interstate wars since 1648 – 1945, 93 were territorial wars. See *Id.* at 223.

the ones most often associated with wars.”²⁰⁵ Dispute over territory can easily flare up and generate destructive war either among the colonial rivalries or a colonial power and indigenous people who actually hold the territory.²⁰⁶ For instance, until finally settled in the Berlin Conference of 1884 -1885, powerful nations had competed among themselves to occupy African territories.²⁰⁷ Art. 34 of the Berlin Act required colonial powers to report their occupation of African territory and Art. 35 the Act demanded effective occupation in order to avoid war among the colonizers for reoccupation.²⁰⁸

3.5.2. *Emergence of the Principle of Territorial Integrity*

At the end of 19th century, most precisely in early 20th century after the end of WWI, the traditional conception and practice of conquest as a legitimate means of territorial expansion was steadily diminished and virtually substituted by the principle of territorial integrity norm.²⁰⁹ The principle of territorial integrity is one of the core principles of international law that was evolved as a solution to avoid frequent territorial expansion wars. Thus, it is a “[...] positive norm of a paramount importance in the contemporary international society.”²¹⁰ The principle of territorial integrity norm prohibits use of force for territorial expansion.²¹¹ Simply put, the principle of territorial integrity prohibits compulsory dismemberment of a territory or impairment of state sovereignty or intervention in domestic affairs of a given state.²¹² It was based on the objectives of

²⁰⁵ *Id.* at 216.

²⁰⁶ *Id.*

²⁰⁷ Goran Aronson, *The Berlin Conference*, 1884

<http://www.thenagain.info/WebChron/Africa/BerlinConf.html>, (last visited 8/20/15 at 10:17 AM.) See also Jason Kong and Emily Zhang, *Berlin Conference of 1884*, GSMUN (2010), <http://gsmun13.weebly.com/uploads/7/3/7/4/737477/berlin.pdf>

²⁰⁸ *Id.*

²⁰⁹ In Versailles treaty victorious nations of the WWI pledged to abandon the tradition practice of annexing territories of the defeated nation. Former colonies of defeated nations were kept under League mandate and States to which these Mandates were entrusted were required to prepare the Mandates for self governance. Sharon Korman remarks, “[...] the First World War undoubtedly marked a moral turning point. “See Zacher *supra* note 5.

²¹⁰ -----, *Rethinking Territorial Integrity*, www.Springer.com/static/pdf/276/bfm%253A978-3-642

²¹¹ U.N . Charter art. 2(4)

²¹² *Id.*

the 19th century nationalist movement that advocated for respect to sovereignty of state and sanctity of territory. According to this movement “ [...] a territory belonged to the national grouping and it was wrong to take the land from a nation.”²¹³ It was viewed that the French Revolution has spurred the nationalist movement in its bid for abolition of conquest as a means for territorial expansion. The Movement was also supported by the Napoleon’s stand for self-determination.²¹⁴ The principle of territorial integrity requires all States to respect territorial integrity of fellow State and not to encroach an occupied territory, either directly or indirectly. Thus, the principle of territorial integrity is based on a rule that an already occupied territory cannot be reoccupied by force, thereby ending the legitimacy of conquest as a norm of territorial acquisition.

The principle of territorial integrity has got legal recognition and “formal support” since the end of WWI.²¹⁵ Art. 10 of the Covenant of League of Nations specifically declares the duty of member States to respect territorial integrity of another State as follows:

The member of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.²¹⁶

Art. 10 of the Covenant of League of Nations was a product of W.W.I. It was a provision proving, “formal support for the territorial integrity norm.”²¹⁷ It was designed to discourage conquest for territorial expansion. Historically, as Graham states, the duty to respect territorial integrity was not a novel creation of the Covenant.²¹⁸ Graham remarks, “The passive aspect of this territorial guarantee ‘to respect’ was no departure from the existing practice under the international

²¹³ Zacher, *supra* note 5 at 217.

²¹⁴ *Id.*

²¹⁵ *Id.* at 219.

²¹⁶ League of Nations Covenant art. 10.

²¹⁷ Zacher *supra* note 5 at 219.

law in 1919.”²¹⁹ It may be rightly argued that since the Westphalian stipulation, international law has firm stand for respect for a defined territory. The motive of Westphalian congress was to avoid war by setting a clearly defined territory and inviolability of State sovereignty.

In this respect Graham was right, but the Westphalian stipulation did not deter territorial invasion. Since then the world has experienced numerous wars that aimed at territorial expansion. Graham in his seminal article, however, did not deny the novel contribution of Art. 10 of the Covenant of League of Nations. The Covenant for the first time declared the duty of member States to “preserve” territorial integrity. Graham states the duty to “preserve” existing territory of member States as “[...] a new obligation previously unrecognized and implied a potential coercive duty as a consequence of the new order.”²²⁰

The League of Nations attempted to discourage conquest by requiring member States to settle disputes peacefully.²²¹ Though the Covenant has made a great contribution, at least, by formalizing the legality of the principle of territorial integrity, in effect, the League failed to stop violations and territorial invasions.²²² Two major aggressions by member states against another member states often cited for the ultimate demise of the League. After 10 years of membership of League of Nations, Italy invaded Ethiopia, a member of League of Nation, and Japan invaded Manchuria.²²³ In the former case, the then Ethiopia’s king, Emperor Haile Selassie appealed against

²¹⁸ Malbone Watson Graham (Jr.), *The Effect of the League of Nations Covenant on the Theory and Practice of Neutrality*, 15:5 CAL L. REV. 362 (1927).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Art. 12 and 13 of the Covenant spell out the requirement and procedures of settling disputes not only among the member States but also between members and non-members and Art. 16 declares sanctions that may be imposed in case peaceful dispute settlement cannot be attained and the aggressor pursues invasive activities.

²²² In 1932 Japan invaded Manchuria, in 1935 Italy conquered Ethiopia (then Abyssinia), in 1936 Germany reoccupied Rhinland in defiance of the League, in 1938 Germany merged Austria contrary to the Treaty of Versailles. See <http://www.bbc.co.uk/schools/gcsebitesize/history/mwh/ir1/manchuriarev1.shtml> ultimately, combination of all aggressions and aggressive behaviors coupled with ignores and betrayal of power nations rendered the League powerless to attain its objectives. Finally, WWII erupted ultimately taking away the League of Nations.

²²³ B. B. C. The Manchurian and Abyssinian crises shook people’s confidence in the League and proved that <http://www.bbc.co.uk/schools/gcsebitesize/history/mwh/ir1/manchuriarev1.shtml> (last visited 8/21/15

Italian invasion in person, but the League could not stop the invasion. In defiance of Italy to stop the invasion, the League in accordance with Art. 16 of the Covenant, imposed sanction on both States that mainly harmed Ethiopia. The League prohibited sale of arms to both nations. The sanction had little impact on Italy as a maker of arms, but it had crippled Ethiopia, which totally relied on import.

Surprisingly, contrary to Art. 10 of the Covenant, the League advised Ethiopia to surrender certain border territories to Italy as a consideration to stop the invasion. Italy, however, refused to comply with the advice longing to occupy the whole Ethiopia – not simply annex border territories. With the help of superior arm and highly trained military personnel, and use prohibited poisonous gas, Italy occupied the whole nation until driven out after 5 years of the occupation. The League was not only powerless, but also slow in responding to territorial invasion. For instance, after Japan invaded Manchuria, it took the Council of League a year respond to the request by the victim to avert the situation. After twelve months of lodging of petition, the Council visited Manchuria but could not stop the invasion as it simply sought Japan to leave the invaded territory. Weak response of the League, supposedly, motivated Japan to invade more territory. Ultimately both Japan and Italy left the League. Subsequently, Germany disclosed an extensive aggressive behavior and invaded more territories under the leadership of Hitler.²²⁴

Though the principle of territorial integrity had already got international legal recognition, signatories of the Covenant of League of Nations were not actually committed to respect binding provisions. Expansionist ambition never stopped. Very few African States were members of League

²²⁴ Supposedly, losing hope due to weakness of League of Nations to resolve international issues, more members left the League. In 1933 German, Italy in 1937. Due to Leagues failure to stop invasion by Italy, Ethiopia formally left the League in 1936. For details of the list of members of League of Nations, date of membership and date of dismemberment see <http://www.indiana.edu/~league/nationalmember.htm>.

of Nations.²²⁵ In actual fact there was no difference in being member or non-member as the League was not effective in discharging its goals. Powerful nations were not really committed to abide by the Covenant. This had rendered weaker nations, like Ethiopia to lose hope. The League was unable to maintain global peace and security. It practically failed to control widespread violations of territorial integrity and political independence. As a result, at the end of WWII a new relatively effective global organization, the United Nations, constituted thereby ending League of Nations.

3.5.3. *The Principle of Territorial Integrity Norm after WWII*

The end of WW II has heralded multifaceted socio-economic, and political changes. Most importantly, the global political system has been restructured.²²⁶ As Stuart Elden attests, with a final goal of maintaining global peace, preservation of existing boundaries was one of the core tenets of this structure.²²⁷ The weak League of Nations was dissolved and a “progressive” global umbrella organization, the United Nations, was constituted. The most important mission of United Nations is maintaining global peace. As United Nations may be viewed as the product of WWII, it is not an exaggeration to say that it was an organization meant to keep global peace. Peacekeeping mission of the United Nations can be observed from the very first line of the preamble. It states, “ WE THE PEOPLES OF UNITED NATIONS DETERMINED to save succeeding generation from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”²²⁸

In reorganizing the global organization, world leaders have determined to build unshakable global peace, and thereby avoid another world war. Tolerance of member States of United Nations, peaceful coexistence, fostering to unit, and strength maintenance international peace and security,

²²⁵ Liberia, South Africa, Ethiopia and Egypt were the only African members of League of Nations. For list of League of Member States see, <http://www.indiana.edu/~league/nationalmember.htm>

²²⁶ Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, XXVI SAIS REV. 11, 11 – 24 (2006).

²²⁷ *Id.*

development of good neighborhood are among the principles that are enshrined in the United Nations Charter.²²⁹ As a modality of keeping peace and security the Charter strictly prohibits use of force for any motive save self-defense.²³⁰ The act of self - defense may be carried out by the victim, or collective action may taken to avert an aggression.²³¹

It has been repeatedly pointed out that border issues can easily and quickly generate armed confrontation and spoil global peace. With a view to avoid use of war to resolve border conflict or territorial dispute, the charter has reaffirmed territorial integrity of member States as one of the important tenets for maintenance of global peace and friendly relationship. Art. 2 (4) of the Charter in this case is vital. It declares, “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.”²³² Use of force for the purposes of territorial expansion or redrawing boundary, thus *ipso facto*, illegal. A State having territorial or border issue has to resort peaceful dispute resolution method. Any attempt to force a neighboring State surrender an illusive territory or border is illegal and, in principle, can trigger

²²⁸ U.N. *Charter of United Nations*, Preamble. 1UNTS XVI. (Oct. 24, 1945),
<http://www.refworld.org/docid/3ae6b3930.html> (Accessed: 4/20/16).

²²⁹ *Id.*

²³⁰ U.N. *Charter of United Nations* Art. 2(4). 1UNTS XVI. (Oct. 24, 1945),
<http://www.refworld.org/docid/3ae6b3930.html> (Accessed: 4/20/16).

²³¹ Art. 1 of the U. N. Charter reveals the most important principles of the United Nations. Keeping global peace and security takes lions share of the United Nations mandates. As pinpointed in Art. 1 of the Charter, in case of disturbance of global peace and security, member States collectively can take preventive action and remove threats to the world peace.

²³² U.N. *Charter of United Nations* Art. 2(4). 1UNTS XVI. (Oct. 24, 1945),
<http://www.refworld.org/docid/3ae6b3930.html> (Accessed: 4/20/16).

collective action.²³³ “The principle of territorial integrity is considered as one of the primary means in achieving and maintaining international security and stability in the world.”²³⁴

The principle of territorial integrity norm has been strictly enforced since Second World War.²³⁵ The only exceptions were temporary acquisition of sovereignty of former colonies of Italy, Germany and Japan by the allied forces, and Soviet Union’s annexation of Baltic States. While the former was temporary until colonies got ready for independence, the latter States retained under the federation of U.S.S.R until Soviet Union finally disintegrated.²³⁶ Despite Soviet Union’s actions of traditional practice of taking sovereignty of territories of loser of war, almost all the founding members of United Nations have accepted the sanctity of territorial integrity norm.²³⁷ Since then the Principle of territorial integrity has become “[...] one of the cornerstones of the U.N. Charter system and the post-Second World War international legal order.”²³⁸

Following the Charter, several international agencies and movements, either under the auspicious of United Nations or regional organizations, have acknowledged the need to preserve existing territorial limit and the need to keep them whether they are good or bad with the goal of maintaining international peace and security. The 1960 United Nations Declaration accordingly states, “ Any attempt aimed at the partial or total disruption of the national unity or territorial

²³³ Collective use of force against Iraq to avert its violation by invading and later annexing Kuwait, and a collective action against North Korea for its violation of South Korea’s territorial integrity are some of instances in which Security Council authorized collective use of force.

²³⁴ Vita Gudeleviciute, *Does the Principle of Self-Determination prevail over the Principle of territorial Integrity?*, 2 INT’L J. BALTIC L. 48, 48- 74 (2005).

²³⁵ The contribution of League of Nations and international agreements thereafter is not doubtful, but some States were not ready to stop conquest for territorial expansion and were not satisfied by the gains of the WWI. As a result, Japan, Germany and Italy ignored Art. 10 of the League of Nations and Versailles Treaty in quest for territorial expansion, while France, Great Britain and United States stood for territorial integrity of all states. After WWII, however, supporters of the territorial integrity got enhance power over Italy, Germany and Japan, as their motive was failed. Mark Zacher rightly remarks, “At the end of the World War II the Western Allied Powers exhibited very strong support for the integrity of the interstate boundaries.” Zacher *supra* note 1 at 220.

²³⁶ Soviet Union also retained some of the territories of Poland, Germany, Finland and Rumania. *Id.*

²³⁷ U.N. Charter art. 2(4).

²³⁸ Jure Vidmar, *Territorial Integrity and the Law of Statehood*, 44 GEO. WASH. INT’L L. REV. 692 – 747 707 (2012).

integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.²³⁹

In 1970 United Nations further clarified how to effectuate the decolonization process while maintaining territorial integrity. It is clearly pointed out in Clause 5(6) of the Declaration of Principles of International Law that territories of colonies and other self governing entities was separate from territories of colonial powers²⁴⁰ Thus, self-determination of a colony cannot be viewed as an act distracting the preservation of territorial integrity, as colonies were allowed to declare their independence within the bounds of their own territories. But ethnic groups were not entitled for the unreserved declaration of independence.²⁴¹ In Africa, for instance, most colonial boundaries were arbitrary and ethnic groups were split into several colonial powers; granting independence to ethnic groups would obviously disrupt territorial integrity thereby generating unmanageable territorial and boundary conflict.

The 1970 Declaration of Principles of International Law, and Friendly Relations and Cooperation among States has further strengthened the sanctity of existing territories. The Declaration reaffirms that territorial integrity norm has reached the level of customary international law.²⁴² It requires all states to refrain from any act or conduct that may disrupt national unity or territorial integrity of any state.²⁴³ The Principle of Territorial Integrity also endorsed by some regional organizations. The Charter of the Arab League of 1945 and the Charter of Organization of American States 1948 acknowledged the sanctity of territorial integrity of member States.²⁴⁴ Similarly, the 1963 Charter of Organization of African Unity (OAU) and subsequent 1964 Cairo

²³⁹ Clause 6, UNGA RES. 1514, DECLARATION ON GRANTING OF INDEPEDENCE TO COLONIES COUNTIERS AND PEOPLES (1960), <http://www.un.org/en/decolonization/declaration.shtml>

²⁴⁰ GA Res 2626 Clause 5(6) of the 1970 Declaration on the principles of international law concerning friendly relations and co-operation among states in accordance with the charter of the United Nations.

²⁴¹ Zacher *supra* not 5 at 221.

²⁴² Vidmar, *supra* note 238 at 23.

²⁴³ *Id.*

Declaration approved the principle of territorial integrity.²⁴⁵ The Conference on Security and Cooperation in Europe (CSCE) reaffirmed the territorial integrity. The present Europe also acclaimed the respect to territorial integrity by the Paris Charter of 1990 and by the Dayton Peace Treaty.²⁴⁶

Now it appears almost settled, that the existing territories should not be disrupted or disintegrated, as the preservations of inherited territories for the maintenance of international peace and security. Thus the only available legal option to redefine international boundary is peaceful means; use of force to redraw boundary is strictly prohibited and contrary to the United Nations Charter.²⁴⁷ The strong and sensitive statements of founding fathers of OAU reveal this fact. Elden pinpoints remarks of Michael Walzerin as follows:

Although boundaries may be arbitrary, rooted in history and subject to the politics that condition the making of maps, they are the grid that create a “habitable world.’ State sovereignty generally provides a measure of protection within those borders. While [Michael Walzer] recognizes that adjustments may be necessary, in a most cases borders should be preserved. In deed, if ‘an invasion has been threatened or has actually begun, it may be necessary to defend a bad border simply because there is no other.’²⁴⁸

Thus, the existing international law favors stability and integrity of territory. It is plausible that keeping territories stable and intact makes immense contribution for stability of international peace and international solidarity. By implication, as territorial limits are identified by their borders, the existing international borders, should remain undisturbed. That is why most nations chose to honor existing boundaries, despite their elusiveness or arbitrary nature.

²⁴⁴ Zacher *supra* note 5 at 221.

²⁴⁵ Somalia and Morocco opposed the position of OAU that requires member States to respect boundaries existing on the critical date of independence.

²⁴⁶ Zacher *supra* note 5 at 222

²⁴⁷ Needless to say that a State having border issue cannot use force, as use force unless fails under Art. 51 of the U.N. Charter is illegal and may trigger collective action.

3.5.4. *The Principle of Territorial Integrity and Self-determination*

In this Section we will briefly look at the relationship between self-determination in non-colonial situation and implications of the principle of territorial integrity norm. The question is whether ethnic groups or an administrative region of a given nation can exercise self-determination or the principle of territorial integrity bars the right of self-determination outside colonial setting.

The right of self-determination is a universal right.²⁴⁹ As clearly stated in international human rights covenants, “All peoples have the right of self-determination.”²⁵⁰ Thus, as a rule all people can exercise the right of self-determination. On the other hand, the principle of territorial integrity requires territory of a given nation to remain in tact. Thus, the two principles are apparently contradictory.²⁵¹ Therefore, an inquisitive mind may fairly question how to reconcile this apparently conflicting situation.

In non-colonial sense the principle of self-determination applies to internal self-governance of ethnic or territorial units of a given nation.²⁵² This stand is well clarified by the Declaration of International Law, which reaffirms both territorial integrity norm and the principle of self-determination. Clause six of the Declaration is very pertinent in this regard. It states:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unit of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging of the territory without distinction as to race, creed or colour.²⁵³

²⁴⁸ Elden *supra* note 226 at 13.

²⁴⁹ See the very first provisions of the United Nations Charter, International Convention on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural rights (ICESCR)

²⁵⁰ Art. 1 of INTERNATIONAL COVENIENT ON CIVIL AND POLITICAL RIGHT. Almost the same expression is stated in Art. 1. of the INTERNATIONAL COVENEINT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS.

²⁵¹ It may appear that the principle of territorial integrity imposes limitation on Self-determination. See Jure Vidmar, *Territorial integrity and the Law of Statehood*, 44 GEO. WASH. INT’ L. REV. 692-747 707 2012

²⁵² Vidmar *supra* note 238 at 708.

²⁵³ G.A. RES/25/2625 - Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with United nations Charter (1970).

As mentioned in the purpose clauses Art. I(2) and Art. 55 of the United Nations Charter and international covenants, the principle of self-determination is peoples' right – it is about “equal right and self-determination of people.”²⁵⁴ It is not dismemberment or interference in domestic affairs of a nation. If the right of self-determination is invoked to dismember a territory, then it will turn to be secession, which will be briefly discussed later. Self-determination, therefore, need not be secession. In non-secession context, the principle of self-determination affords autonomy to self-administer an administrative unit of a State.²⁵⁵ As Vidmar lucidly remarks:

[The principle of territorial integrity] “limits peoples' right of self-determination, so the elaboration reflects the doctrine that outside of colonialism, the right of peoples to self determination will be normally consummated internally within the international borders of the parent State and thus will not result in a new State.”²⁵⁶

Though the principle of self-determination may appear to include secession or dismemberment, close assessment of the rule reveals that the right of self-determination is independent of secession or dismemberment. It is simply the right of people, nations and nationalities for self-governance, which does not affect territorial integrity. Secession or dismemberment obviously affects territorial integrity, as both actions result in disintegration of territory.

3.5.5. The Principle of Territorial Integrity and Secession

Secession results in dismemberment of territory and hence, affects territorial integrity of a given State, and post-colonial practice reveals that in the case of unilateral secession, the claim for

²⁵⁴ U. N. Charter art. I(2) and Art. 55.

²⁵⁵ According to Nawaz, President Wilson in his infamous fourteen points indicate that “the concept of self determination consisted of the nation of self-government of people.” See M.K. Nawaz, *The meaning and Range of the Principles of Self-Determination*, 82 DUK. L. J 82 -101 84 1965 This line of interpretation accords with the original draft of I(2) of U.N. Charter as can be understood from *Travaux Preparatoires*. The original Dumbarrton Oaks draft stated that “to develop friendly relations among nations and to take other appropriate measures to strengthen international peas.” The original motive behind Art. I(2) thus appears to maintain internal peace by granting autonomy for self administration. *Id.*

²⁵⁶ Vidmar *supra* note 238 at 708.

territorial integrity is “*prima facie* applicable.”²⁵⁷ So is it permissible to unilaterally secede while a parent State objects? If so, what international law authority supports it? This question often asked than answered. Prevailing authorities simply support the sanctity of territorial integrity and prohibit dismemberment of existing territories, but in reality we know new state emerge by secession. For instance, the world’s newest nation, the Republic of South Sudan has declared its independence in 2011 after more than 30 years of armed struggle, and Eritrea split from Ethiopia in 1993 after fighting one of the longest civil war in Africa during cold war era.

With regard to unilateral secession, international law appears neutral. In normal course of things, international law does not acknowledge nor explicitly prohibit unilateral secession.²⁵⁸ Once a new State acquires independence without a counterclaim by the parent State or the parent State so consents to the secession by waiving its right to claim the principle of territorial integrity, international law acknowledges the new State. But where a parent State makes the claim of territorial integrity, international law never affords recognition, unless the situation falls in one of the strict exception. For instance, *de facto* independent States like Somaliland, Taiwan are not independent States; as their respective parent States make territorial integrity claim. However, in very limited instances exceptionally, Security Council may disregard the counterclaim for territorial integrity and confer independent existence of a new secede State.²⁵⁹ For instance, where the parent State makes explicit discrimination or causes grave human rights violation in a territory demanding unilateral secession, the claim for territorial integrity may be disregarded.

²⁵⁷ *Id.* at 710.

²⁵⁸ *Id.* at 708. International experience so far discourages unilateral secession. The Congo case proves this fact. In 1960 the State of Katanga declared independence from Congo but the international community fought against the State of Katanga by affording respect to territorial integrity of Democratic Republic of Congo. The question of Nigerian State of Biafra was another illustration. The international community, in particular African States, have opted for territorial integrity of Nigeria. Only Tanzania recognized Biafra as independent State while the rest of the African countries and the world supported Nigeria’s territorial integrity.

As Marc Waller argues in *Kosovo Advisory opinion*, unilateral secession may bestow statehood, if and only if the new State is conferred with “legal authority.”²⁶⁰ It is an authority that may be granted either by the parent State or collectively by international community including Security Council for just cause.²⁶¹ A parent State may expressly or impliedly consent to the secession. In the case of session of Eritrea, for example, Ethiopia was the first country to recognize Eritrea as an independent State just after the people Eritrea opted for secession by U.N sponsored referendum. Recognition by Ethiopia was waiver of the claim for territorial integrity thereby created legal authority for the creation of State of Eritrea. Almost an identical procedure was in secession of South Sudan. Legal authority may also be created by constitutional process. For example, the current Ethiopian Constitution legalizes secession if certain procedural requirements stipulated in the Constitution are met.²⁶² A constituent State of the Federal Democratic Republic of Ethiopia can get an unchallenged statehood by the authority of the FDRE Constitution.

As pointed out above, in very exceptional cases, as a result of grave human right violation and injustice, the Security Council may act under Chapter VII of the United Nations Charter to confer legal authority that may enable secession in rare cases. This situation may surface if collective action is taken under the auspicious of Security Council. Where Security Council confirms unstoppable and widespread human rights violation against a specific category of nation by mother nation, or grave discrimination that cannot be averted and thought to destabilize the State and affect international peace and security, may grant legal authority. Similarly wide spread recognition may confer statehood. Say for example, if almost all State recognize State hood of

²⁵⁹ Take for instance the case of East Timor where United Nations ignored the question of territorial integrity by Indonesia and finally assisted East Timor to get secede. Security Council acted under VII of the Charter by establishing a transitional administration. See Vidmar *supra* note 258 at 729.

²⁶⁰ Vidmar *supra* note 238 at 710.

²⁶¹ *Id.*

²⁶² FDRE Constitution, art. 39.

Somaliland, and if there is no way for Somalia to avert the situation through claim of territorial integrity, Somali Land may be conferred legal authority to secede.

3.6. Stages of International Boundary Making

International boundary making involves some basic stages. The stages are commonly adhered though strict adherence is not a legal requirement, or not a necessary step that need to be strictly. However, the stages naturally involve in international boundary making. For instance, the territory to be separated by a boundary line should be determined; then the criteria for the actual separation should be set. The size, width, length, the method of delineation is supposed to be expressed in the boundary making treaty. The territory then will be apportioned in accordance with the pre-determined rule. Each part of territory will be described in a way it is possible to specifically distinguish from the other portion of territory. On the basis of the description, and accompanying map, boundary markers will be emplaced on the actual point of separation (the boundary line). Boundary markers may be pillars, monuments, posts or beacons that signal the end of territory of a given State and the beginning of another. These are normal procedures that naturally involve in the international land boundary making.

The stages of international boundary making termed until finally settled with clearly articulated expressions. For instance, in *Argentine-Chile case* of 1902 Edward VII captioned the stages as *definition, delineation* and *fixation*.²⁶³ Definition holds the initial stage of boundary making, including agreement on the territory to be partitioned, deliberation on areas to be apportioned, the extent of the division and the part to be ceded to or given to a neighboring State. The stage of definition is too general, which may not specifically locate a given boundary line. The

²⁶³ Dennis Ruthworth, *Mapping in Support of Frontier Arbitration* IBRU BOUNDARY AND SECURITY BULLETIN (SPRING 1999) at 61 available at https://www.dur.ac.uk/resources/ibru/publications/full/bsb5-1_rushworth.pdf last accessed 9/2/15.

next step, *delineation*, is description of each part of territory including maps. Fixation is the last stage in which visible signs will be planted on the actual point of separation. In 1902 Sir Thomas Holdich termed the last stage of boundary making (fixation) as “actual demarcation”.²⁶⁴ Lord Cruzon in his 1907 lecture describes the second stage of boundary making (known as delineation at the time), as a work of diplomats that require the art of diplomacy, whereas, the last stage (fixation at the time), as a mechanical process.²⁶⁵ It is a mechanical process because it is a stage of implementation of deliberations of political authorities that is already described in the boundary-making document. At this stage, boundary engineers will build pillars signaling the end of one’s boundary and the beginning of another.

French International Jurist, Paul de Lepadelle, however, chose other captions denoting international boundary making. To Lpadelle, boundary making involves three important stages: *preparation*, *decision* and *execution*.²⁶⁶ Apart from variation in caption, in essence all classifications of boundary making stages are similar.

In the middle of 20th century Stephen Jones came up with the expressions that clearly reveal practical functions of stages of boundary making which has got universal acceptance. Jones in his notorious book entitled, “Boundary-Making A Handbook for Treaty Editors and Boundary Commissioners) illuminates four stages of boundary making: allocation, delimitation, demarcation and maintenance.²⁶⁷ Allocation is a political decision to divide a given territory among two or more

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Donaldson & Williams, *Delimitation and Demarcation: Analyzing Legacy of Stephen B. Jones Boundary-Making* 13:4 GEOPOLITICS 687 (2008).

²⁶⁷ Victor Prescott accepts the four stages of boundary making as stated by Stephen Jones (See Prescott *supra* note 123 at 59 – 76).

contending States. The next stage of boundary making is a stage of precise delineation of the allocated territory. It is known as delimitation.²⁶⁸

Delimitation can be effected in numerous ways and by different organs depending up on the nature of the contest relationship between contending States. It may be stipulated by treaty, resolutions or minutes of political decision makers, resolution of international organizations like Security Council, UN General Assembly or regional organizations, court decision or arbitral award and so forth that can effectively determine territorial limits of two or more states. The next most important step in international boundary making is demarcation. It is generally viewed as the last stage in boundary making, as it finalizes the most important aspect of boundary making by emplacing boundary signs at the actual boundary point, in accordance with the act that has created the boundary. Maintenance is routine administration and periodic inspection of the boundary. It is “maintenance of the boundary makers [...] as long as the relevant boundary lines run.”²⁶⁹ Delimitation is more specific phase when compared to allocation but less precise when compared to demarcation.²⁷⁰

These historical classifications of phases still dominate boundary-making literature. As pointed out above, the stages of boundary making may not necessarily be strictly followed step by step in each case. In some cases some phases may be merged together, or in other cases it may be overlapped or delayed for centuries.²⁷¹ For instance, allocation and delimitation may be decided in the same forum, as both steps may be decided simultaneously.²⁷² Allocation may also take place by a unilateral action of one or more of parties and the other party may simply acquiesce by conduct or

²⁶⁸ The terms “delimitation” and “demarcation” were coined by McMahon who regarded the dictionary meaning of the terms identical. McMahon’s usage of the terms did not win universal acceptance. See STEPHEN B. JONES, BOUNDARY-MAKING, 57(1945).

²⁶⁹ GBENGA ODUNTAN, INTERNATIONAL LAW AND BOUNDARY DISPUTES IN AFRICA, 79(2015).

²⁷⁰ Jones *supra* note 268.

²⁷¹ *Id.*

²⁷² See *Id.*

expressly approve the stand of the contending party to take a given portion of territory before a precise scope is delineated. Thus, where the boundary is allocated for whatever reason before the formal delimitation, there is no need for reallocation, unless the parties involved disagree with the action of another.

The stages of boundary making may also vary depending upon the situation. Though the timing at which the parties involved, or the prevailing scenario on the ground may vary, each boundary making process involves some common phases. In some case parties may have involved in violent confrontation and either attempting to end the ongoing war or simply attempt to take time, tactically to prepare for a bigger war, or genuinely negotiate to end confrontation. The forum of negotiation may be bilateral, or mediated by third party, or it may be arbitration tribunal or International Court of Justice, which exercises a formal judicial process.

Execution of each phase demands resources and knowhow – expertise.²⁷³ Some times a political will or a motive may determine the actual process of boundary making. Depending upon urgency, after dealing with some pressing issues, states may keep a given phase for later consideration until financial or technical preconditions are met. In some cases demarcation may be delayed for centuries, unless there is a pressing issue for immediate actual demarcation. The nature of territory and its economic value may determine the moment of demarcation. Needless to say, if the territory is economically important and involves high cross boundary contact, states may be motivated to demarcate the border as soon as possible. On the contrary states may not prioritize demarcation of a barren land to other pressing issues. States may opt to use meager resources for necessities of life thereby reserving demarcation of unimportant land for some time in the future. Political, administrative, economic, technical considerations may therefore play a role in deciding a

²⁷³ Economic, technical, and times variables may influence the decision to demarcate.

moment in which a delimited territory has to be demarcated. Thus, depending upon the variables, after delimitation on paper, the boundary may remain unmarked for a long period of time.

This Section highlights each of these phases with a view to appreciate the legal, socio cultural and economic problems that may arise as a result of poor boundary making. International boundary making process, technically, starts with allocation or division of territory among contesting political organs. After a successful allocation, the next step is defining each point or negotiating on exact lines of separation. After an agreement reached on the specific points of separation then the actual boundary will be marked on the ground. The later stages are more of boundary management that may be done routinely. Some of the important steps are briefly summarized below.

3.6.1. Allocation

The first step in boundary making is to allocate a territory among the contesting parties. “Allocation is the initial political division of territory between two states.”²⁷⁴ Stephen Jones limits the number of parties to which a territory to be allocated into two, but in some cases a territory may be allocated among numerous States; there is no reason to limit the number of parties into two. It is not the number of beneficiaries of allocation that matters, but its meaning and nature. As pinpointed above, allocation is a political decision or an agreement authorizing a given state/states to legally possess a certain part of territory that will be specifically described under the stage of delimitation. For instance, Italy and Ethiopia agreed that the Kunama ethnic group (borderland residents in the north west of Ethiopia) was on Eritrean side. This is a general agreement because an exact limit of the territory that belonged to Kunama was not specifically described, even it was not actually known at the time of the allocation. The “contractants” agreed to deal with the actual specification of an exact limit of territories of Kunama later on.

In colonial times, territories were allocated among the European superpowers. Most of African territories were allocated among the colonial powers in the Berlin Conference. This process was continued even after WWI. For example, Great Britain and France agreed the former Levant (Syria and Lebanon) to be allocated to France and Palestine to Great Britain.²⁷⁵

A territory may be allocated to contending parties as a temporary relief on going conflict. First, allocating a territory by referring to indigenous communities like Kunama, as pointed out above. This is known as allocation referring to the “general inherent boundary”.²⁷⁶ In this case, the parties refer to a boundary separating tribes, villages or watersheds. The very purpose of this kind of clearly unsettled or precisely undefined distribution of territory is a temporary measure that would avoid dispute by giving some relief to the parties until a clear boundary is set.

Parties may also refer to a previously known administrative boundary.²⁷⁷ The previous administrative boundary may not necessarily be precisely delineated, but it can serve as a temporary solution until a joint boundary commission or any other designated organ makes a final and clear delineation. In some cases, allocation may be simply recognition of sovereignty of a given political organ. Allocation, however, is not identical to recognition of a state by another political entity having no territorial link. A State negotiating with another State to get a given portion or part of territory may be a constituent part of a bigger State. For instance, former U.S.S.R member States or a state from which a given constituent political organ was seceded can recognize territorial holding of the parted State. After collapse of the U.S.S.R most former members have recognized the independence of another State before dealing with the actual boundary that has clearly divided them. For example, “Ukraine has signed bilateral and multilateral agreements with all of its

²⁷⁴ Jones *supra* note 268

²⁷⁵ INTERNATIONAL FEDERATION OF SURVEYORS (FIS), INTERNATIONAL BOUNDARY MAKING, FIG PUBLICATION NO. 59, 21(Haim Srebo ed. 2013). This was not actually colonization but occupation of the states concerned until they are able to exercise self – determination.

neighbours that recognize sovereignty over their respective territories and the inviolability of boundaries that defined them at independence.”²⁷⁸ Parties may also use geometrical method at distant location without having topographic view or actual holders of the territory. This was the method applied in Berlin Conference during partition of Africa. In a situation where geographic or human realities were not known, the only method was using meridian and parallel lines. Eastern Sector of Ethio-Eritrean boundary was delimited by mathematical system of boundary making. This method is also known as astronomical method.²⁷⁹ This method may appear the actual delimitation but it has an element of allocation too.

Allocation is a procedure of boundary making that is often done at a time where no clear knowledge about the geographic or human realities on the ground is available. It is a temporary solution, but effective use of some available information would make delimitation quicker and easier. Needless to say, an ambiguous allocation would result in a messy delimitation that would plant an unmanageable conflict like the one Africa has been enduring. The decision to allocate a territory may not necessarily specify every aspect of boundary points but it should address all the possible issue that may halt delimitation. The political decision “ [...] should better address the problems that are likely to emerge in the later stage of delimitation or demarcation.”²⁸⁰ Thus, the quality and efficacy of demarcation depends upon clarity and preciseness of allocation. Jones remarks, “ If territorial allocation has been unwise, the utmost nicety of treaty phrasing or surveying will not make a stable boundary.”²⁸¹ On the same token, a well-allocated boundary should also be

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 22.

²⁷⁸ Organization for Security and Cooperation in Europe (OSCE), Applied Issues in International Land & Boundary Delimitation/Demarcation practices, A seminar Organized by the OSCE Borders Team I Cooperation with Lithuanian OSCE Chairmanship 31 May – 1 June 2011, <http://www.osce.org/cpc/85263?download=true> Accessed 03/28/15

²⁷⁹ FIS, *supra* note 275 at 22.

²⁸⁰ Organization for Security and Cooperation in Europe (OSCE), Applied issues in International Land Boundary Delimitation Demarcation practices 9 (2011).

²⁸¹ Jones *supra*, note 268 at 5.

specified in the treaty or other forms of delimitation precisely; otherwise, demarcation would be impossible or conflict may arise during demarcation.²⁸²

3.6.2. Delimitation

3.6.2.1. *Meaning and Nature*

Delimitation is a legal process in which two or more sovereign nations “establish and describe” the location of their common border.²⁸³ McMahon, the first person to coin the notion of “delimitation” defines it as, “...*the definition on paper either in words or on a map of the limits of a country.*”²⁸⁴ To Professor Cukwurah, delimitation is “[...] a diplomatic procedure, the business of treaty makers, who should decide on the trustworthy evidence the line which will be acceptable to both high contracting parties.”²⁸⁵ Stephen Jones illuminates delimitation as, “... the choice of a boundary site and its definition in a treaty or other formal document.”²⁸⁶ Other formal documents include judicial decisions, arbitral award, or compromise in which boundary dispute is resolved.²⁸⁷

Thus, delimitation is a process in which an exact specification of the scope of boundary is stated. The extent of boundary description or specification may vary with the level of development and technological progress. Each separating point will be pinpointed in a way it is possible to emplace boundary makers on the borderline. Delimitation, therefore, services as a blueprint that guides the actual boundary making. As preparatory stage for the actual boundary making, “Delimitation covers [...] all the preliminary processes and procedures involved before a boundary

²⁸² *Id.*

²⁸³ Alec McEwen, *The Demarcation and Maintenance of International Boundaries*, A paper presented at a training workshop on the Demarcation and Maintenance of International Boundaries, University of Durham, 8 – 9 July 2002, Available at <http://people.ucalgary.ca/~amcewen/IBCdem.pdf> (last visited Jun 24, 2015 3:38 PM).

²⁸⁴ International Federation of Surveyors (FIG) *supra* note 295 at 23, cited from Totter, 1897).

²⁸⁵ A.O.CUKWURAH, *THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW*, 33 (1967).

²⁸⁶ Jones *supra* note 268 at 57.

²⁸⁷ Cukwurah, *supra* note 101 at 34.

is laid down on the ground [...]”²⁸⁸ Thus, all acts and procedure that involve in boundary making before the stage of demarcation commences is viewed as delimitation.

It has been pointed out that delimitation is a description of supposed boundary. As a procedure leveling ground for erection of boundary markers, delimitation should be clear enough specifying all the boundary points in consideration of local geographic and human factors. The question then is how to gauge the clarity? The bottom-line for delimitation is its unambiguous guidance to set an actual boundary line on the ground at the demarcation phase. It is not only the clarity that matters, but as Professor Cukwurah points out, delimitation should be acceptable to all involved.²⁸⁹ This aspect makes the work of delimitation hard, as it is not possible to win consensus of all involved in the boundary making. To settle issues that may arise during delimitation, compromise appears mandatory; otherwise, peace cannot prevail in the region.

The clarity of delimitation, therefore, depends upon its quality to ease the demarcation process. Boundary engineers can easily understand a clear delimitation that coincides with the border facts to erect boundary markers. The demarcators will be able to build pillars or other forms of boundary signs just by reading or observing the delimitation without the need for further clarification or negotiation. The engineers or other experts may not necessarily be people who took part in the delimitation negotiation to have personal knowledge of the geographic or human realities on the actual boundary. They will be guided only by the statements and figures stated in the delimitation.

3.6.2.2. *The Need to Know Geographic and Human Situation*

To make an acceptable borderline, treaty makers should know the nature of borderland. As Stephen Jones rightly remarks, “[...] a boundary is not an idea, nor a paragraph in a treaty, nor a

²⁸⁸ Ruthworth *supra* note 263.

line on a map, but a functional feature of the face of the earth.”²⁹⁰ Boundary making, therefore, involves a hybrid process. It is a mix of multifaceted facts and factors such as historical facts, political and economic considerations, and demographic factors.²⁹¹ Needless to say, delimiters should have a clear understanding of all of these complex realities on the ground.²⁹² Therefore, actual field visit and observation appears a necessary requirement that need to be carried out before actual commencement of delimitation. Stephen Jones, thus, rightly remarks, “The best definition or description of a boundary is that based on *personal knowledge of the area in question* [...]”²⁹³ (Emphasis added). Put simply, before attempting to delimit a borderline, there should be a complete field study of bordered regions.

A mistake in one stage of boundary making may hamper execution of the other stage. It may also lead into friction and stale the whole process or may even lead into war. The best approach to avoid or reduce mistake is to have personal knowledge of the borderland facts or gathering information from all possible sources if delimiters cannot personally visit the borderland.²⁹⁴ Participation of all relevant organs in boundary making would also reduce the possibility of mistake. Numerous people, with diverse expertise and political commitment, may take part in the delimitation process. Diplomats/ politicians, lawyers, surveyors, civil engineers, are among the persons that may be chosen to describe (delimit) an exact boundary line. As International Federation of Surveyors suggests, “[S]ince the precision of the delimitation process is very important, in order to avoid problems during the demarcation on the ground, the participation of

²⁸⁹ Cukwurah, *supra* note 101.

²⁹⁰ Jones *supra* note 268 at 6.

²⁹¹ See *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Ron Adler, *Positioning and Mapping International Land Boundaries*, 2:1 BOUNDARIES AND TERRITORY BRIEFING, 4(Clive Schofield ed.) 1995).

practical experts, who are capable of anticipating the practical problem of demarcation, is essential.”²⁹⁵

International Federation of Surveyors, suggest the need to form a joint team of experts who may reconnaissance border situation before carrying out delimitation. The team will analyze facts on the ground in light of demand of States to be separated by a boundary line. The team will regard historical facts, natural features and impact on the borderland residents. Investigation of facts on the ground may include studying and interviewing borderland community and their wishes. The team will also consider the actual evil of the prevailing boundary (*dejure* or *defacto*). The team “ [...should be assigned to the task of defining and preparing all the necessary professional data and tools for the boundary annex, of the treaty including defining the wording and the graphical expression of the delimitation which will be incorporated in the Treaty.”²⁹⁶ Despite paramount contribution of expert team that may ease the whole task of delimitation and shorten the time to complete border making, in a hostile environment that may be backed by multifaceted motives (like a situation border issue is simply a bargaining leverage, like Ethio-Eritrea border case), it is almost impossible to constitute a team of experts. ²⁹⁷ Constitution of expert team will not only facilitate boundary making, it will formulate an acceptable borderline.

If delimitation carried out without assistance of experts and in disregard of local situation, it may not be implementable – or would be extremely be hard to implement, if not impossible at all. According to Stephen Jones, “ It is highly desirable that no boundary be defined irrevocable in a treaty until a technical adviser experienced in boundary problems has been consulted upon the

²⁹⁵ FIS *supra* note 275 at 24.

²⁹⁶ *Id.* Alder *supra* note 226.

²⁹⁷ In such a scenario, it would be vital to settle the actual issue behind the scene before dealing with border delimitation or demarcation. If the main issue is settled amicably border question may easily be settled with working solution.

choice of the site and the working of the definition.”²⁹⁸ This reconnaissance need not consume much time but may prevent delimitation of unsuitable lines and reveal inaccuracies on maps.

Eritrea and Ethiopia border delineation best explains ambiguous boundary delimitation. . During colonial time, the Ethio-Eritrean boundary was delimited in the treaty of Addis Ababa, which was far away from the boundary area. It was very hard for the Ethiopian King who was not from Tigray Region to know an exact boundary line. Given the absence of quick communication or modern transportation facility that would enable Ethiopian negotiators and experts to contact border people, it is incomprehensible to admit that facts in the border were known.²⁹⁹ Presumably, as a result of unfamiliarity of the border regions, serious errors have been made which referred a boundary point to a non-existent river (*Muna/ Berbero Gedo*) or a confusing river that was referred several times in the map (maiteb, maiten, Meeteb or Maeten, Belesa A, B, C), that confused EEBC to draw an acceptable boundary and stuck the whole process of boundary making. The delimitation decision by the Eritrea/Ethiopia Boundary Commission has been unacceptable to the border residents, especially *Irob* people.³⁰⁰ As Stephen Jones attests, delimiters may commit a grave mistake if they are not familiar with the boundary, unfamiliarity with geographic and human facts or lack of knowledge of defining boundary.³⁰¹

To be familiar with the boundary in question one has to visit the borderland and observe facts on the ground. This method may, however, be impossible due to several contingencies. As physical visit is the best choice, members of the boundary commission should exert utmost effort to

²⁹⁸ Jones *supra* note 268 at 58

²⁹⁹ The apparent treaty does not mention whether border people were consulted or visited by the Ethiopian king. For the Italian negotiators there was ample possibility as they drafted the treaty in a way they wished to have more land. It has hared for the king who sat in the Capital, which was far away from the border area to know the local realities.

³⁰⁰ The *Irob* are indigenous people that reside on Ethio-Eritrea border region, but always been on the Ethiopian side even during colonial time. They never regarded them as Eritreans and never separated. Details of the *Irob* people and their opposition to the decision of the Eritrea/Ethiopia Border Commission (EEBC) will be mentioned in the last chapter.

³⁰¹ Jones *supra* note 268

visit the actual boundary. It is true that physical visit by high-ranking political personalities may not be possible, but authorities may delegate experts who can relay them documented facts on the ground. An actual physical visitation and reconnaissance of the borderland reality will consume much time but will save a lot during the delimitation stage and avoid errors and consequential confusion and conflict. Aerial photograph and satellite picture can be used, but may not effectively substitute an actual physical observation. In a situation where it is absolutely impossible for physical observation, the aerial photograph or satellite image may be the only option.³⁰²

3.6.2.3. *Methods of Delimitation*

Jones has provided numerous options for defining boundary.³⁰³ The first method is complete definition. In this case, the whole boundary line will be defined. This kind of delimitation makes demarcation easier as each point of boundary will be clearly spelled out. A boundary commission or other experts may opt to define boundary with the possibility to deviate. This means, delimiters may expressly authorize demarcators to deviate from the terms of delimitation in case of unforeseen situation that may not coincide with the terms of delimitation surfaces. One scenario may be human relationship like the situation of native border people. A treaty entered between Estonia and Latvia best illustrates this point. The treaty had authorized the Boundary Commission to make certain adjustments in consultation with the Parties to introduce changes to accommodate local facts, for example to “ [...] reunite farms which had been divided by the Arbitrators, and to make most reasonable use of the channels of communication.”³⁰⁴ The treaty may restrict the Boundary Commissions power to adjust by using words like “slight” or “minor”³⁰⁵ or the treaty may express

³⁰² *Id.*

³⁰³ *Id.* at 58

³⁰⁴ Estonia-Latvia: Convention regarding the Delimitation on the Spot of the Frontier between the Two States, Riga, October 19, 1920. League of Nations, Treaty Series, Vo. 17 (1923) at 40 Note 6 *Id.* at 59

³⁰⁵ Treaty between Belgium and the United Kingdom, March 19, 1927 Concerning Cong-Rohodesia boundary (Jones *supra* note 268 at 600).

the extent of deviation that the demarcators may go. It may be in terms of length. Costa Rica and Nicaragua, for example, authorized the Commission to depart up to one mile from the line drawn in the treaty.³⁰⁶

Delimitation may also be made in terms of turning points. This is the most common method of delimiting an exact scope of the boundary. The boundary point may be located by latitude and longitude (geographic coordinates). For efficacy of delimitation by turning points, the points should be clear enough so that a straight line to be drawn without any deviation. In some cases, a clear turning point may not be available. If the points were at a known place, the name of the place may also be used.³⁰⁷ It may be hard for the demarcators if the turning point cannot be found. This situation happened in Somaliland-Ethiopia border.³⁰⁸ It would have been easier, had the delimitors used the name of the place at which the turning/boundary point was located.

A zone may be defined as a point of demarcation in the delimitation. This method, however, is not advisable unless the two neighboring States have a reliable and strong friendship.³⁰⁹ Similarly, a boundary may be delimited by referring to natural features of land. This is the most common method of delineation in old days. In medieval times it was common to delimit boundary by referring to natural features of land. Mountains, rivers, lakes, oceans, are the prominent natural features that were commonly used as points of division of territories of two or more states.³¹⁰ Land holding of a given ethnic group had also been used as the end of territory of a given states. When delineating the Ethiopia and colonial Eritrea territory, Ethiopia and Italy agreed the Western Sector of the boundary to be territorial limit of Kunama ethnic group. Delimiting by the location of mountain, forest and desert is also elusive as an exact dividing line can be doubtful. The very purpose

³⁰⁶ For example, Convention between Costa Rica Nicaragua December 24, 1886. See Jones *supra* note 104 at 60.

³⁰⁷ *Id.* at 61.

³⁰⁸ In British Somaliland-Ethiopia Boundary, it was not possible to find out the turning point as stated in the delimitation while names were not rare. As a result, demarcators have adopted latitude and longitude (44° E, 9° N).

of boundary setting is to avoid possible territorial dispute, but is an elusive delimitation is not helpful to locate the actual boundary and dispute may arise.

As rivers cover a longest distance of boundary often used as point of separation of two or more states. It may be used on assumption of clarity or for defensive purposes.³¹¹ The colonial boundary treaties that were concluded between Ethiopia and Eritrea referred to rivers. If the river is not big enough, it may dry up or its name may vary from one locality to the other and create confusion during demarcation. Before delimiting borderline, by referring to river, a thorough study of nature and common naming is helpful. Delimiting by referring to river nowadays is almost settled. The actual boundary depends upon the kind of river. In non-navigable river, in absence of contrary agreement, an exact boundary is exactly the middle of the river, whereas in the case of navigable river, an exact point of separation of two states is thalweg.³¹²

Thus, delimitation by natural features of land often causes trouble.³¹³ Maps drawn on the basis of natural features of land may be inaccurate, and inadequate map may cause conflict during demarcation. This situation exactly happened in the Western and Central Sectors of Ethiopia - Eritrea border. The 1900 colonial treaty mentioned three rivers: *Belesa*, *Muna* and *Mereb* as boundary rivers separating Eritrean and Ethiopian land, but the river *Muna* was not known in *Irob* districts and could not be found. As a result a huge mistake that may split *Irob* indigenous people and permanently change their lives was committed. The *Irob* people have been fighting to convince the Ethiopian Government to ignore the decision of Eritrea/Ethiopia Boundary Commission. This and other similar issues have practically stalled the demarcation process.

³⁰⁹ Elder *supra* note 226 at 5.

³¹⁰ Cukwurah, *supra* note 101 at 40 – 77.

³¹¹ IBRU, *International River Data Base*, <https://www.dur.ac.uk/ibru/resources/irbd/> (last Visited Jun 18, 2015).

³¹² Cukwurah, *supra* note 101 at 51.

³¹³ Jones *supra* note 268 at 62.

A boundary may also be defined in principle. It is a flexible form of delimitation. Boundary makers depending upon the prevailing circumstance may adjust boundary with a view to reduce rigidity. Delimitation in principle, thus, is not a comprehensive and fixed type of definition. Delimiters authorize demarcators to consider geographic and human factors into account. This kind of delimitation is based on fairness. It is a form creating boundary line by considering the need and interest bordered people. For instance, Boundary Commission may ignore a borderline that may split closely related indigenous people; it may be set by considering resource sharing, among communities, or follow prevailing trade line.³¹⁴ Delimitation in principle cannot be used to delimit the whole boundary but can only be applied in need basis to create justice among the closely related border residents. This kind of delimitation gives high latitude to demarcators, but is time consuming, as the demarcators have to investigate the prevailing geographic reality and border residents' way of life before deciding on the point of separation (the border line). With a view to limit the power of Eritrea-Ethiopia Border Commission (EEBC), the two States have expressly avoided consideration of fairness (the principle of *ex aequo et bono*).

3.6.3. Demarcation

3.6.3.1. Nature and meaning

It has been point out that delimitation is a blueprint in boundary making process – it is a plan that directs the process of boundary making at the demarcation stage. Delimitation, in fact, not only guides the process of demarcation, but also controls demarcators to carry out the boundary making in accordance with the specification enshrined in the delimitation document (the treaty). Work procedures, governing laws, personnel and financial consideration, and so forth are expected to be exhaustively dealt at the delimitation stage. The number of demarcators, composition and

³¹⁴ *Id.* at 63.

power, the extent of neutrality expected from the expert demarcators, security personnel, assistants and laborers, medical personnel, scientific staff, resources, the extent of each party's share of demarcation expenses, supplies and transportation are some of the points expected to be decided at the delimitation stage.³¹⁵ The demarcation process, thus, may not be as tense as delimitation and will be carried out by experts and technicians, relieving high level authorities from routine technical matters, unless unexpected event that would stale the work of demarcation surfaces.

To geographers and other experts in the field, the notions of “demarcation” and “delimitation” are very basic concepts, but to an ordinary people the terms may be vague or may appear one and the same. An ordinary person may have notice of a border when it restrains movement. But a border wall or a fence that restrains movement comes into existence after the stage of demarcation is completed. Therefore, one may question what demarcation is and how it actually works? Who carries out the demarcation and what makes it less tense than delimitation? How unexpected situations that may surface during border making may be managed? These are some of the issues that need brief explanation.

According to Stephen Jones demarcation, “ [...] by its very nature, [is] a field operation,”³¹⁶ It is a work which “ [...] is strictly technical: control by astronomy, triangulation, or aerial photography, projection of the line, mapping a boundary strip and erection of monuments.”³¹⁷ A pillar, post or monument will be erected at the spot stated in the delimitation and shown in the map. As has been pointed out else where, a map may illustrate textual description of treaty, court decisions or arbitral award regarding a given boundary. In all cases an exact boundary point at which a pillar may be placed is expected to be pinpointed in the delimitation. Surveyors and cartographers can easily locate the boundary point as stated in the delimitation and boundary

³¹⁵ Jones *supra* note 268 at 165 – 178.

³¹⁶ *Id.* at 165.

engineers will erect boundary marker. After boundary markers are erected at all the spots, and other complementary tasks are discharged, the demarcation team will be discharged and the processes of boundary making may be complete.

It may happen that demarcation, for various reasons and causes, may not be congruent with the boundary points as stated in the delimitation. For instance, a boundary pillar, by mistake or in deliberate foul play, may be implanted at a wrong location contrary to the treaty wordings. The problem may be discovered after centuries and the two neighboring States may not reach into agreement to amicably resolve it. This was an actual problem that surfaced in the boundary between Israel and Egypt. In this contradictory situation which one shall prevail? The boundary point that was specified in the delimitation treaty about 100 years ago or the location of pillar on the ground which was known to the local people as a boundary point for several years? Each State will supposedly favor an interpretation that adds more territory. The disparity between the two important facts of boundary making may happen due to mistake, foul play or a pillar may have been moved unilaterally by one of the neighboring State or it may have happened by third parties or by non-state actors. The point in this situation is not investigation of how the disparity surfaced, but how to resolve such a situation? Put other ways, if delimitation and demarcation don't coincide which one prevails?

In Israel-Egypt case, the joint Boundary Commission could not solve the contradiction and referred the case for resolution by a neutral court.³¹⁷ As delimitation is simply a description stated on the paper – be it treaty, judgment or arbitration award with or without accompanying map - the boundary marker – may be pillar, monument, post or there mark denoting boundary line on the boundary spot, which is known to the local people, and presumably impliedly approved by serving

³¹⁷ *Id.*

³¹⁸ E. Lauterpacht, CBE, QC, *The Taba Case: Some Recollections and Reflections*, 23 ISR. L. REV. 443 – 468 (1989).

as a line of separation of two neighboring States is preferred to an abstract delimitation, which may not be known to the local people - the actual beneficiary.

3.6.3.2. Demarcation on the Basis of Natural Features of Land

It has been pointed out elsewhere that before advancement of technology to precisely locate an actual boundary point on the ground, nations had relied on natural features of earth like mountain, river, ocean, sea and even dense forests. If a treaty simply refers to a given land scape as boundary, say for example, a given river or mountain as a boundary between two or more states, then the law regards the stated land scape as a point of separation between the neighboring States. The problem of delineation with “natural boundaries” is its elusiveness. An ocean, a river or a given forest may be large enough having its own width to specifically demarcate. Thus, demarcation by using these natural features of earth may arise a question, “Where is an exact boundary line?” If a treaty, for instance, stipulates, “The boundary between China and India is Mountain Everest,” one may fairly ask if which State owns the mountain or if the mountain is taken as commonly owned, or the extent of share of China’s or India’s share of the mountain. Therefore, delineation of boundary on the basis of natural features of land may not be precise enough to tackle boundary conflict.

However, experts in the field have attempted to mitigate the elusiveness of natural boundaries. For instance, in the case of mountain boundaries, unless otherwise agreed, the watershed is taken as boundary point.³¹⁹ In the case of dense forest or desert, however, an exact dividing line is still elusive. As Cukwurah, rightly points out deserts or dense forests may afford effective barrier for border crossing, “[...] yet unlike mountain, they do not possess naturally marked sites for boundary lines.”³²⁰ The most rational solution appears to take the median point of

³¹⁹ Cukwurah *supra* note 101 at 41.

³²⁰ *Id.* at 20

the desert. Otherwise, a forest boundary will be deemed as a zonal boundary that is in between the bordered States.

The traditional rule of delimitation in non-navigable river boundaries was riverbanks as boundary line and making the riverbed common to the riparian States.³²¹ In this changing world where all spaces can be exploited for natural resources, this rule is not adequate enough to preclude the possibility of conflict. Thus, unless otherwise agreed to the contrary, a separating line extends to the riverbed. In the case of non-navigable river, the center of the reverted riverbed is boundary point; whereas, in the case of navigable river, it is *thawleg*, (the median channel) of the riverbed is a boundary point.³²² Apportioning the navigable part of the river allows both riparian States to benefit the navigation function of the river. Its side effect is the possibility to annex more territory to the other side if the deepest navigable side of the river squeezed to one of the banks.

The other related issue of river boundary is the legal effect of boundary when the river changes its route. The old rule was that the boundary follows the river. This means, if the river diverts to the other riparian territory, the old bed will belong to the other adjacent territory, making the owner of the territory to whom the river diverted lose some portion of territory including the former waterbed. This rule appears unfair, as it makes one of the neighboring States to lose a portion of its territory because of the diversion of the river. The current law has changed the unfairness of the old law by making the former riverbed to continue serving as boundary point.³²³ River diversion, therefore, cannot change the old boundary. It will be changed into a land boundary.

³²¹ *Id.* at 46

³²² *Id.* Boundary dispute between the State of Iowa and Illinois it was held that the boundary of two States was the mid channel (thewalg).

³²³ In the Case between Iowa and Nebraska, where Missouri river suddenly changed its course and made a new channel the Supreme Court of United States held that the old boundary was not changed. See also *Pereyra Iraolo v. Provincia De Buenos Aires* in which it was pointed out that if a navigable river abandons its former water bed, the former boundary line continues to run at the former mid channel.

Regarding water boundaries, it is not only river that poses puzzle, but also litigation and legal wrangling is common in respect of boundaries of stationery water like lakes, oceans and seas. Who owns for example, an inland lake that is bounded by two or more States? For instances, numerous States are surrounded by Lake Victoria. It is true that each neighboring State has interest in the lake and its rich resources. International law has to address an apparent conflict of interest. A lake is inland water; thus unless otherwise agreed, the rule of delimitation and demarcation of river boundary governs demarcation of lake boundaries.³²⁴ A lake is normally navigable, and hence, the median channel, *thalweg*, is the boundary point. Thus, territorial jurisdiction of State extends up to the middle of *thalweg* of the lake.³²⁵ It is a matter of measurement and physical assessment that can be easily determined by the neighboring States with the need of judicial assistance.³²⁶

In the case of sea, it is also settled that jurisdiction over coastal states goes up to 12 nautical miles,³²⁷ with the possibility of EEZ of 200 nautical miles. The fundamental principles of international law governing international sea has been never doubted since the judgment of the seminal case, *Anglo-Norwegian Fisheries Case*,³²⁸ which extends territorial limit of coastal states to certain predetermined scope of international sea. The core principle is the adjacent land determines the possibility of extending territories into the sea. ICJ in the *Anglo Norwegian Fisheries cases* has declared, “ [...] the belt of territorial water must follow the general direction of the coast [...] ”³²⁹

³²⁴ Cukwurah, *supra* note 101 at 69.

³²⁵ A 1920 Peace Treaty between the former U.S.S.R and Lithuania directly address this issue. Art. 2 of the Treaty declares, “ in those cases where the frontier is carried along lakes, and canals, it shall pass through the middle of these lakes, rivers and canals, unless otherwise provided for in this treaty.” Cukwurah *supra* note 115 at 69 quoted from Doc.E/eCE/136, at 18.

³²⁶ In maritime boundary, no pillars or monuments signaling boundary can be emplaced. Geographic coordinates virtually serve as a point of boundary line. Thus, out of necessity the only method of demarcation is virtual demarcation.

³²⁷ U. N. Convention on Law of Sea, art. 3.

³²⁸ I.C.J Rep., 1951, at 115, 133.

³²⁹ *Id.*

Demarcation and boundary making is generally *sue generis*, though territorial limit of sea is as a general rule is applicable through out the globe. Unless the parties stipulate otherwise, a commonly accepted international law norm governs the demarcation of international maritime boundaries. Territorial water limit of a State is demarcated virtually through geographic coordinates.

3.6.3.3. *Is demarcation a necessary requirement in all cases?*

Demarcation is sign making on the actual boundary line to indicate the end of one's territory and beginning of another. Should the point of separation of two nations still be demarcated while a clear boundary line is set at the delimitation stage? Technically, it is possible to say that if all the contours of the boundary are precisely and exhaustively spelled out at the delimitation stage, demarcation may be redundant. For instance, if negotiating States have exhaustively described a boundary line and if the boundary line is unambiguously clear, demarcation will be redundant. If the negotiating parties have agreed a specific river, mountain, or another form of permanent mark to be a boundary point, and an exact point of separation is clear, there is no need to carry out demarcation.

In practice, however, delimitation by using natural features of land can never be precise. Nature is always in the state of change and so does the landscape of earth, but boundaries are expected to be permanent and stable. For instance, a river may divert its bank, or may dry up or perimeter of a mountain may be wide enough and later on conflict may arise. Thus, if the clarity of the boundary line is doubtful or subjected to varied interpretation, it is advisable to erect a pillar or monument that will sharply indicate a specific point of separation between the neighboring States. The very purpose of demarcation is to set an unambiguous mark that can clearly reveal a point of

separation. If this point is naturally and clearly set, and the Parties have consented to it, there no need for demarcation – delimitation in this case serves both functions.

3.6.3.4. *Demarcating Personnel*

Enormous people with diverse experience, professional capacity and political interest may involve in the demarcation process. Depending upon terms of the delimitation, boundary engineers, surveyors, cartographers and other supporting staff will carry out the actual marking of exact of point of separation (the boundary line). The Parties in, accordance with terms of delimitation, will name demarcators. The number of demarcators, their professional expertise, nationality and the scope of neutrality expected to be specified in the delimitation.

In the case the demarcation personnel was not stated in the delimitation, the highest officials of the concerned States have to name the demarctors or set a criteria for the appointment of demarctors. Demarcation traditionally performed by a group of people assigned from the neighboring States. Each State will appoint certain number of persons as stated in the delimitation. The number of demarcators from each of the States may be equal, but this is not a requirement. The experts (engineers, surveyors, cartographers, researchers, doctors, other assistants, like drivers, cook, security personnel and so forth) may be appointed either by the joint Boundary Commission (usually highest category).When delimitation is court judgment or arbitration award the tribunal may also be entrusted with power of demarcation. The judges or arbitrators may not personally carry out the demarcation, but can hire experts who work under their guidance and close scrutiny. In other cases, tribunals simply decide on delimitation and another group of people may be empowered to demarcate the actual boundary line. The Eritrea-Ethiopia Boundary Commission, for instance, empowered with the power to delimit and demarcate.

3.6.3.5. *The Power to Adjust Boundary*

It appears unwise to refer all minor contingencies that may surface during demarcation to the busy political authorities for explanation. As a result, it has been an established practice to authorize expert demarctors to adjust the delimitation line if an unforeseen barrier emerges out during the demarcation. Put simply, the demarctors may be empowered to make a minor adjustment in the boundary line, should strict application of terms of delimitation thought to hamper peaceful coexistence or if it is manifestly impracticable to demarcate. International boundary experts, including Stephen Jones, agree with the possibility of adjusting boundary to suit to the borderland facts and geographic realities.³³⁰ In the words of Jones, “Many treaties leave, and *all should leave*, to the demarctors the final adjustment of the line to local needs and the realities on the terrain.”³³¹ (Emphasis added). The very purpose of boundary making is to create a lasting peace. If the boundary fails to meet this objective, it would be waste of time and resources. Therefore, unless all situations were empirically studied and considered in advance, the demarcating team should be conferred with fair latitude of power to adjust an actual line before drawing a final boundary line. It is the demarcating team that interacts with two sides of border residents and observe an actual problem on the ground. A notorious boundary-making expert remarks as follows:

[...] when Commissioners reach the locality of demarcation, a reasonable latitude is commonly conceded to them in carrying out their responsible task. Provision is made for necessary departure from the Treaty line, usually on the basis of mutual concession.³³²

The demarcating team will analyze the impact of a given boundary line on border interaction and border transactions. The team knows the weather condition, shared resources like water springs, grazing land or forests for firewood. If a power to adjust boundary line is given in a

³³⁰ Jones *supra* note 268 at 165.

³³¹ *Id.*

³³² Ruthworth, *supra* note 263.

treaty with the objectives of making lasting peace, the borderline will be respected forever and will be a gate for interaction thereby changing the traditional restraining function of borders. Therefore, adjustment of the border by the demarcators who may take local facts into account will have a paramount significance in building a smooth functioning border.³³³

3.6.3.6. Ancillary Functions of Demarcators

A demarcation team may extend effort beyond border marking to peaceful and stable border making. In other words, demarcators in addition to emplacing border markers, may endeavor to improve borderland interaction by encouraging bordered people to socialize. Socializing bordered people will build confidence and avoid animosity. In the words of Stephen Jones, “A demarcation commission has also a third function, seldom, if ever explicitly stated.” That function is according to Clifford, the improvement of frontier relationships.³³⁴ Though not empowered with the task of border making, the United Nations Mission on Ethiopia and Eritrea (UNMEE) has attempted to connect Ethiopian and Eritrea church leader with a view to build confidence between the two brotherly people. A border marking (demarcation) team is the only neutral body working in the borderland with a view to create peace in the region, especially in a situation where the scares of violent conflict not healed. Peace making, thus, is complementary to border creating and hence helpful to build an acceptable and effective borderline that can create a lasting peace.

3.6.4. Boundary Administration (Maintenance)

A demarcated boundary should serve the goals of keeping peace and stability by signaling an exact limit of boundary line between neighboring States. Visibility of a boundary marker avoids confusion and conflict that may arise as a result of inadvertent intrusion. Travelers crossing a well-

³³³ Jones *supra* note 268 at 165.

³³⁴ *Id.* at 268.

demarcated boundary with a clearly noticeable boundary pillar, voluntarily submit themselves to the jurisdiction of a State that has sovereignty over the territory. A boundary marker is an important tool to regulate the behavior of border residents or anyone around the border.³³⁵

Erecting boundary markers is not the end of the “business” of boundary making. Boundary pillars have to be kept in tact in a way visible to the actual and potential boundary crossers. A boundary marker is a man-made building that may be destroyed either by naturally catastrophe, wild animals or by human act. To be specific, a pillar or other form of boundary marker may be destroyed by wear and tear, it may fall or may be dismantled by flood and erosion, or may be wiped out by wind and other forms of natural disaster with/without influence and contribution of human being. A pillar may be obliterated or moved from its original location by human act or by other unforeseen cause. Visibility of a boundary marker may also be vitiated as a result of growing trees or vegetables that may cover the boundary marker. This calls for a periodic inspection and a remedial action with a view to obviate an act or fact that can hamper the important functions of the boundary markers. The inspection and reconnaissance of boundary markers is a permanent activity that should be done periodically at a predetermined time gap.

Stephen Jones classifies this stage of as a fourth stage of boundary making, and labels it as boundary administration. It is also known as boundary maintenance. Is boundary maintenance, which is unending enterprise, a stage of boundary making? Both boundary administration and maintenance are permanent in nature, as far as the boundary exists. Boundary administration/maintenance is vital to keep boundary markers to continue “making good neighbors” by keeping peace and stability.

Boundary administration has to be preplanned as a part of boundary negotiation at the delimitation stage or can also be done during demarcation, or may be agreed immediately after

³³⁵ FIS *supra* note 275.

completion of the demarcation. Treaty makers should devise a specific provision governing boundary administration. Cukwurah attests this view stating, “The delimitation and demarcation of an international boundary will be no avail if, in the long run, no provisions are made by parties for the protection, maintenance and repair of an established boundary.”³³⁶

According to the Federation of International Surveyors, with a view to keep border stability, boundary markers should be maintained continuously in regular intervals.³³⁷ An uninterrupted and periodic maintenance demands a clear procedure and a regular reconnaissance.³³⁸ It may be carried out by a professional team, who may work either jointly or separately depending upon the terms of negotiation. A periodic inspection and reconnaissance can be effected through a joint boundary commission. Joint boundary team of China-Mongolia boundary commission, for instance, in addition to the partial investigation that can be carried out as needed, the joint team works within 5 years, while Israel – Jordan carries out reconnaissance within a year.³³⁹ Boundary administrators will jointly or individually resolve boundary problems depending upon the terms of agreement or the nature and volume of the problem. All problems and solutions should be documented.³⁴⁰

Boundary Commissioners of United States/Canada are authorized to permanently administer United States – Canada boundary.³⁴¹ Each State appoints a commissioner who makes annual report to State department. The Commissioners have their own staff that assist Commissioners and remunerated by their governments. The boundary commission works in accordance with the treaty that was approved by the States. Some boundary commissions discharge the normal periodic duty of inspection separately in accordance with prearranged method while others may carryout the

³³⁶ Cukwurah,*supra* note 101 at 83.

³³⁷ *Id.* at 33.

³³⁸ FIG 275 32

³³⁹ *Id.* at 34.

³⁴⁰ For example, Art. 4 of the U.S.A Canada treaty of Feb. 24, 1925 empowers a joint team to monitor the boundary line and to settle all problems that will be encountered including repairing damaged boundary marker, relocate or rebuild them if obliterated, keep boundary vistas open or move boundary monuments to the new sites. *Id.*

inspection jointly.³⁴² While inspection has to be done individually, unless there is issue, each team should not repeat what the other has done. It is possible to apportion the duty to inspect the pillars among the team. If anyone of the team finds some thing unusual, has to report the finding to the other team and action can be taken jointly.

³⁴¹ See International Boundary Commission,

³⁴² Pillars with the tag of odd numbers were allocated to Chinese team, while even numbered pillars were allocated to Mongolian team. FIG *supra* note 295 at 35.

CHAPTER FOUR

African Boundary Regime and Governing Principles

4. 1. Overview

There is little doubt about the arbitrary and divisive nature of African colonial boundaries. African boundaries were set in complete disregard of geographic, linguistic, and ethnographic affinity, and have planted unending conflict and animosity among Africans.¹ Ironically, in fear of presumed chaotic situation that thought to surface, had the boundaries redrawn², founding fathers of OAU have decided to respect boundaries existed on the critical date of independence.³ Despite the decision to abide by the pre-independence boundaries with the intention to avoid the presumed chaotic situation, colonial boundaries have been source of most of Africa's "civil and [international] wars that have ravaged the continent, and brought misery to many of its inhabitants."⁴ In some cases, arbitrary boundaries are pondered as time bombs that may explode at any time and in any

¹ The very people who partitioned Africa admit ignorance of African facts when partitioning Africa. Lord Salisbury's in his 1890 speech regrettably remarks, "*We have been engaged ... in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers exactly where those mountains and rivers and lakes were.*" (Emphasis mine) (Lord Salisbury's speech of 1890 quoted in Territorial Dispute (Libya v. Chad) by Judge Ajbola in his separate opinion, ICJ Reports 6(1994) at 53 quoted in Robert McCorquodale and Raul pangalangan, *Pushing Back the Limitations of Territorial Boundaries*, 12:5 EJIL 867, 867 – 888 (2001). See also Johson Oalaosebikan Aremu, *Conflict in Africa: meaning, Causes, Impact and Solution*, 4(4) AFRICAN RES. REV. 559 551, 549 – 560 (2010).

² Ikome terms the takings of founding fathers of OAU as, "... partly because of a legitimate concern that any attempt to review the boundary will lead to anarchy." Francis Nguendi Ikome, *Africa's International Borders as Potential Sources of Conflict and Future Threats to Peace and Security*, ISS PAPER NO. 233 12 (2012). According to Ikome, though "inviolability" of existing border did not absolutely avoid border conflict, had the borders been reviewed quite more chaos would have been emerged. *Id.*

³ Apart from Morocco and Somalia, the rest of the founding members of OAU have consented to respect boundary lines drawn before decolonization, See the Cairo Resolution of Assembly of Heads of States and Governments (AHSG/Res/16(1) July 1964

⁴ Report of the Chairperson of the Commission on the 34d Conference of African Ministers in Charge of Borders Issues, EC.CL/726(XXI) 9- 13 July 2012. See also Depart of Peace & Security of African Union Commission, *From Barriers to Bridges Collection of Official Texts of African Borders from 1963 – 2012* 22(2nd ed. 2013). It is aptly stated, "Africa became the theatre of the most devastating wars that have occurred in the world since 1945." *Id.* See also Samuel G. Amoo, *The OAU and African Conflicts: Past Successes, Present Paralysis, and Future Perspectives*, WORKING PAPER Inst.of Conf. Analysis and Res, George Mason University, (May 1992).http://scar.gmu.edu/wp_5_amoo.pdf

direction.⁵ Continued push by the separated tribal groups for unity, irredentist movement, vague boundary line that is hard or impossible to demarcate on the ground has been perpetuating unending conflict in Africa.⁶ As a result, more than any continent in the world, Africa suffers from protracted territorial and boundary wars.

As do pre-Westphalian European boundaries, pre-colonial African boundaries were porous and had been changing, as tribes, ethnic groups, nations or nation states frequently move or migrate from one place into other looking for favorable environment or resources necessary for conducive life. Despite some attempts to devise a clear boundary line, the Westphalian formula of creating a linear boundary was largely “imported” to Africa by colonial powers. The African Westphalia, however, was arbitrary. The actual people for whom the boundary was set or their representatives did not take part in the boundary making to suggest a better working boundary line that would align with facts on the ground.⁷ African boundaries were drawn far away in Europe by the people never been in Africa and were not aware of African terrain.⁸

This Chapter briefly assesses African boundaries starting from Pre-colonial era to the current state. Part I reveals that pre-colonial Africa had an indigenous form of boundaries that had separated territorial holdings of nations, nationalities, and tribal groups. Pre-colonial African

⁵ President Chadly of Algeria views colonial boundaries as “delayed action bombs left by colonialism.” See J.R.V. PRESCOTT, *POLITICAL FRONTIERS AND BOUNDARIES*, 254(1987). For detailed consequences of colonial boundaries see Stelios Michalopoulos and Elias Papaioannou, *The Long-run effects of the Scramble for Africa*, WORKING PAPER SERIOUS, NATIONAL BUREAU OF ECONOMIC RESEARCH, WORKING PAPER 1720 (2011), <http://www.nber.org/papers/w17620>

⁶ Ikome, *supra* note 2. See also Agulbou Diarrah, *An Overview of the African union Border Programme*, in *DELIMITATION AND DEMARCATION OF AFRICAN BOUNDARIES: GENAEAL ISSUES AND CASE STUDY*, DEPT OF PSC, COMMISSION FOR AFRICAN UNION 8(2013).

⁷ Professor Mutua surmises, “Unlike their European counter parts, African states and borders are distinctively artificial and are not ‘the visible expression of the age-long efforts of [indigenous] peoples to achieve political adjustment[...].’” See Makau wa Mutua, *Why Redraw The Map of Africa: A moral and Legal Inquiry*, 16 MICH JL INT’L L. 1115, 1113 – 1176 (1994 – 1995). Thus, colonization and resultant arbitrary boundary has interrupted evolutionary process of African boundaries by implanting arbitrary European formulation. *Id.* Professor Mutua, contends that foreign imposition of African system would lead into African extinction and proposes for readjustment. *Id.* at 1118.

⁸ Lord Salisbury’s admission of arbitrary delineation of African boundaries is often cited.

boundaries were analogous to the European boundaries before the historic Westphalian Resolution of 1648. All boundaries, being human creation are artificial, but all boundaries need not necessarily be arbitrary. A boundary that is set by the common will of the people who reside therein in, or by their representatives who took geographic and human factors, may not necessarily be regarded arbitrary. Part II of this Chapter illuminates the scramble for Africa and partition of its territories and people by the European colonial powers. Finally, the post colonial movements to revise African boundaries during pan Africa movements, the stand of founding fathers of African umbrella organization (OAU) and subsequent efforts to stop recurrent territorial and boundary conflicts in Africa is briefly outlined.

4.2. Pre-Colonial African Boundaries

As pinpointed in Chapter two of this work, the emergence of private property has necessitated the creation of boundaries in medieval times. Traditional African societies share this characteristic, and had indigenous type of boundaries that separated private holdings of ethnic and national boundaries.⁹ The state of pre-colonial African boundaries was almost identical to the pre-Westphalian European boundaries.¹⁰ As boundary setting was started with frontier system, early African boundaries were zonal (frontiers) in nature. Though porous and periodically changed, African Empires, nations or cities states had their own territories and boundaries before European boots landed in Africa.¹¹ Take, for instances the boundaries of Axumite Kingdom. Despite it often worked to expand the scope of its territory, Axumite kings were fully aware of territorial limits of

⁹ Adekunle Ajala, *The Nature of African Boundaries*, 18:2 AFR. SPECTRUM, 178, 177-189 (1963).

¹⁰ As pointed out chapter 2 of this work, it was in 1648 that the Westphalian congress deliberated for the linear boundaries and sovereignty of states in their respective jurisdictions within the clearly defined boundaries.

¹¹ Ajala *supra* note 9. See also Edward Kofi Quashigab, *Legitimate Governance: The Pre-Colonial African Perspective* in LEGIMATE GOVERNANCE IN AFRICA international and Domestic Legal perspectives, 43 (Edward Kofi Quashigah & Obiora Chinedu Okafor eds. 1999).

the kingdom. Expansionist tendencies and even the possibility to lose one's territory cannot lead to suppose pre-colonial Africa did not have boundary.

There is an assertion that pre-colonial African societies "[...] were neither in need nor capable of projecting their power over large territories."¹² As a result, Englebert and colleagues argue that pre-colonial African kingdoms claimed political authority and property rights over people more than land.¹³ Consequently, the learned authors surmise, "[...] with few exception such as Ethiopia the concept of territorial delimitation of political control was by and large culturally alien."¹⁴ This assertion is not acceptable, for instance, to the pre-colonial dweller of Ovamboland, Namibia. In Ovamboland, according to Gregor Dobler, "Territory did matter for pre-colonial political domination, even if land as such was plentiful and different polities lay for from each other. [...] The King and his power were strongly linked to the land."¹⁵ In medieval Africa, thus, it is not only the people, but also the territory in which authority may be exercised was considered vital.

As do pre-Westphalian Europe, some nation states in Africa had their own boundary walls that are still standing. The Harar City wall in Ethiopia manifests this fact.¹⁶ The wall was erected with a view to defend residents of the City State from frequent external invasion. The invaders need not be neighboring city-states, empire or ethnic groups but extra-continental invaders like Turkish,

¹² Pierre Englebert et al, *Dismemberment and Suffocation (A Contribution to the Debate on African Boundaries)*, 33:10 COMP. POL. STUDIES, 1095, 1093-1118 (2002).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Gregor Dobler, *Boundary drawing and the notion of territoriality in pre-colonial and early colonial Ovamboland*, 3 J. OF NAMBIAN STUDIES 16, 1 – 25(2008).

¹⁶ Harar City Wall is one of UNESCO Heritage sites. For details see, <http://whc.unesco.org/en/list/1189>

¹⁷ Ajala, *supra* note 9 at 178.

¹⁸ *Id.* at 179.

¹⁹ Both *Hadya* and *Wolaita* ethnic groups are now under their own separate zonal administration of Southern Nations and Nationalities Regional State in Ethiopia.

²⁰ Now the ditch is situated in the middle of districts neighboring *Hadya* Zone of *Wolayta* Zone (former *Boloso Sore*, *Damot Gale* and *Damote Woyde* districts).

²¹ Oromfa speaking zone of Amhara Regional State is an exception.

²² This is simply to show that pre-colonial African societies had boundaries that were either altered or redefined by the colonial powers. This is author was born and raised in *Wolayta* nation and personally aware of the boundaries of *Wolayta* and surrounding nations and nationalities. By chance the boundaries of *Wolayta* nation never altered evening

Arab or Europeans. Pre-colonial African borders, like pre-Westphalian European borders, had been delineated by the natural features of land. The boundaries often set unilaterally and marked by natural features of land. Rivers, mountains, deserts, forests, watersheds, marshlands, lakes and sea were some of the dominant method of marking boundaries between tribes, nations, city-states, or Empires. Ajala attests this view stating, “ Pre-colonial Africa adopted age-old systems of using zones or border marches as buffer between kingdoms.”¹⁷ Some of the zonal areas may be wide enough to cover deserts or dense forests. As land and resources were more than the need of people at the time, there was no question whoever uses the resources in the buffer zones. Practically no one cared about resources, as resources were naturally abundant. Buffer zones that separated territories of the neighboring tribes were no man’s land.¹⁸ This, however, does mean, anyone could occupy the boundary zone. It is implied that the zone belonged to the neighboring polities.

Some pre-colonial African kingdoms have attempted to draw a clear boundary line. The *Wolayta* Kingdom (now *Wolayta* Zone in the Southern Nations and Nationalities Regional State in Ethiopia) unilaterally drew its boundaries with *Hadya* ethnic group by digging huge and long ditch that covered the supposed boundary.¹⁹ The ditch was a clear mark of the end of territories of *Wolayta*. The kingdom of *Wolayta* had been in frequent war with the neighboring *Hadya* nation, quickly went beyond the ditch line when it won another war and succeeded in acquiring more territories.²⁰ The eastern boundary of *Wolayta* Kingdom was the river *Bilaate*. The river still serves as the boundary line between *Sidama* and *Wolayta* Zones of Southern Nations and Nationalities of Ethiopia. The river *Blaate* is traditionally an accepted boundary line between the kingdom of

¹⁷ Ajala, *supra* note 9 at 178.

¹⁸ *Id.* at 179.

¹⁹ Both *Hadya* and *Wolaita* ethnic groups are now under their own separate zonal administration of Southern Nations and Nationalities Regional State in Ethiopia.

²⁰ Now the ditch is situated in the middle of districts neighboring *Hadya* Zone of *Wolayta* Zone (former *Boloso Sore*, *Damot Gale* and *Damote Woyde* districts).

Wolayta and *Sidama*. This boundary line never doubted, by the former and current residents of the two neighboring nationalities.

The western boundary of *Wolayta* ethnic group is river *Omo*. River *Omo* separates territories of *Wolayta* and *Dawuro* ethnic groups. The *Dawuro* ethnic group, the *Gamo*, and *Goffa* ethnic groups share some of the features of *Wolayta* and *Wolayta* never sought to take territories of these ethnic groups. The border of *Wolayta* and *Gamo* and *Goffa* ethnic groups is very porous when compared to *Sidama* and *Dawuro*, but no known territorial or boundary conflict ever been surfaced. No one clearly knows an exact time of the creation of these boundaries. The creation of these boundaries may be equated with the creation of the two separate kingdoms and their territories.

Ethiopia has several ethnic groups, kingdoms, nations and nationalities. Most of the boundaries of nations and nationalities are still kept intact serving as internal administrative boundaries. Boundaries of several *Oromfa* speaking kingdoms constituted the *Oromia* Regional State²¹, the *Amhara* kingdom changed into the *Amhara* regional State, and so forth.²² Boundaries of Tigrigna speaking ethnic group constituted *Tigray* Regional State. In Western and Eastern Ethiopia, there are several ethnic groups and nationalities that kept their traditional boundaries until reshuffled by the colonial powers. For instance, before French occupation of Western Africa, the territory had been divided into various independent regions, which were also subdivided into independent regions that were settled by the local ethnic group.²³ The local people undoubtedly knew the limit of territories of each of the regions and sub regions. The limits of territories, be it

²¹ Oromfa speaking zone of Amhara Regional State is an exception.

²² This is simply to show that pre-colonial African societies had boundaries that were either altered or redefined by the colonial powers. This is author was born and raised in *Wolayta* nation and personally aware of the boundaries of *Wolayta* and surrounding nations and nationalities. By chance the boundaries of *Wolayta* nation never altered evening during the five years Italian occupation. The boundaries traditional features even survived the changing regimes. The ditch the was supposed to separate the *Wolayta* and *Hadya* ethnic groups now situated in the middle of *Wolayta* territory as the kingdom of *Wolayta* expanded into more *Hadya* territories by the frequent expansionist war.

²³ SUZANNE LALONDE, DETERMINING BOUNDARIES IN CONFLICTED WORLD: THE ROLE OF UTI POSSIDETIS 108(2002).

river, mountain, watershed, forest or desert or some kind of zone having its own width and length may be taken as boundary.

Pre-colonial African boundaries were generally elusive, but did not create problem or never been considered as problem or actually created problem at the time. Traditional African people never fought for boundaries or transgression on boundaries, but the fight was for expansion of territories and desire to have more people that can serve the empire. Frequent territorial expansion had rendered the meaning and purposes of boundary meaningless, as there was no guarantee for permanent holding of a territory. For instance, the kingdom of Dahomey (now Benin) in West Africa and Buganda often invaded their neighbor to expand their territorial holdings.²⁴

Expansionist character was the feature of medieval kingdoms throughout Africa. In a situation where a powerful ruler could forcefully cede the whole territories and capture its residents, the only concern was to protect territories and the people from frequent invasion either from the neighboring ethnic groups, tribes or from foreign aggressors. Grazing land or other resources including timber, water was not scarce. When things were abundant, boundary conflicts rarely surfaced. For instance, nomads of neighboring *Sidama* tribe in Southern Nations and Nationalities of Regional State of Ethiopia often crossed the border - river *Bilaate*- and pastured their cattle in the *Wolayta* side, but there was no complaint. Now resources are scarce and everyone expects another not to encroach borderlines and use scarce resources. The competition for scarce resources has been source of territorial or boundary conflict.

As Ajala pinpoints, pre-colonial African boundaries can be classed into three categories.²⁵ First, pre-colonial boundaries did not absolutely retrain movement. Pre-colonial African boundaries, as Schengen currently does in Europe, served as points of contact. In frontiers of

²⁴ Ajala *supra* note 9 at 179.

²⁵ *Id.*

contact, neighboring kingdoms or ethnic groups were lived side by side and passed territories of each without impediment. The southern boundaries between *Wolayta*, and *Gamo* and *Goffa* fall under this category; still now, there is no impeding mark or some kind of barrier that separates the two groups. So far there is no boundary conflict. The boundary between *Wolayta*, *Hadya*, and *Kambata* has no restraining barrier or boundary mark. The ethnic groups, however, know the limits of their territory and there is no boundary dispute. Even if one inadvertently trespasses, the conflict could easily be resolved through traditional peaceful dispute mechanism. Any misunderstanding can be cleared on spot and easily. As a result, no one knows if there was a boundary conflict.

The second kind of frontier, according to Ajala, is frontier of separation. In this case two or more bordered groups were separated by wide border mark – the frontier. The mark may be a river, as between *Sidama* and *Wolayta* or dense forest or a desert that was hard to cross. The ditch that was dug between *Wolayta* and *Hadya* may be an exceptional kind of clearly delineated boundary line. In the eastern boundary of *Wolayta* and *Gamo-Goffa*, there is Lake Ababa. But it never impeded both groups, as each group was not barred to use the Lake or resources therein. *Daana* Forest, a frontier, on the Western side may be used both of the groups as far as they needed it. There was no issue in pastureland or water. But borderland residents of both ethnic groups know their respective territories that are bounded either by the forest or lake. According to Ajala, “[...] states of Central Sudan including Bornu, Maradi, Air and the Fulani Emire had frontiers.”²⁶

The third form of pre-colonial Africa boundary was a kind of overlapping boundary. This is a rare kind of pre-colonial boundary. This was a mixed type in which different ethnic groups lived separately in different localities. It is hard to know an exact boundary between different tribes and ethnic groups, as one may be situated within a territory of a bigger group. When ethnic groups were mixed the only possible way of boundary setting was individual land boundary. As ethnic groups

were too liberal and scattered among another group, there was no way to know boundaries of a single ethnic group. A group may also be an enclave within territory of a bigger unit. In this case, ethnic boundary setting, however, is not hard to perceive. Nomadic life also makes boundary setting impossible or hard to prove. For example, migratory nature of the Masaai and Tuaregs makes it hard to exactly locate their boundaries.²⁷

4.3. Partitioning Africa: Drawing New Boundary Lines in Europe for Africa

4.3.1. *Introduction*

This Section briefly outlines how colonial powers apportioned Africa and redrew its boundaries disregarding geographic and human facts on the ground. Though there were sporadic individual attempts to occupy African territories by European powers since yearly 1830s²⁸, African territories were largely partitioned by the Berlin Conference of November 1884 – February 1885. The Conference was sponsored by Otto van Bismarck with a view to amicably divide Africa among European powers. One of the important resolutions of the conference was the requirement to report occupation of a given part of Africa to the potential colonizers. This avoided war among the Europeans, as a colonized territory could not be recolonized. Thus, Berlin Conference ‘[...] was meant to defuse colonial tensions and avoid the risk of war among the conferees.’²⁹

4. 3. 2. *Arrival of Foreign Agents in Africa*

²⁶ *Id.*

²⁷ *Id.*

²⁸ For instance France invaded Algeria I 1830, British and King Leopold got territories long before the Berlin Conference. After all, the Berlin Conference was the consequence of competition of European colonizers on Africa. See Mutua, *supra* note 7 at 1126. The most important objective of the Conference was to partition Africa legally and formally by avoiding war among the Europeans.

²⁹ *Id.* at 1127.

Before the actual colonization, European explorers, missionaries or traders had explored Africa and exposed its economic significance to their respective states.³⁰ Some under the guise of spreading Christianity had permanently settled while apparently preaching and coaching African tribal chiefs. While it may not be possible to categorize all the missionaries and explorers as spies or agents of European colonial powers, undoubtedly they served as source of information to the European powers. Explorers, missionaries and traders³¹ relied important facts and potential benefits of occupying African territories.³² Some missionaries or traders bought land as any private African person from local chiefs who did not suspect that they would be swallowed later, and would be considered slaves in their own territories. Unwary native people and naïve traditional chiefs had created a conducive situation to the agents and representatives of colonial powers to settle on the land that was already acquired with the hidden motive of subsequent expansion of the territory and for the ultimate occupation of the entire territory.

The original visitation or settlement was very peaceful. The European visitors concluded treaties with the local chiefs pledging to help the kingdom or offered gifts or arms to the chief. In Ethiopia, Italians who purchased land in coastal areas of Red Sea donated guns that served the ruling chiefs to wage war against rival kingdoms. The Kingdom that had modern guns easily

³⁰ Lalonde, *supra* note 23 at 105. Lalonde witnesses that “Until the latter half of nineteenth century the impact of Europe upon Africa in general terms was relatively minor. [...] By the late 1870s, however, the increasing activity in Africa by explorers, merchants and missionaries led not only to a greater impact upon indigenous societies but also to a growing awareness in Europe’s political capitals of the advantages to be derived from a more forward policy in Africa.” *Id.*

³¹ Prescott enumerates some of the commercial companies that facilitated colonization of Africa. For example, the British South Africa, the Royal Niger Company in Nigeria, the Deutsche Kolonialgesellschaft für Südwest Afrika in the Namibia, the Nord West Kamerun Gesellschaft in Cameroun, and several French commercial firms Congo, Gabon and the Central Africa Republic. See J. R. V. PRESCOTT, *POLITICAL FRONTIERS AND BOUNDARIES*, 242(1987).

³² It may be surprising to know that missionaries served some political purpose under the cover of religion. In medieval Africa European missionaries acted on behalf of their governments by spying African kingdom and relaying information. Most importantly, the missionaries bought land on which European colonizers were able to settle before the virtual taking of the whole territory. Bishop Desmond Tutu’s statement vividly explains how missionaries took African land. In the words of Desmond Tutu:

conquered rival kingdoms that were not exposed to the foreign handouts. For instance, King Minilik II of Ethiopia had conquered almost all the Southern Kingdoms using arms donated by Italians who occupied some Red Sea coastal regions, which later termed as Eritrea.³³

Initially, the European agents stationed at the coastal areas, but later penetrated into the interior territories. For instance, according to Prescott, “The first British fort at the mouth of the Gambia River was built in 1664. [...] France’s concession at Grand Lahu on the Ivory Coast dated from 1787; a Portuguese fort was built at Luanda in 1575.”³⁴ However, there is conflicting view regarding an actual date of the commencement of the scramble for Africa. Hertslet points to 1882 in which Belgian expeditions, the International Association of the Congo started in upper Congo and Niadi-Quillou.³⁵

4.3.3. Pre-Colonial Treaties

Pre-colonial treaties were apparent promises of European powers to “protect” African chiefs – often called *Protective Treaties or treaties conferring territorial rights*. According to Mutua, ‘treaties of protection’ were imposed to effectuate colonial rule between African rulers and European powers.³⁶ For instances, the International Association of Congo, after arriving in Congo, concluded a treaty that may also be taken as contract and got territorial right, before the ultimate control of the whole Congo territory by the King of Belgium.³⁷ Similarly, a German colonization society concluded treaties with local chiefs in the East Africa and obtained concessional right over

“When the missionaries came to Africa they had the Bible and we had the land. They said “Let us pray.” We close our eyes. When we opened then we had the Bible and they had the land.” See www.globalissues.org/article/84

³³ This process has led to the colonization of the northern regions of that had been under the Axumite empire from the time immemorial. They saw the seed of difference and separation among the two closely related people that ultimately led the Eritrean secession and bloodshed. After Eritrean independence Ethiopia remained landlocked as Italian colonizers occupied all the coastal regions that ceded later to Eritrea after occupation of the whole Eritrean territory. The current generation, as a result suffer from non-healing wound.

³⁴ Prescott *supra* note 31 at 246

³⁵ Lalonde *supra* note 23 at 105.

³⁶ Matua *supra* note 7 at 1131.

territories while the other German group of explorers entered into the South West of Africa and concluded treaties that legally authorized colonial power to have territorial right.³⁸ The German explorers also entered into protective treaties in West Africa.³⁹ Similarly, Great Britain agents entered into treaties with a number of local African chiefs.⁴⁰ The consideration to African side in almost cases was very minimal or none. Offering guns and bombs was the greatest gift that thrilled local authorities to perpetuate their dominance against local rivalries.

European agents had deployed all possible tactics to secure ostensible “consent” of tribal chiefs in surrendering their sovereignty, the territories and their people contractually through ‘shame’ treaties. Colonial agents offered priority to peaceful method of acquiring territories by convincing or inducing local chiefs. Bribery, inducement, intimidation, or coercion commonly applied to secure signature of local authorities. It may be shocking to know that local authorities had surrendered sovereignty of their kingdoms for silly consideration like beads, cloths or old pair of boots.⁴¹ Gift of arms to wage war on other rival African kingdoms was so common.⁴² When all deceptive method of securing treaties fail to work, colonial powers invaded African territories for establishing their sphere of influence through effective occupation.

On account of signature of naïve local chiefs, some authors tend to argue that Africans were involved in colonial boundary making in Africa. Touval, for instance, asserts that Africans were indirectly involved in colonial boundary making in Africa.⁴³ It is true that African local chiefs had

³⁷ Lalonde *supra* note 35.

³⁸ *Id.*

³⁹ Lalonde *supra* note 23 at 105.

⁴⁰ *Id.*

⁴¹ Mutua, *supra* note 7 at 113.

⁴² The 30000 rifles and 28 artilleries that were donated by Italy to King Minilik of Ethiopia were helped Minilik fighter to fight Southern kings like the Kingdom of Wolayta – Kaw Tona. Without such assistance it was almost impossible for Minilik fighter to occupy Wolayta, as tough fighter of Kawo (king) Tona had defeated Minilik soldiers four time before. The rifles made Minilik and his fighter superior to the fighter of Kawo Tona who used simply traditional spear and courage to defend their territory and their king.

⁴³ SAADUA TOUVAL, THE BOUNDASRY POLITICS OF INDEPENDENT AFRICA, 5(1972). Nevertheless, Touval admits that Africans were naïve but not passive at the time. Their decision making power was influence by

signed on the pre-drafted standard treaty documents that were written in a language alien to the signatories and very technical to comprehend. In most cases the chiefs were cheated, induced, or coerced to sign the documents. How a signature that was acquired by coercion would prove participation of Africans in redrawing boundaries? For example an African chief who refused to surrender sovereignty of his kingdom to British peacefully signed a treaty with the following terms with a view to end war and killing of his people:

I Docemo, do, with the consent and advice of my council, give, transfer, and by these present grant and confirm unto the Queen of Great Britain, her heirs and successors for ever, the Port and the Island of Lagos, with all the rights, profits, territories and appurtenance and the direct, full and absolute dominion and sovereignty of the said port, Island, and premises, with all the royalties thereof, freely, fully entirely, and absolutely.⁴⁴

If Trouval regards Chief Docemo has involved in the redrawing the colonial map of Nigeria, it appears not only wrong, but also it is a blind ignorance. Chief Docemo initially refused to surrender his territory, but was overpowered to accept whatever his captors dictate him. A defective consent to a treaty term that was tainted by fraud, deceit or inducement cannot be taken as participation of colonial boundary making.

To view Africans had indirectly or directly participated in the partition of Africa is not only unconvincing, but also appears endorsement of the methodologies of the infamous Berlin Conference. No African was invited to take part in the partition process, and no attempt was made to collect empirical data before splitting Africa. In the words of Mutua, “Little consideration was given to pre-colonial inter-state relations or other relationships between different traditional states. In the majority of cases, map-makers were proceeded as though Africa was a blank slate,

either coercion or inducement, by the ‘stick and carrot.’” *Id.* In this situation it is doubtful to conclude that Africans also participated in the boundaries.

⁴⁴ U. O. UMOZURIKE, *INTERNATIONAL LAW AND COLONIALISM IN AFRICA* 40(1979), Quoted in Mutua *supra* note 7 at 1132.

uninhabited.”⁴⁵ Needless to say, local people should have taken part in crafting the treaty terms -- they should have all possibilities to say no. In a situation where there was no option, “signing” on a treaty documents that was “alien” in all terms is simply unconscionable and an assumption that Africans were involved in partitioning Africa is utterly wrong.

Explorers, traders or missionaries or in some cases government agents proceeded to the inland where they concluded bogus treaties with the tribal chiefs. According to Prescott, these treaties apparently offered exclusive trading right or trading depot and sometimes the treaties concerned with protection of chief’s territory and payment of subsidies.⁴⁶ Thus, the treaties were colored by some apparently economic or friendship objectives. For instance, when Italy attempted to colonize Ethiopia by the treaty of *Wuchali* (also known as *Uccali*) stated in the treaty that establishing friendship and cooperating between Ethiopia and Italy while the latent motive was to take sovereignty of Ethiopia. The three treaties that EEBC wrangled to delimit Ethi-Eritrea boundary were concluded with the objective of establishing friendship with Ethiopia. The bogus treaties were drafted and presented for monarch’s signature.⁴⁷ Almost all of the pre-colonial treaties disclosed non-occupation objectives – the most usual objective was protection, assistance or friendship. After the treaties signed, the latent motives behind the treaties surface. As Prescott attests, “ Once a treaty had been signed, that territory was reserved for possible annexation in the future.”⁴⁸

⁴⁵ Mutua, *supra* note 7 at 1135. See also A. I. ASIWAJU (ed.), *PARTITIONED AFRICANS: ETHINCI RELATIONS ACROSS AFRICA’S INTERNATIONAL BOUNDARIES 1884 – 1984* 1(1985). Asiwaju observes:
[...] despite its significance for the subsequent history of Africa, [the Berlin Conference] was essentially a European affair; there was no African representation, and African concerns were, if they mattered at all, completely marginal to the basic economic strategic and political interest of the negotiating European powers.
(*Id.*)

⁴⁶ Prescott *supra* note 5 at 126.

⁴⁷ The details of these treaties will be stated in Chapter Four of this Dissertation.

⁴⁸ Prescott *supra* note 46.

The illusive treaties⁴⁹ also severed as evidence to prove existing interest before any other super power – a potential colonial competitor.⁵⁰ In accordance with the Berlin deliberation of 1884 - 1885, to avoid war among the colonizers, agreement among the colonial powers were necessary for the partition of Africa.⁵¹ Proving prior interest or sphere of influence was one of the important facts to get priority in agreement concluding the sphere of influence. As a result, “[i]t was always considered to be an advantage to possess a treaty which bore an earlier date than that held by a competitor”⁵²

A ‘phony treaty’ that was apparently concluded with local African chiefs served as evidence supporting the establishment of the sphere of influence. These fraudulent documents often invoked as binding authorities conferring a right on African territories.⁵³ Colonial powers did not concern about clarity or correctness of the contents or terms of the shame treaties as the very motive was to get some kind of evidence signed by the local people. As Ajala witnesses, “Such ‘treaties’ served many purposes but more importantly they were used to back up their claims for the territories involved.”⁵⁴ Traders or explorer’s at the time carried standard treaty forms in which local names and names of chief and witnesses to be signed.⁵⁵ A commercial representative who carried out a printed treaty forms and had signature of local chief in Africa attests the following illustrative declaration:

⁴⁹ Most progressive people agree that the colonial treaties were simply shames that were not negotiated in full comprehension of its terms. Touval attests that “The treaties can of course be questioned on moral and legal grounds.” Touval *supra* note 43.

⁵⁰ *Id.* at 6.

⁵¹ For instance, in 1889 Great Britain and France conducted a convention for deliberation of their respective possession and delimitation of boundaries of West of Niger and the spheres of influence to the East of Niger river was signed. See Ajala *supra* note 9 at 179.

⁵² Prescott *supra* note 5 at 246.

⁵³ According to Touval unless the treaties are challenged immediately being faulty, taken as authoritative documents for determining African colonial boundaries. Touval *supra* note 43 at 10.

⁵⁴ Ajala *supra* note 9 at 179.

⁵⁵ In 19th century apparently commercial companies, such as East India Company, served not only commercial objectives but also acted as political purposes. Colonial powers used such alias companies to put their boots in the territories they desired to occupy. See *Id.*

I had bundle of printed treaties which I was to make as many people sign as possible. This signing is an amiable farce, which is supposed to impose upon foreign government, and to be the equivalent of an occupation... A ragged untidy European, who in any civilized country would be in danger of being taken up by the police as a vagrant, lands at a native village, the people run away; he shouts out after them to come back, holding out before them a shilling's worth beads... the so called interpreter pretends to explain the treaty to the chief. The chief does not understand a word of it, but he looks pleased as he receives another present of beads; a mark is made on a printed treaty by the chief and another by the interpreter, the vagrant, who professes to be the representative of a great empire, signs his name... The boat sails away, and the new ally and protégé of England or France immediately throws the treaty into the fire.⁵⁶

Thruston's declaration evidently depicts the scenario and character of the pre-colonial treaties. It is just an obligation imposed on African kingdoms for nothing. In the words of Mautua, "[...] it would make a mockery of the notion of a treaty and the concept of freedom of contract."⁵⁷ It is absurd and unacceptable to true mind an African chief to surrender sovereignty of his kingdom, his people, and his territory for no consideration. It is of course not natural and unacceptable. But if the chief's state of mind was controlled either by coercion or inducement, a mockery treaty should not be taken as a binding document as it cannot establish legality and fairness.

As has been mentioned out elsewhere, the immediate cause of the war between Ethiopia and Italy was deceptive wordings of a "Treaty of Friendship and Trade between the Kingdom of Italy and the Empire of Ethiopia" (the Treaty of Wuchale).⁵⁸ The treaty was written in Italian and Amharic languages. While the Amharic version revealed the true sense of the treaty, the Italian version took Ethiopia's sovereignty claiming Ethiopia must deal all foreign relationship by the good office of the Government of Italy while the Amharic version stated that Ethiopia could use the

⁵⁶ A. B. THRUSTON, AFRICAN INCIDENTS 170-171 (1900) quoted in Ajala *supra* note 54.

⁵⁷ Mutua, *supra* note 7 at 1132.

⁵⁸ See Daniel Berhane, Text of *Wuchale* Treaty/1889 Ethio-Italian Treaty – HORN AFFAIRS – ENGLISH, AUGST 17, 2011, <http://hornaffairs.com/en/2011/08/17/text-of-wuchale-treaty-1989-ethio-italian-treaty/> (last visited Sep. 30, 2015 at 9:11 PM.) Article XVII of the treaty was wrongly translated to mean Ethiopia must have all foreign relation through good office or Italian government. The Italian translation reads: " His Majesty the King of Kings of Ethiopia allows you to make use of the Government of His Majesty the King of Italy for all business dealings he had with other powers or governments." While the Amharic vision of Article 17 states: " His Majesty the King of Kings of Ethiopia could allow you to make use the Government of His Majesty the King of Italy for all business dealings he had with other powers or Governments." See <http://snem.tk/documents/wuchale.pdf> As a result, "Italians proclaimed a protectorate over Ethiopia." (Encyclopedia of Britannica). The then Ethiopian king renounced the treaty as a result,

Government Italy while dealing with foreign powers. In rejection of Emperor Minilik II to respect the treaty terms, Italy invaded Ethiopia but suffered huge blow that resulted in nullity of the deceptive treaty.

The defunct *Wuchale* treaty, in addition to attempting to take away Ethiopian sovereignty, had annexed some Ethiopian territories to the Italian Eritrea.⁵⁹ Almost identical treaties later concluded after the battle of Adwa in Addis Ababa that were considered by the Eritrea - Ethiopia Border Commission when attempting to settle the Ethio-Eritea border conflict in December 2000.⁶⁰ The Ethio-Italian treaties do not sound binding treaties in modern sense. The objective of the “treaties”, their appearance and procedures involved don’t confer treaties in the sense of Vienna Convention of Law of Treaties.

Matua rightly summarizes, “ It is difficult, if not impossible to sustain the legality of the treaties of protection’ even under extant European law at the time.”⁶¹ First only states can make treaties and there are strict procedures that should be followed to attain the legality and binding force of a valid treaty. Genuine and free negotiation, free consent that is not tainted by any vitiating factors and fulfillment of fair procedures including ratification, gives force to treaty. Thus, a treaty obtained by explicit or implicit coercion, intimidation, fraud, deceit, or even by error cannot legalize cession of a territory. In the modern sense, the treaties do not qualify as binding documents as treaties were signed people representing an entity that did not qualify as a state in terms of Vienna Convention of the Law of Treaties.⁶² Moreover, Europeans at the time did not recognize

Italians attempted to occupy Ethiopia by force but suffered embracing defeat in which black men for the first time defeated what forces.

⁵⁹ Bogos, Hamasen and Akale Guzai were granted to Italy while Italy gave money and 30,000 muskets (rifles) and 28 cannons which of course gave some assistance to Ethiopia when fighting the war. (See Treaty of *Wuchale*, ENCYCLOPAEDIA OF BRITANNICA., WWW.BRITANNICA.COM

⁶⁰ For details see Chapter 5 and 6 of this Dissertation.

⁶¹ Mutua, *supra* note 7 at 1133

⁶² *Id.* at 1134. According to Matua, “ one African scholar has argued that these principles, which existed then invalidates the treaties.” *Id.*

signatories of the treaties as states. For them Africa was no man's land that could be occupied as medieval people were considered as politically unorganized and their territories may be occupied akin to vacant land.

4.3.4. *The Berlin Conference*

The Berlin Conference of November 1884 – February 1885 has got important place in the international political history. After 1870s due to exposition of Africa and African resources well known by the European explorers, missionaries and traders, more European powers attracted and started partitioning Africa which created tension among the competing powers. With a view to settle the tension among the European powers, especially between Great Britain and France thereby avoid potential war in Europe⁶³ the then German Chancellor Otto Von Bismarck organized the notorious Berlin Conference for smooth partition of Africa.⁶⁴ Before the Berlin Conference, the Scramble for Africa was unregulated and there was fierce competition and tension to occupy the already occupied African territories. By the request of German Chancellor Otto von Bismarck, fourteen powerful nations of the time attended the Conference.⁶⁵

⁶³ Ajala states that, “[...] rivalries among the European powers that at the times even threatened the peace of Europe when the partition of Africa was in progress.” See Ajala *supra* note 9 at 180. The tension among the colonial power did not afford time to make empirical survey before partition of Africa. *Id.*

⁶⁴ As Elizabeth Heath summarizes partition of Africa started before the Berlin conference. The Conference with organized by the Otto Von Bismarck with view to avoid conflict among the European powers unilaterally launched campaign to colonize Africa. There fierce completion among British and France in West Africa, the Portuguese and British in East Africa, French and King Leopold II of Belgium in Central Africa. Finally a strong rivalry between Great Britain and France lead intervention by the Otto Von Bismarck that culminated in organizing an international conference in creating peace among the European and legalizing the scramble for Africa. See Elizabeth Heath, *Encyclopedia of Africa*

<http://www.oxfordreference.com/view/10.1093/acref/9780195337709.001.0001/acref-9780195337709-e-0467>

⁶⁵ Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, Turkey, and the United States of America were the States that attended the Conference. The Conference was Chaired by the Otto Von Bismarck. France, Germany, Great Britain, and Portugal were the most important players of the Conference.

The explicit agenda of the Conference and its latent but the most dominant motive were different. The express objectives of the Conference were: To make Congo and Niger basin free and open for trade. The conference has explicit purpose of working for the elimination of slave trade and maintenance of political stability in Africa. One may fairly questions whether African kingdoms asked for such help or the then African situation created some international problem affecting the interest of super powers. The issues may appear senseless, as the very motive of behind the Conference is self-evident – sharing African territories peacefully among the European powers. The conference took unusually long time: November 15 – February 26, 1885 was extraordinarily long for a conference, unless it was training. The colonial powers were furious not to miss their target of acquiring more territories and not to fight among themselves. The participants took time in devising the best mechanism that would help get their share of Africa to collect raw materials and labor for the developing industry and market for industrial product.

As stated in the Article 34 of the Berlin Conference, each European nation had to report to the other its sphere of influence, which has to be sufficiently proven. At the time of the Berlin Conference 80% African territories were administered under indigenous kingdoms.⁶⁶ Most coastal areas, however, were long occupied by Europeans. The Berlin Conference has enabled colonial powers to penetrate deep into the interior. One of the requirements of Article 34 of the Berlin Conference was *effective occupation*, which can easily be proven by bogus treaties that were signed by naïve tribal chiefs and fraudulent commercial representatives or other foreign actors. Copies of the treaties submitted as proof for occupation in accordance with the geometric map drawn by the Berlin Conference.

⁶⁶ See A Brief History of Berlin Conference, <http://teacherweb.ftl.pinecrest.edu/snyderd/MWH/Projects/mun-bc/History.htm> See also A. I. Aswaju, *The Conceptual Framework* in PARTIONED AFRICANS: ETHNIC RELATIONS ACROSS AFRICA'S INTERNATIONAL BOUNDARIES 1884 – 1984 (A. I. Aswaju ed.) 2(1985).

The Berlin Conference is not only condemned for disregarding African interests, but also it is blamed for sowing vicious seeds that periodically bear violent territorial and boundary conflict in Africa. The arbitrary geometric boundary has split interrelated ethnic groups and lumped them with culturally, linguistically and religiously unrelated groups. Needless to say, the Conference did not offer an opportunity for the African indigenous people to suggest the bet option. The architects of the colonial boundaries were rather relied by the bogus “[...] treaties, concessions and account of European travellers as well as personal reports of local European agents or ‘the men on the spot’ to do their job.”⁶⁷ Whenever these source not available in certain areas, the crafters of the African boundaries ‘resorted to ingenuity.’⁶⁸ It has been a usual saying that the crafter of African boundary just took “a blue pencil and a ruler and began drawing lines from one point on the map to another.”⁶⁹

4.3.5. Effects of Arbitrary Boundary on Local People

The devastating effect of arbitrary boundary was separation of closely related ethnic groups into several colonial powers.⁷⁰ Tough figures are not uniform in all instances, 30 – 40% of African ethnic groups were split into different states. According to Asiwaju, about 177 African tribes are split into different States.⁷¹ This makes 30 – 40 % of ethnic groups. The case of Somalis is often cited in this regard. Somalis were split into French Somaliland, British Somali, and Italian Somali and Ethiopian Somali, Somali region of northern Kenya. The statement of the first Somali present appears heart touching. He said:

⁶⁷ Ajala *supra* note 9 at 180.

⁶⁸ *Id.*

⁶⁹ *Id.* This aspects African boundary arbitrary which has been non-healing wound causing animosity among Africans and has been source of most African conflicts.

⁷⁰ Anthony I. Asiwaju, *Borders and Borderlands as Linchpins For Regional Integration in Africa: Lessons from European Experience*, I WORLD BOUNDARIES: GLOBAL BOUNDARIES 61 (Clive H. Schofield ed. 1994).

⁷¹ Asiwaju, *supra* note 66.

Our misfortune is that our neighboring countries with whom, like the rest of Africa, we seek to promote constructive harmonious relationship, are not our neighbours. Our neighbours are our Somali kinsmen whose citizenship has been falsified by indiscriminate boundary arrangement. They have to move across artificial frontiers to their pastures. They occupy the same terrain and pursue the same pastoral economy as ourselves. We speak the same language we share the same creed, the same colours and the same tradition. How can we regard our brothers as foreigners?⁷²

It is pretty clear that Somalis in East Africa share common culture, identical way of life, same religion, but some are Ethiopians, Djiboutian, or Kenyans. But this trait of partitioned societies is not peculiar to Somalis. Similarly, the Afar ethnic group is also split into three States. Afar's main land is in Ethiopia in Afar Regional State, whereas the Red Sea Afars who reside in the coast of Red Sea are allocated to Eritrea. This was the spot where Italians initially settled by purchasing land from a local chief. The rest of the Afars are in Djibouti. The Masai nomadic people were split into Kenya and Tanzania.⁷³ In West Africa the Gyaman, Indenie, Sefwi were partitioned between Ghana and Cote d'Ivoire, Kakwa ethnic groups is found in Uganda and South Sudan, Mandara partitioned between Cameroon and Nigeria, Iteso people found in Kenya and Uganda, Bobo ethnic groups divided between Mali and Burkina Faso, Chewa and Ngoni found in Zambia, Mozambique and Malawi, Hausa is split between Niger and Nigeria.⁷⁴ The Ewe in West Africa was split into three colonial regimes: French Togo, British Togoland and British Gold Coast.⁷⁵ Similarly, "the Bakongo across the Gabon-Congo, Congo-Zaire and Zaire – Angola boundaries."⁷⁶

⁷² JOHN DRYSDALE, THE SOMALI DISPUTE, 8(1964), Quoted by Said S. Samatar, *The Somali Dilemma*,: *Nation in Search of A State*, in PARTITIONED AFRICANS: ETHNIC RELATIONS ACROSS AFRICA'S INTERNATIONAL BOUNDARIES 1884 – 1984. 155 (A. I. ASIWAJU (edu.) 1985).

⁷³ Enormous ethnic and tribal groups were split due to arbitrary nature of the African boundary. The main ethnic groups in Ethiopia, the Oromo, for instance, separated into Kenya and Ethiopia. The Anuak ethnic group found both in Ethiopia and South Sudan. Highland Tigrigna speakers of Eritrea are almost identical with the people of Tigray Region of Ethiopia. More such cases can be enumerated throughout the whole Africa.

⁷⁴ Asiwaju *supra* note 66 at 2.

⁷⁵ Touval *supra* note 43 at 19.

⁷⁶ Asiwaju *supra* note 66. Asiwaju provides several list of petitioned ethnic groups. The Lunda, the Zande, the Yorubathe Wolf and the serers of Senegal and Gambia, the Soninke and the Tukulor the Tubu the Tswana are some of the ethnic groups that were petitioned by the colonial boundary. See *Id.*

The arbitrary boundary not only split the closely related kinsmen, but also restrained movements and inflicted economic hardship and social inconvenience. In the words of Ajala, “[Africans] suddenly discovered that they could not longer move freely across areas which they and their forefathers had for centuries regarded as their virtual backyard.”⁷⁷ Africans were ignorant of the Berlin deliberation and never cared about the action of colonial powers in Berlin, but they felt brunt of the boundary after its demarcation. Their natural right of free movement was suddenly restrained. After creation of the boundary wall either they were required to have permission to enter into the artificial alien land or they had to walk far distance to the checkpoint. The artificial boundary has introduced different way of life, different laws, tax system and so forth. The problem of separation of ethnic groups turned the life of nomadic people from bad to worse. Nomads are moving people looking for pasture and water for their herd. The artificial barrier thus has deprived economic opportunity.

In addition to the physical, social and economic restraints, arbitrary boundaries take forefront among the factors that has been fueling conflicts in Africa.⁷⁸ The war between Ethiopia and Somalia, Ethiopia and Eritrea, Morocco and Algeria, Libya and Chad, Mali and Burkina Faso, are some of the African border related wars that erupted after formation of OAU. The partitioned ethnic groups have been fighting for unity and in the case of civil war, the split group on another side of the boundary served as hiding place. Any attempt of hot pursuit generates dissatisfaction and animosity which in turn interstate violent conflict. For example, suspected rebels allegedly belonged to Afar Ethnic group that killed and abducted tourists in the northern Ethiopia fled into the

⁷⁷ Ajala, *supra* note 9 at 181.

⁷⁸ Touval however does not agree with the assertion that arbitrary colonial boundaries are as source of conflicts in Africa. Touval argues that the assumption that African “[...] borders would give rise to many bitter conflicts,” was unsubstantiated. According to Touval, “the expectation has not been born out.” Trouval *supra* note 10 at *preface*. This stand is contrary to the takings of most African intellectuals and friends of Africa. Kwame Nkrumah propagated for either redrawing of African border or total unification of Africa to avoid the effects of arbitrary boundary. The

Eritrean territory of Afar region. Hot pursuit by the Ethiopian arms resulted in condemnation by the State of Eritrea, on the ground of encroachment of state sovereignty.

4.4. Post Colonial African Boundaries

In the eve of decolonization, the Pan African movement had campaigned to take away the arbitrary colonial boundaries. The aim of the Pan African movement was to reunite partitioned Africans by avoiding restraining colonial boundary walls by redrawing lines that would reunite the divided ethnic and tribal groups.⁷⁹ The Movement pioneered by the Pan Africanist leader of independent Ghana, President Kwame Nkrumah who felt, Ghana's independence was meaningless while other African states were colonized.⁸⁰ Supported by the progressive Pan Africans the Movement conducted the first Pan African conference known as "All African People's Congress" in the African soil in 1958.⁸¹ As one author rightly attests, Kwame Nkrumah was "[...] regarded as one of the principal spokesmen of African nationalism warned in 1958 against the danger of inherited in the colonial legacies of irredentism and tribalism."⁸² The Congress was led by the

revisionist movement that was centered in Ghana in late 1950s nevertheless discarded by the founding fathers of Organization of African Unity. See Touval *supra* note 43 at 18 – 19.

⁷⁹ The Movement was inspired by the Pan African movements of 1919 – 1945 which aimed to unit West African tribes that were former German colonies but later among the territories colonized by France and Great Britain. The 1945 Pan African Conference was held in Great Britain but the participants were Africans. The conference did not discuss the whole African boundary problem but the point of discussion was boundary problems of West African and Ethiopia. See *Id.* at 18. With regard to Ethiopia, the Congress of 1945 has passed very important resolutions that contributed for maintenance of territorial integrity of Ethiopia. The Congress opposed keeping Massawa and Asmara under international administration, demanded Eritrea and Somalia to be reunited to their mother land, Ethiopia and required Great Britain to surrender administration of Eritrea handing it back to Ethiopia. See *Id.* at 23.

⁸⁰ South African History online (SAHO), *All African People Conference is held in Accra, Ghana*, Nov. 8, 1958, <http://www.sahistory.org.za/dated-event/all-african-people-conference-held-accra-ghana>

⁸¹ Kwame Nkrumah, *Africa Prospect*, 37 Foreign Aff. 45, 45 - 53(1958 -1959). Nkrumah who was secretary of the 1945 Manchester Pan African Conference, has presided the first Pan African Conference in Accra, Ghana. Limited number of free African States took part in the Conference. Statesmen from Ghana, Ethiopia, Liberia, Morocco, Sudan, Tunisia, and United Arab Republic (now Egypt) took part in the Conference. After the Conference Nkrumah visited capitals of all the participating nations to know more about African issues (common problems and purposes.) *Id.*

⁸² Touval *supra* note 43 at preface. The effort of Kwame Nkrumah to unit Africa and abolish all arbitrary boundary that has disrupted communal life in Africa has been revived during the formation of African Union which decided construction of Statue of Kwame Nkrumah in AU's heard Quarter – Addis Ababa Ethiopia. See also Lalonde *supra* note 23 at 116.

courageous Africans who worried about the future of Africa and campaigned for revision of African boundaries all together or redraw African boundaries in a way it would reunite the split ethnic groups.⁸³ The 1958 Pan African conference of Accra among other things passed the following border related Resolutions.⁸⁴

- denounced artificial boundaries that has divided the people of Africa,
- demanded abolition or adjustment of colonial boundaries as soon as possible; and
- asked independent States of Africa to work for the permanent solution for the destructive colonial boundaries.

Pan African movements finally culminated in founding the first continental umbrella organization. Foreign ministers of independent African deliberated in Addis Ababa shaping directions forward and paving ways for the historic mission of forming a continental organization – the Organization of African Unity (OAU). Determination of the nature of the continental organization divided African leaders into two major camps.⁸⁵ The *Unionist* Camp demanded immediate political integration of Africa thereby abolishing colonial boundaries, whereas, *Statist* group advocated for a loose continental organization in which the sovereignty, independence and political integrity of constituent members maintained. Samuel Amoo succinctly puts the scenario of formation of OAU as follows:

The OAU was very much a product of its time, and its principles and provisions reflect the aspiration, concerns and fears of the founding fathers. [It...] evolved as a compromise solution to the ideological disputes and divisions, which dogged African states at the initial stages of systematic relations.⁸⁶

⁸³ Touval *supra* note 43 at 18.

⁸⁴ *Id.*

⁸⁵ Ideological division of African leaders had been boiling since All Peoples Conference that was held in Accra, Ghana. At the time the balance of movement was toward political integration of Africa but when time went on African leaders tend to support sovereignty and independent existence of each of the States. Ultimately the Statists movement dominated the Unionist ideology which lead into formation of a compromised continual organization. See Amoo, *supra* note 5.

⁸⁶ *Id.*

President Kwame Nkrumah had a strong will for the political unity of Africa with a view to avoid the effects of arbitrary boundaries once and for all. However, most the founding fathers of OAU, including King Haile Selassie, Jomo Kenyatta did not accept the political unity of Africa at the time.⁸⁷ The overwhelming majority of founding fathers were under *statist* camp decided to form a loose continental organization. Ethiopia proposed a draft Charter which served as starting point for deliberation on drafting the Charter of OAU. Most of the principles of the OAU charter were dedicated to maintaining sovereignty, independence and territorial integrity of Member States “preferring loose form of [continental] association based on principles of functions and cooperation.”⁸⁸

The original version of the Charter of OAU of 1963 did not explicitly stipulate how to deal with the border issue that had been boiling since late 1950s, and that was the center of campaign by the Pan African movements. Pan African movements openly blamed the arbitrary colonial boundary that has split Africans. African border issues and liberation of Africa were among the top points of deliberation in pre-independence conferences and in revisionist movement. Silence of the original version of OAU Charter on African boundary issue may appear strange but it was for good, as it gave time for the young continental organization not to be thwarted before its birth. African border issue is very complex that affects everyone and not easy to resolve. In a situation where compromise may not be easily reached, the founding fathers traded time by avoiding anything that would block formation of the continental organization that thought to facilitate African unity.

⁸⁷ Kwame Nkrumah advocated for full continental integration as a necessary means to solve African socio-economic and political deficiencies, due to inexplicable justifications, other founding father of OAU refused to honor the idea of integration of African states forming a loose continental organization. The very motivation behind formation of continental organization was integration but several limitations and constrains surfaced (see SAHO, African Union and Regional Economic Integration, <http://www.sahistory.org.za/article/african-union-and-regional-economic-integration>). See also Lalonde *supra* note 23 at 117.

⁸⁸ Amoo *supra* note 5.

Due to the arbitrary partition of Africa, territorial and boundary issues were widespread. There was hot territorial and boundary issue in North Africa. Morocco claimed the whole territory of Mauritania and Sahara Arab Republic and portion of territories of Algeria. In East Africa Somalia already started claiming certain territories of Ethiopia, Kenya. In a situation where every state and founding fathers were overwhelmed with variety of interests, any attempt to deal with the “unsolvable boundary issue” feared to turn continental relationship from bad to worse. Therefore, prioritizing organizational unity before attempting to deal with inescapable colonial seed was a wise decision.

The founding fathers of the continental organization have decided to keep *status quo* with a view to maintain territorial integrity of Member States. It was absolutely not possible to go back to the traditional African boundaries (pre-colonial boundaries), as the whole terrain was altered. Colonial power had repeatedly changed pre-colonial frontiers, which rendered traditional zonal nature of boundaries unrecognizable. Any attempt to redraw African boundaries in accordance with the pre-colonial boundary lines would further complicate continental relationship. As a result, the Charter sets out guiding principles instead of a specific provision that meant to resolve border issues. In Art. 3(3) of the OAU Charter African Heads of State and Government have agreed to maintain “[...] territorial integrity of each State and [...] its inalienable right to independent existence.”⁸⁹ This provision does not directly address the impending border dispute but rather spells out a general norm. Thus, territories of Member States were expected to continue as it was inherited from colonial powers. The Revisionist agenda had been set aside in fear of opening Pandora’s box

⁸⁹ Charter of Organization of African Unity, Art. 3(3).

that was thought to activate unmanageable territorial and boundary conflict at all corners of Africa.⁹⁰

Remarks of the President Tsiranana of Madagascar and President Modibo of Mali at the in the inaugural Conference of Organization of African Unity reveals compelling causes for African territorial integrity norm.⁹¹ Apart from Morocco and Somali, the rest vast majority of newly decolonized African States have unreservedly “endorsed the supremacy of the principle of territorial integrity.”⁹² This was formally negotiated and incorporated into continental rule in first ordinary OAU Summit, July 1964. Put simply, the founding fathers of OAU have consented to recognize boundaries of new States, as it was existed on the critical date of independence. This decision thus has effectively trashed the idea of redrawing African boundaries on the bases of culture, religion, and ethnic affinity or the possibility of abolishing borders at all thereby creating United States of Africa.⁹³

Shortly after formation of the OAU, devastating border wars engulfed in the north and eastern Africa. To find African solution for the on going wars and settle other looming border issues, OAU convened the first ordinary session of Assembly Heads of States and Governments in Cairo, Egypt. The Cairo summit has devised a specific rule governing issues involving African

⁹⁰ While President Kenyatta proposed for a special charter that expressly bound OAU Member States declaring preservation of the territorial status quo, King Haile Selassie I of Ethiopia stressed for the “acceptance of colonial boundaries necessary for Africa’s safety.” See Lalonde *supra* note 23 at 119.

⁹¹ President Tsiranana acclaimed, “ It is no longer possible, nor desirable, to modify the boundaries of Nations, on the pretext of racial, religious or linguistic criteria.... Indeed, should we take race, religion or language as criteria of setting our boundaries, a few States in Africa would be blotted out from the map.” *Id.* at 117 Similarly, the President of Mali, Modibo Keita supported pre-existing boundaries stating, “ We must take Africa as it is, and we must renounce any territorial claims, if we do not wish to introduce what we might call black imperialism in Africa.” *Id.* at 117 - 118.

⁹² *Id.* at 118.

⁹³ In 1958 few independent African states deliberated in Ghana to redraw African boundaries based on cultural, linguistic, and religious affinity. President Nkrumah was one of the leading advocates of revisionist movement (See Lalonde *supra* note 94 at 116). President Nkrumah attempted to convince the founder of Organization of African Unity, but “African leaders soon realized the risk involved in the abolishing the entire colonial territorial framework or in systemically revising all existing boundary regimes,” and took a firm standing to maintain boundaries existing on independence. (*Id.*)

boundaries. The main point of the Summit was the agreement to, *respect border existing on achievement of national independence*.⁹⁴ The motive behind the Cairo Resolution was maintaining territorial integrity of Member States, and avoiding unmanageable territorial conflict. In Cairo Summit, the Assembly Heads of State and Government pledged to respect borders of each Member State actually possessed on achievement independence.⁹⁵ The Assembly has agreed to respect existing boundaries whether it was good or bad.⁹⁶

Unlike Art. 3(3) of the OAU Charter, the Cairo Resolution was very specific and self explanatory. Again, apart from Morocco and Somalia that had expansionist motives, the overwhelming majority has voted to respect boundaries existed on critical date of independence. Boundaries existing on the date of independence means boundary lines that a given state possessed on the actual date of declaration or granting of independence. Therefore, unless otherwise agreed, a State cannot claim a territory beyond the boundary it possessed on the date of independence. It appears that the proponents of Pan African Movement who sought to revise colonial African boundaries have changed their position and agreed to comply with the boundaries existed on independence. This rule effectively bars Somalia and Morocco's claims.

The Cairo Resolution of July 1964, in effect, appears synonymous to the Latin American principle of *uti possidetis*.⁹⁷ The usual issues with regard to the Cairo Resolution of 1964 was whether it is an African innovative formulation which is different from the Spanish Latin American principle of *uti possideti* or it is actually an African *uti possidetis*? This issue has split international lawyers and tribunals as two camps. As the final goal of the Cairo Resolution and the Principle of

⁹⁴ Cairo Resolution of Assembly of Heads and Governments, OAU Doc. AHG/Res.16(1) July 1964.

⁹⁵ *Id.*

⁹⁶ Tomas Bartos, *Uti Possidetis, Quo Vadis?* 18 AUST. YBIL 56, 37-68 (1997)

⁹⁷ The African rule of “ respect for boundaries existing on independence” and the Principle of *uti possidetsi* appear conveying the same meaning. The principle of *uti possidetis*, as has been discussed in chapter Three of this Dissertation, means “ You may possess, as you possess” which basically the same with the meaning of continuing

Uti possidetis, are analogous, international lawyers who are familiar with rationales the principle of *uti possidetis* are quick to read the Cairo Resolution of July 9, 1964 to mean African *uti possidetis*.⁹⁸ Most commentators admit that the principle of *uti possidetis* is implicit in the Cairo Declaration.⁹⁹ Garth Abraham states, “In its Cairo Declaration of 1964 the principle of *uti possidetis*, although not explicitly referred to by name, was formally adopted by the organization of Africa Unity.”¹⁰⁰

Close assessment of the Resolution vis-à-vis the principle of *uti possidetis*, however, points the contrary. A simple question that has to be answered at the outset is, if the founding fathers of Organization of African Union were inspired by the Latin American Principle, as a conflict avoidance tool, why they kept shy away from express recognition of the principle of *uti possidetis* in the Cairo Resolution? The Cairo Resolution was passed at a time in which the contours of the principles of *uti possidetis* were well settled, but why the African Heads of States and Governments at the Cairo Summit opted to use a different the expression instead? Though some international lawyers view that the founding fathers of OAU were inspired by the Latin American principle of *uti possidetis*,¹⁰¹ it appears that the founders of African continental organization have deliberately

possession of boundaries that an African States continue to possess as it possessed on actual date of gaining independence. The procedures entitling to continue possession, however, are not identical.

⁹⁸ As Lalonde attests, “Many commentators have argued that this respect for boundaries inherited from the colonial past is simply the application in the African context of the Latin American principle of *uti possidetis*.” See Lalonde supra note 5 at 104. Contantine Antonopoulos, for instances, states “ The Principle of *uti possidetis Juris* was also applied in the course of decolonization in Africa.” Antonopoulos, supra note 95 at 32. Antonopoulos, assumes the founding fathers of Organization of African Unity in the formative document declared the Principle and reaffirmed the same principle in the Cairo Declaration of 1964.

⁹⁹ Sumner, supra note 1. *Frontiers Dispute, Judgment*, I.C.J. Reports 554 (1986). Some authors view Art. 4(b) of the current AU Constitutive Act which states “ respect to pre-existing boundaries,” as express recognition of the principle of *uti possidetis*. See COMMISSION OF AFRICAN UNION, DEPARTMENT OF PEACE AND SECURITY, DELIMITATION AND DEMARCATION OF AFRICAN BOUNDRIES, (General Issues and Case Studies) 43 (2013). See also Lalonde supra note 5 See also Dubai-Sharjah Border Arbitration, which expressed that *uti possidetis* revived in Africa. (Lalonde, supra note 94 at 125).

¹⁰⁰ Garth Abraham, “Lines upon”: *Africa and the Sanctity of African Boundaries*, 15 Afr. J. INT’L & COMP. L. 70, 61-84 (2007).

¹⁰¹ *Id.* Abraham remarks that “[...] although not explicitly referred to by name, was formally adopted by the Organization of Africa Unity.” The founding fathers have all possibilities to explicitly refer the principle of *uti possidetis* had they wished to import the Principle to Africa; all other remarks appear speculation as the Cairo

avoided use of the expression *uti possidetis* by applying a general expression “ *boundaries existing on the date of independence,*” which need not be a boundary defined by colonial powers. The intention of African leaders can also be read from objectives of Pan African Movement. The Movement had a motto of redrawing boundaries of Africa to reunite the partitioned ethnic or tribal groups, until it changed its stance by accepting to respect boundaries existed on independence.

There are numerous justifications to prove incongruence of the African meaning of colonial boundary delineation rule, and the Latin American principle of *uti pssidetis*. Unlike Latin American States, Africa houses some States that never been colonized.¹⁰² As the principle of *uti possidetis* explains only boundaries inherited from colonial powers, it has nothing to do with the boundaries of States never been colonized. Most importantly, the principle of *uti possidetis*, as a principle of defining international boundaries, was born in a situation where administrative boundaries were inherited from a single colonial power - Spain. The principle of *uti possidetis* never been applied even in South America States that were not colonized by Spain. Brazil which was a colony of Portugal or other enclaves of South America that were colonized by other European colonial power do not recognize the Principle of *Uti possidetis Juris*.¹⁰³

Africa was colonized by several European powers. In some cases, a single ethnic group was split into several European powers. Even if nations opt to rely on the principle of *uti possidetis* acknowledging the doctrine of *uti possidetis* with all its deficiencies, it can be used to delimit

Resolution has some element identical concept. Antonopoulos poses the same view stating, “ The adoption of *uti possidetis juis* in Africa by virtue of the 1964 Cairo declaration has worked as the legal vehicle of reaffirming the right of territorial integrity.” *Constantine Antonopoulos, The Principles of Uti possidetis juris in Contemporary International Law*, 49 RHDI 29 996. Similarly, Thomas Bartos, for example, summarizes, “ Since the Cairo Declaration says nothing of situations where colonial boundaries are physically non-existence, or incorrectly demarcated, or where boundary documents cannot be interpreted without recourse to arbitration, the Declaration is meaningless unless viewed as standing only for a broad principle of inheriting colonial boundaries.”

¹⁰² For instance, Ethiopia and Liberia never colonized. Ethiopian boundaries were set by treaty with the neighboring States that were represented by their respective colonial powers. Boundaries of Ethiopia and Sudan, boundaries between Ethiopia and Kenya, boundaries between Ethiopia and the current Somaliland were set by the treaties concluded with Great Britain, while Eritrean boundaries was defined by three defunct treaties while Ethiopian and Djibouti boundary was set between Ethiopia and France.

boundaries that were inherited only from a single colonial power. This accords with the traditional sense of the Principle as practiced in Spanish Latin America. In this regard, Bartos suggests, “[the principle of *uti possidetis*] needs to be applied where the new States succeed to different administrative units of the same colonial power.”¹⁰⁴ In a situation where states have inherited boundaries from different colonial powers, “It is unnecessary to have recourse to *uti possidetis*.”¹⁰⁵ The situation in Africa is, essentially different from Spanish Latin America. Africa was not only colonized by numerous colonizers, but also colonial powers repeatedly altered African territories with a view to smooth their administration under divide and rule system.¹⁰⁶ Apart from Ethiopia that survived colonization by resisting several colonization attempts and Liberia that was protected by the United States, the rest of Africa was partitioned among various super powers. A single ethnic group, in certain cases was split into administration of multiple colonial powers. In east Africa, the Somali ethnic group was shared among Great Britain, Italy, and France. In West Africa, the current Cameroon was split into Great Britain and France. If the Principle originally meant to apply to colonial administrative subdivision of a single colonizer, how could it work in Africa?

On top of this, most African boundaries were delineated by bilateral or multilateral treaties either between African States among themselves after gaining independence, or an African State and a colonial power. For instance, Ethiopia concluded a number of territorial or boundary treaties with colonial power that had occupied neighboring east African States. In defining the northern boundary, Ethiopia in 1900, 1902 and 1908 concluded boundary treaty with Italy that colonized

¹⁰³ Take, for instance, the former Great Britain colony of Guyana.

¹⁰⁴ Bartos *supra* note 95 at 62.

¹⁰⁵ *Id.*

¹⁰⁶ At the end of WWI all African colonies of loser of the war either allocated into winners of the war or mandated into the administration of another State. For example, Togoland and Cameroon were formerly German colonies but after German defeated by the WWI, both of the territories apportioned between Great Britain and France. Similarly Rwanda & Burundi were entrusted to Belgian administration and the rest of German East and West Africa were transferred to Great Britain and Tanganyka. For details see James E. Kitchen, *Colonial Empires after the*

Eritrea. Great Britain and Ethiopia concluded various colonial treaty governing Kenya, Sudan and Somalia. After decolonization, Kenya, Sudan and Somalia succeeded the treaties thereby complying with the boundary lines that were set by Ethiopia and Great Britain. Ethiopia concluded boundary treaties with Italy regarding Ethio-Somalia boundary and successive treaties governing Eritrean boundaries though Italy shortly terminated the treaties by invading Ethiopia thereby attempting to unify both countries as Italian East Africa Colony.

Thus, if any issue arises in boundaries between Ethiopia and Kenya or Sudan it is possible to resort to the Cairo Resolution. Had there been no treaty, by chance, the scope of the boundary would have been determined in accordance with the limits of territory actual held on the critical date of political independence. The principle of *uti possideits* can offer no better solution than the Cairo Resolution in this regard. Boundaries of French Somali Land (now Djibouti) were set by colonial treaties that were entered between Ethiopia and France. The same situation prevailed in other areas of Africa.¹⁰⁷ In this *sui generis* boundary setting that was created by bilateral or multilateral treaty, it is the treaty that defines boundary – not the principle of *uti possidetis*.

The Cairo Resolution dictates Member States to respect pre-existing boundaries on the critical date of independence. There are various ways of proving either critical date or colonial boundaries. The date in which the colonial power expressly declared decolonization or forced to leave political administration to the local people may be taken as the critical date in which the starting point of the existing boundaries. Colonial treaties, colonial maps, other documents that can prove the extent of colonial boundary limit, or in absence of all these effective control may prove the limits of the colonial boundary line. Unlike the Latin American principle of *uti possidetis juris*,

War/Decolonization, INTERNATIONAL ENCYCLOPEDIA OF FIRST WORLD WAR, http://encyclopedia.1914-1918-online.net/article/colonial_empires_after_the_wardecolonization (last visited Aug. 5, 2015 5:44 PM).

¹⁰⁷ *Id.*

the Cairo Resolution refers to the boundaries actually held on the very date of independence. Put simply, boundaries were set by effective possession.

Thus, a nation cannot invoke a territory that it did not effectively control on the date of independence. There is no assumption of possession. In accordance with the old Spanish law, the Latin American principle of *uti possidetis juris* assumes all vacant lands were also assumed occupied. But the African rules respects sanctity of territories of already occupied by the claimant state. This aspect makes the African boundary law completely different from the Spanish Latin American principle of *uti possidetis*. The principle of *Uti possidetis de facto*, which recognizes boundaries of territories actually held on independence appears relevant to the African boundary law, it is not an established international law even in Latin America.¹⁰⁸

Moreover, the principle of *uti possidetis* never been consistently applied even in Latin America. Brazil always rejected the principle of *uti possidetis juris* opting for application of *uti possidetis de facto*. Even some former Spanish American colonies, albeit certain limited instances, sidelined the Principle by contracting with Brazil or forming a bigger union of States reforming an already formed international boundary into different form of internal boundary. Moreover, application of the Principle of *uti possidetis* was effectively suspended territorial or boundary conflict temporarily, but it did not offer a lasting solution for territorial or boundary conflict. The usefulness of the principle of *uti possidetis* specifically to Africa, therefore, is unsubstantiated.

ICJ's equation of the expression, "boundaries pre-existing on independence" with the Spanish Latin American principle of *uti possidetis juris* in *Frontier Dispute Case (Burkina Faso vs. The Republic of Mali)*¹⁰⁹ was not supported by any evidence, nor the intention and conduct of founding fathers, suggest such assumption. The Cairo Resolution that was passed at a time Africa

¹⁰⁸ Only Brazil invokes the application of *uti possidetis de facto*. Therefore, this is not a commonly accepted international law doctrine.

was chocked with engulfing territorial or boundary conflict did not mention a word or there is no clue to deduce the possibility of application of the doctrine of *uti possidetis* in Africa. Given the popularity of the Principle in 1964, Suzan Lalonde, aptly surmises that omission of the Principle of *uti possidetis* from the most pertinent declaration, the Cairo Resolution of 1964 was “a deliberate choice.”¹¹⁰

The Cairo Resolution by referring to expressions, “boundaries pre-existing at independent” meant boundaries that a State possessed exactly on the critical date of independence and that can be proved by unequivocal evidence. Thus, the African policy was effective occupation.¹¹¹ Any attempt to go beyond the lines effectively controlled at the critical time of acquiring independence, appears contrary to the OAU charter and the Cairo Resolution. The Cairo Resolution gives no room to constructive possession – in African sense, only territories actually possessed on the critical date confers title. The actual possession rule aligns with the Brazil’s position of *uti possidetis de facto*, but it is not an international law principle.¹¹²

4.5. Current State of African Boundaries: Transforming Borders from Barriers to Bridges

4.5.1. *Moving Toward Integration of Africa: Leveling the Play Ground*

The Pan African Movement’s motto of creating an independent, prosperous, peaceful and united Africa appears revitalizing since the Algiers conference of Assembly of Heads of State and Government.¹¹³ The 35th Ordinary Session of Assembly of Heads of State and Government took

¹⁰⁹ Case Concerning The Frontier Dispute (Burkina Faso /Republic of Mali), ICJ Reports (1986), <http://www.icj-cij.org>.

¹¹⁰ Lalonde *supra* note 23 at 120.

¹¹¹ *Id.* at 123.

¹¹² Suzanne Lalonde, agrees with this stand stating, “ [...] if African practice is to be equated with the *uti possideits* principle, it should at least be assimilated to the much less influential *uti possideits de facto* formula. On this rival formulation of the *uti possideits* principle, the Chamber is silent.”

¹¹³ DECLARATION AND DECSIION ADOPTED BY THE THRITY FIFTH ASSEMBLY OF HEADS OF STATE AND GOVERNMENTS, ALIGIERS, ALGIVERIA, July 8 – 9, 1999. https://www.issafrika.org/Af/RegOrg/unity_to_union/pdfs/oau/hog/9HoGAssembly1999.pdf

the initiative to work beyond “business as usual.” The Summit ended up with a great motivation and ambition to move for ultimate political integration of Africa “[...to] enter the third millennium with a genuine spirit of cooperation.”¹¹⁴ The Assembly of Heads of States and Governments (AHG) in quest for unity, economic and social development have deliberated in length the possibility for leveling the play ground for the ultimate political integration of Africa.¹¹⁵

The Assembly of Heads of States and Governments reassessed the socio-political and economic journeys that OAU has travelled and have supported Colonial Muhammad Gadhafi’s proposal for greater unity and cooperation of Africa to resist the challenges of globalization and changing world phenomenon and improve living standards of Africans.¹¹⁶ The Algiers Resolutions underpin the need for thorough deliberation to attain a greater unity with a view to cope with the changing global social-political and economic situations that demand greater unity, strength and determination to uplift the state of Africa.¹¹⁷

Visionary African leaders have expressed their dedication to change the usual journeys of OAU by transforming its nature. African leaders applauded OAU’s success in playing pivotal role during liberation movement against colonialism and apartheid. But due to external and internal factors, OAU could not fully meet the expectations of Africans. According to Vincent, though

35th Ordinary Session of Assembly of Heads of State and Governments (AHSG) that was held in Algiers in July 1999 deliberated variety of continental and international issues. Among other things the proposal suggested by the late Libyan leader, Muhammad Gadhafi geared toward political integration of Africa. The declaration of 35th Ordinary Session of African Heads of States and Governments reveals that Muhammad Gadhafi suggested for reshaping OAU and creating a strong continental organization that can align with the changing world phenomenon. To deliberate on this noble agenda Assembly of Heads of States and Governments scheduled an extraordinary conference to be held a month later (Sep. 1999) in Sirte, Libya by the invitation of Colonel Ghadhaffi.

¹¹⁴ The late Libyan leader Muhammad Gadhafi suggested for the formation of United African and accordingly the an extra ordinary meeting was scheduled to be held in Sirte Libya. See Convening of extra Ordinary Session of OAU Heads of States 6 – 9 Sep. 1999 to discuss ways and means of making OAU Effective See, https://www.issafrika.org/Af/RegOrg/unity_to_union/pdfs/oau/hog/9HoGAssembly1999.pdf

¹¹⁵ Vincent O. Nimehielle, *The African Peer Review Mechanism Under the African Union and its initiative: The New partnership for Africa’s Development* 98 AM. SOC’Y INT’L L. PROC. 242, 231 – 249(2004).

¹¹⁶ *Id.*

¹¹⁷ Clause 2 of Sirte Declaration, EAHG/Draft/Decl. (IV) Rev.1. FOURTH EXTRADODINARY SESSIN OF THE ASSEMBLY OF HEADS OF STATES AND GOVERNMENTS 8 – 9 Sep. 1999 Sirte, Libya.

“OAU played a central role in the political emancipation of colonized African states, but beyond that it was of little relevance and effectiveness in shaping political, economic and social development of the continent.”¹¹⁸ Lack of good governance, neocolonialism, sporadic conflicts, protracted territorial and boundary induced wars among Africans, and corruption have been the usual phenomenon.

African leaders offered credit to the philosophy of visionary Pan Africanist,¹¹⁹ who sought to abolish colonial boundaries and redraw genuine African boundaries in a way uniting balkanized nations and nationalities with the ultimate goal of creating united Africa under the auspicious of Pan African movement.¹²⁰

Kwame Nkrumah’s vision of creating a united Africa was ultimately trashed in the Addis Ababa Conference of 1963 that founded the Organization of African Unity (OAU). Kwame Nkrumah foresaw possible consequences of fragmented Africa and arbitrary colonial boundaries that has partitioned communities and restricted their right to use natural resources like grazing land and water. President Kwame Nkrumah at the early days of independence of African nations

¹¹⁸ Nimehielle supra note 115 242. Africans though technically free, but still remained under the bondage of poverty, recurrent war, political instability, famine, corruption (all sorts of evils). African

¹¹⁹ See Sirte Declaration Clausees 3 and 4 which recall the heroic struggles during liberation movement. Assembly of Heads of States and Governments afforded respect to the Pan Africanists and the people of African for efforts endeavored to consolidate African Unity. (Clause 4 of Sirte Declaration). The decision to erect a Statute in memory of Kwame Nkrumah at the newly constructed AU head quarter in Addis Ababa, Ethiopia proves the credit afforded to the extra-ordinary vision of creating United Africa. The Statute of Kwame Nkrumah gives grace to the head quarter of the AU. The aspiration of the Pan Africanist was dumped at the very formation of the continental organization where some parts of Africa were under the yoke of colonialism. Various rationale may be speculated: interest of “corrupt and inept political elites” to be sovereign in their local land over the divided people with competition for long time. (See Matua supra note 7 at 116. In fear of opening Pandora’s box that would saw unavoidable boundary conflict all over Africa may be another reason why founding fathers of OAU have opted to give respect for the colonial boundaries though it was arbitrary and artificial. The other reason may be the interest of super powers that have been remotely controlling African leaders. For instance, Liberia did not out rightly reject the idea of forming a United West Africa, but later changed it stance of joining the already united Ghana and Guinea. Later on the then Leader of Liberia together with the leaders of Mali, and Ethiopia adversely fought Kwame Nkrumah’s vision of forming a United States of Africa.

¹²⁰ It was viewed that colonial boundaries disrupted the natural evolution of African indigenous boundary. Arbitrary colonial boundary disregarded “[...] the age-long efforts of (the indigenous) peoples to achieve political adjustment between themselves and the physical conditions in which they live.” J. C. ANENE THE INTERNIOANAL

vigorously worked to create a unified and independent Africa with a view to fight natural and manmade evils that have been cursing Africa. President Nkrumah went beyond mere political campaign to create a united Africa.¹²¹ Before the formation of Organization of African Unity President Nkrumah attempted to unite neighboring regions of West Africa – Union of West Africa States.¹²² Ghana and Guinea formed a United West Africa and attempted to incorporate Liberia. After 50 years of the formation of OAU, facts on the grounds have been completely changed and it appears not easy, if not possible at all, to launch a single continual political entity - the United States of Africa.

The possibility of uniting Africa, however, is not a dead agenda.¹²³ Inspired by the cooperative spirit of Assembly of Heads of State and Government at the 35 Ordinary Session of OAU in Algiers Algeria, the late Libyan strongman, Colonel Muhammad Gadhafi, vigorously campaigned for immediate political unity of Africa. He invited African leaders to deliberate for instant political integration of Africa. Clause 7 of Sirte Declaration manifests Gadhafi's enthusiasm to form politically integrated and strong Africa that can resist challenges of

BOUNDARIS OF NIGERIA 1885 – 1960 3(1970) Quoted in Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L 1115, 1113 – 1176 (1994 – 1995).

¹²¹ Mwangi S. Kimenyi and Katrin Kuhmann, *African Union: Challenges and Prospects for Regional Integration in Africa*, 13 WHITEHEADJ. DIPL. & INT' REL. 7-27 (2012).

¹²² Paul-Mare Henry, *Pan-Africanism: A Dream Come True*, 37 FOREIGN AFF. 450, 443 – 452 (1958 – 1959).

¹²³ After 50 years of decolonization, due internal and external factors good brotherly relationship is spoiled. Communism and cold war era world relationship has spoiled Africa. There is a wide gap in socio-economic and political development among Africans. Colonialists, with a view to divide and rule Africa, have spoiled African nationalism and good brotherly relationship by Africa by planting protracted problems as a result of which brotherly people sought separation with a view to exploit weak side of neighboring States that was built by colonial powers. Take for example the boundaries of Ethiopia. Before Arrival of Italian boots in coastal areas of Red Sea, in all standards and proof, Ethiopia's boundary extended into the Red Sea. Italy cut all the coastal areas and formed the colony of Eritrea by changing its former name "*Bahir Negash*." France took the coastal land- Djibouti and Ethiopia though few miles away from Red Sea now landlocked. Now separation from the motherland, Ethiopia, has been source of income to Eritrea and Djibouti as they can simply live by the income they get from the port fee that Ethiopia pays. African unity would avoid this advantage to Eritrea and Djibouti. Moreover, the leaders of this tiny States would compete with more competent persons to lead the nation. It is hard to convince selfish leader who desire to retain power for life. In order to Unit Africa as a one political entity, it may take years to change the attitude of African leader and level ground for creating United States of Africa by reducing poverty, developing infra structure and developing stronger tie by creating peace. Border can play vital role in uniting Africa by creating peace among Africa.(the role of borders in keeping peace among the neighboring States will be dealt later.),

globalization and protect interests of Africa. With this view in mind, by the invitation of Colonel Muhammad Gadhafi, fourth extra-ordinary Summit of Assembly of Heads of States and Governments was held in Sirte, Libya to assess possible ways for political integration of Africa.¹²⁴

Assembly of Heads of State and Government, in principle, accepted the possibility of uniting Africa as a single political entity.¹²⁵ Simply put, there was no strong objection against the proposed political integration of Africa, but immediate political integration was almost impossible. In a situation where divisive consequences of colonization have been spread all over the continent, immediate political integration would easily be thwarted. Due to arbitrary colonial partition of Africa and other disruptive seeds that were sown by the colonial powers, animosity and hatred still reigns in some vicinities of Africa.¹²⁶ There are potential internal and external forces that can spoil any move for immediate political integration: former colonial hands still subtly control Africa.¹²⁷

Consequently, African Heads of States and Governments have agreed to level the playground for viable political integration before rushing to set up a single continental political

¹²⁴ The Fourth Extra ordinary Session of the Assembly of the Heads of State and Government was inspired by the Pan African movement that restlessly worked of the pressing African issue of the time and attempted to create United States of Africa. As stated in the Sirte Declaration, participants of Summit declared: “ [...] we were inspired by the ideals which guided the Founding Fathers of our Organization and Generations of Pan-Africanists in their resolving to forge unity, solidarity and cohesion, as well as cooperation between African people and among African States.” Sirte Declaration Clause 3.

¹²⁵ Participants of Sirte Assembly expressed their inspiration by the proposal of Colonel Muammar Ghaddafi and “his vision for strong and united Africa capable of meetings global challenges and shouldering it responsibility to harness the human and natural resources of the continent in order to improve the living condition of its people.” See Clause 7 of Sirte Declaration.

¹²⁶ Take for example the case of relationship between Ethiopia and Eritrea. The ambiguous boundary line between Ethiopian and Eritrea has created animosity among Ethiopians and Eritreans. Both of the States host rebels of each other. Almost an identical attitude exists between Eritrea and Djibouti.

¹²⁷ It appears not completely wrong if one says Africa is not completely independent. Though, technically Africa is free and independent, neocolonialism still persists. Most African State depends on foreign budgetary subsidy. Under the guise of human rights violation or western ideology, African States indirect control of the West. One can fairly imagine if any former French colonies integrate with another African nation. For instance, France has military base in Djibouti. If Djibouti, for instance, moves for political integration with any other African State, France would not keep quiet. With respect to political changes taking in any of the former French, colonies France is quick to react than any African neighboring States or Regional Economic Communities or African Union. In current state if Africa moves for political integration, it is not hard to guess the direct or indirect reaction of United States or other European powers. Therefore, for a meaningful integration to take place all threats have to be tackled. Smoothing relationship among the member states may take time but would produce a suit fruit. Thus, border issues have to be resolved amicably and

entity. Accordingly, in Sirte Summit Assembly Heads of State and Government extensively deliberated on possible ways of setting up a continental organization that can effectively work toward fulfilling the mission and attain the vision of African integration goals by keeping “[...] pace with political, economic and social developments taking place within and outside [...the] continent.”¹²⁸ As Nmehielle, attests, “The Sirte declaration was based on frank and extensive discussions on ‘how to proceed with strengthening of the unity of our continent and its people’ and contained a decision to establish [...]”¹²⁹ A continental organization akin to the European Union in which each Member State retains its sovereignty until facts on the ground steadily changes for the future political integration. At present Europe is moving toward political integration under the strong continental organization – European Union. Internal national boundaries have been changed enabling everyone to move freely in the Schengen area. Free movement and monetary union are some of the achievements of the European Union that may lead into a smooth political integration.

In relative thinking, it may be said that Africa was in a better position for integration during the Pan African movement. Africa has missed a better moment for possible political integration when Pan Africanism was at its high and enthusiastic African intellectuals were with full vigor and spirit of Africanism.¹³⁰ Since launching of OAU, African States have messed with evil consequences of colonization that seeded perpetual antagonism.¹³¹ For instance, due to expansionist move of Morocco and Somalia destructive wars erupted. Somalia attempted to unit ethnic Somali

good neighborhood should be created. Economic empowerment brings about political empowerment, the African Union should work for economic integration before moving for complete political integration.

¹²⁸ Clause 2 of Sirte Declaration EAHG/Draft/Decl.(IV) Rev.1 FOURTH EXTRAORDINARY SESSION OF THE ASSEMBLY OF HEADS OF STATE AND GOVERNMENT 8 – 9 Sep. 1999 See also Nimehielle *supra* note 111 at 241.

¹²⁹ *Id.*

¹³⁰ This does not, however, mean that Kwame Nkrumah’s effort for political unity was failed without resistance. Ethiopia, Mali, Liberia strongly argued against political integration. Liberia spoiled the already started political integration with Ghana and Guinea. Though a clear justification is not revealed, one may speculate foreign interference against formation of a strong Africa that may be easy to manipulate.

people in Ethiopia and Kenya by waging war against both of the neighboring States. There was boundary war between Egypt and Sudan, Morocco and Algeria, Morocco and Mauritania, Morocco and Sahrawi Arab, Chad and Libya, Nigeria and Cameroon, Mali and Burkina Faso, Tanzania and Uganda and so forth.¹³²

With this goal in mind, African leaders in Sirte, Libya have decided to phase out OAU and set up a new continental umbrella organization, African Union, to accelerate political integration. The constitutional document (Constitutive Act of African Union) was deliberated and adopted in Lome Summit of July 2000.¹³³ African Union was officially come into existence after 36th accession of Nigeria on May 26, 2001.¹³⁴ For the purposes of paving a smooth road map by structuring and defining the role of constitutive organs of African Union Lusaka Summit was convened. The Lusaka Summit of July 2001 set up major department that thought to play significant role for realization of the objectives of African Union. Finally, in December 2002 African Union was formally launched thereby formally dissolving OAU.¹³⁵

Though there are lingering doubts among ordinary Africans and the academia¹³⁶ that the transformation of OAU into AU was merely a change of name, the mission and expected goals are not strictly alike. According to ASHlegh Lezard, a contributor of African Inventor (Ai), while

¹³¹ See Abdalla Burja, *African Conflicts: Their Causes and Their Political and Social Environment*, DPMF Occasional Paper No. 4 (2002), <http://www.dpmf.org/images/occasionalpaper4.pdf> According to Abdalla, though all post colonial African Conflicts were not border motivated, about 80 conflicts surfaced in Africa. *Id.*

¹³² According to Timothy Besley and Marta Reynal- Querol, since 1950 African conflict propensity approaching to double the rest of world. In Armed Conflict Database (ACD) “measure of Civil Conflict on threshold of 1000 battle deaths suggests that around 8.5% of country years in Africa since 1950 are conflict years compared to 5% of [...] the rest of the world.” Timothy Besley and Marta Reynal- Querol, *The Legacy of Historical Conflict Evidence from Africa*, EOPP/036 (2012), <http://sticerd.lse.ac.uk/dps/eopp/eopp36.pdf>

¹³³ See <http://www.nti.org/treaties-and-regimes/african-union-au/>

¹³⁴ Jeremy I. Levitt et al, *The African Union and The New Pan Africanism: Rush to Organize or Timely Shift*, 13 TRANSNAT’L L. & CONTMP. PROBS. 2 (2003).

¹³⁵ Thirty Six Ordinary Session of Assembly of Heads of States and Governments, AHG/Decl.2(XXXVI) Tog Lomme July 10 – 12, 2000, http://www.afrimap.org/english/images/treaty/CSSDCA_Lome_Decl.pdf, See also <http://www.nti.org/treaties-and-regimes/african-union-au/o>

¹³⁶ See Levitt et al supra note 121. Dero Olowu expressed his doubt stating: “[...] despite noble pronouncement, the African Union is dogged by doubts that it will not achieve any more of tis goals than its predecessor, the OAU.” The

“OAU was about ‘Unity’; the AU is about ‘Union’ [and] unlike OAU, the AU is preparing to take a stand.”¹³⁷ Among other things, the formation of African Union has created new feeling and boosted “[...] consciousness in the African continent among its leaders and its citizenry arising [...] That feeling or consciousness is expressed in the term African Renaissance [...]”¹³⁸ African Renaissance means Africa should be able to solve its problems and uplift moral and logistic needs of its people. Business as usual should end and Africa should unit to tackle all socio-economic challenges that the continent has been wrangling.¹³⁹

As underpinned in the Sirte Declaration, the prevailing continental and global challenges have necessitated the formation of a strong continental organization that can empower Africans to address the socio-economic and political hurdles of contemporary world.¹⁴⁰ The objectives, modalities, and *modus operandi* of African Union are different from the purposes and goals of the OAU.¹⁴¹ AU is conferred with variety of responsibilities to accelerate a way for African political integration. The creation of African Union Peace and Security Department is a noble move that make AU practically differ from OAU. OAU was guided by the neutrality principle, which

authors agree to Olowu stating, “ This skepticism may be well founded because of formidable normative institutional and structural imperfections.” *Id.*

¹³⁷ Ashelegh Lezard, *Valuing Integration*, AFRICAN INVETOR (Ai), July 1, 2004, <http://www.africaninvestor.com/article.asp?id=468>

¹³⁸ Vincent O. Nimehielle, *The African Union and African Renaissance: A New Era for Human rights Protection in Africa?* 7 SINGAPORE J. INT’L L & COMP. L. (2003) Quoted in Nimehielle *supra* note 111 at 242

¹³⁹ This was Gadhafi ‘s vision. Colonel Gadhafi was regarded as dictator and synonymized as African Saddam Hussen, but his ambition for African Renaissance appreciated by many Africans. With a view to speed up African political integration Colonel Gadhafi, invited African Heads of States and Government to conduct a fourth extraordinary meeting in Sirte, Libya.

¹⁴⁰ See Clause 6 of the Sirte Declaration.

¹⁴¹ While promoting unity and solidarity of African States was one of the prime objectives of OAU, AU is expected to achieve a greater unity and solidarity between African States and the people of Africa. The extent of unity that AU has to achieve is greater. AU is not simply expected to promote unity and solidarity, but has been endeavoring to achieve it. AU is also mandated to achieve the unity among African people and strengthen it. Some of the objectives of OAU are already phased out. One of the objectives of OAU was eradicating colonialism. The purpose is already attained. AU is mandated ‘to accelerate the political and socio-economic integration of the continent. While working for ultimate political integration is not the main motto of OAU, AU is expressly mandated to promote peace, security and stability on the continent. Though this was implicit in the OAU’s mandate, the Constitutive Act of AU has afforded constitutional authority that must be achieved. Unlike OAU, AU got a wide range of mandates that consider socio-economic and political development.

prohibited interference in domestic affairs of Member States.¹⁴² But AU is legally empowered to intervene should grave atrocities that could spoil peace and stability surface in anyone of the Member States.¹⁴³ AU has clear vision and mission – facilitating political integration of Africa – with the motive of making Africa a nation caring for all Africans equally. Anything short of this may be redundant or simply a side issue.

With the objective of building strong and close relationship among the Member States, AU is set to perform variety of tasks that may foster friendship, cooperation and regional integration. New Partnership for African Development, NEPAD is among the programs that are believed to bolster smooth ties among Africans.¹⁴⁴ NEPAD has the objective of uplifting the economic position of Africa, which in turn would make positive contribution for African political integration.¹⁴⁵ Specifically, NEPAD aims at eradicating poverty in Africa.¹⁴⁶ Poverty affects integration – a prosperous nation may hesitate to mingle with a weaker one that comes with burden, but has little to offer.¹⁴⁷ Today, trade relationship among African nations is very low.¹⁴⁸ This may be explained in various ways. A poor nation is generally unproductive and may simply look for assistance. Even if

¹⁴² The Rwanda Genocide has shaded a dark strain on OAU, as it did little to avert the slaughter of African on account of maintaining the policy of non-interference in domestic affairs of Member States.

¹⁴³ The main objectives of PSC is to oversee African peace and stability, which includes conflict prevention measures, conflict management and resolution. PSC has the objective of controlling acts and facts disturbing peace in Africa. It will have a regular force that may be deployed instantly to avert a grievous condition that may lead into gross human right violation or genocide. See Ahlegh Leznd , *Valuing Integration*, AFRICAN INVESTOR (Ai), July 1, 2004, <http://www.africaninvestor.com/article.asp?id=468>

¹⁴⁴ Declaration AHG/Decl.1 (XXXVII) adopted by the 37th Ordinary Session of the Assembly of Heads of State and Government of the OAU, Lusaka, Zambia 9 – 11 July 2001.

¹⁴⁵ African States have to open their doors to their neighbors; a nation cannot interact with neighbors while locked up by borders. Mo Ibrahim, Africa's telecommunication Miguel, remarks, “[...] people normally trade with their neighbors first and then move further afield. That hasn't been the case in Africa and that what we really need to start encouraging. We need free movement of people and over trade across local borders. Not only will that encourage the economy, it is also a safeguard against conflict.” See Ashlegh Lezard, *Valuing Integration*, AFRICAN INVESTOR (Ai), Jul 1, 2004, <http://www.africaninvestor.com/article.asp?id=468>

¹⁴⁶ Nimehielle *supra* note 138

¹⁴⁷ Though border dispute takes lion's share of interstate conflict in Africa, poverty is another ground for conflict. See also Johson Oalaosebikan Aremu, *Conflict in Africa: meaning, Causes, Impact and Solution*, 4(4) AFRICAN RES. REV. 549 – 553, 549 – 560 (2010).

¹⁴⁸ Mwangi S. Kimenyi and Katrin Kuhmann, *African Union: Challenges and Prospects for Regional Integration in Africa*, 13 WHITEHEADJ. DIPL. & INT' REL. 7-27 (2012).

it is able to export some to the neighboring nation, commodities may be uncompetitive in term of quality and cost. After all, products of most weak nations are agricultural produce and a neighboring state may not have taste, as it also produces an identical product. On top of this, poor infrastructure, and undeveloped transportation channels increase cost. As a result, African States prefer to trade with Europe or Asian States in exchange for their industrial products.¹⁴⁹

Fragmented nation states, and their boundaries worsen the situation.¹⁵⁰ Due to dispute most boundaries are not open for free passage, which requires to travel far distant that adds up cost.¹⁵¹ The effect of arbitrary colonial boundaries is very evident in the cases of landlocked States. Africa houses 15 of the world's land locked nations that depend on boundaries of neighboring states that may not necessarily be open in all times.¹⁵² As Uprety attests, “ Excessive high transit costs inflate the consumer prices of imported goods in LLDC and undermine the competitiveness of their exports in foreign market. They are thus a serious barrier to trade.”¹⁵³ It is not only changing transit cost but also the whole situation depends upon political will of the neighboring state. For instance due to Ethiopia-Eritrea conflict, the border has been closed for more than a decade and Ethiopia cannot use the port that it built before Eritrea's secession. Ethiopia has to depend on small Djibouti port or has to travel long distance to port Sudan or to another longer distance Mombasa port, Kenya. In all cases Ethiopian people suffer from additional unnecessary cost. This also affects competitiveness of Ethiopian products in continental or global market.

¹⁴⁹ *Id.*

¹⁵⁰ For instances the cost of import cars manufactured in Ethiopia to Ivory coast will cost \$5000 while a better one can be imported from Japan to Ivory coast at \$1500. Similarly, it is cost effective to deal with Europe or Asia to the Eastern African nations. Thus, poor infrastructure and fragmented boundary system discourage inter Africa trade. See *Id.*, at 9.

¹⁵¹ Michael L. Faye *et al.*, *The Challenges Facing Landlocked Developing Countries*, 5:1 J.O. Hum. Devt. 31 (2004). Available at <http://www.unmillenniumproject.org/documents/JHD051P003TP.pdf>

¹⁵² THE WORLD BANK, *THE TRANSIT REGIME FOR LANDLOCKED STATES: INTERNATIONAL LAW AND DEVELOPMENT PERSPECTIVE* (The World Bank) 17 (2006).

¹⁵³ *Id.*

To achieve the vision of continental unity and ultimate political integration among the Member States, all “stumbling blocks” should be tackled – closed boundary walls are some of the determinants. Removing boundary wall or changing its nature from barriers to bridges will speed up integration and ultimately enhance wellbeing of common people. This will enable Africans to trade with their fellow Africans and will boost global competitiveness. Free movement of goods and services will not only reduce cost and promote welfare system of bordered people, but also it would strengthen interdependence and unity.¹⁵⁴ Realization of NEPAD’s objectives would make immense contribute for AU’s integration goals by emancipating Africans from economic dependence, which would indirectly affect Africa’s political integration.

The other important milestone of AU is the objective of maintaining continental peace and stability. In addition to the economic challenges that Africans have been struggling, erratic conflict that unexpectedly explodes at all corner of Africa is another factor that would hamper integration.¹⁵⁵ The Chairperson of the Commission in the report for the African ministers attests this points.¹⁵⁶ Needless to say conflict resolution or prevention is pivotal for keeping peace and stability to create smooth relationship among the member States for the ultimate goal of political integration. As revealed in Clause 6 of the Sirte Declaration, the Assembly of Heads of States and Governments have expressed their commitment to eliminate “ [...] the scourge of conflicts, which constitutes a

¹⁵⁴ The current friendly relationship between Ethiopia and Djibouti explains positive effects of changing barrier nature of border to bridges. While Ethiopia uses Djibouti port, Djibouti gets low cost hydroelectric power from Ethiopia. Ethiopia also provides free underground water to Djibouti. Ethiopians do a lot of investments and businesses in Djibouti. As a result of socioeconomic link between the people and good relation between the Government of Ethiopia and Djibouti, the President of Djibouti tipped the possibility of political integration of both nations, if the people of both States so desire. See also Addis Tribune, May 08, 1998 which quoted Mr. Ismail Omar Geleh saying that authorities in Djibouti would exert every effort to work for economic and political integration of two countries. See http://www.biyokulule.com/Ethio_Djibouti_Union.htm

¹⁵⁵ Report of the Chairperson of the Commission (AUBP) on the 3rd Conference of African Ministers in Charge of Border Issues (EX. CL/726(XXI).

¹⁵⁶ The Chairperson states, “ [N]on – definition of borders constitutes an obstacle to the process of economic integration, which the Member States are striving to achieve.” *Id.* Non-definition – imprecise boundary line by itself cannot affect integration but its consequences obviously strains good relationship with also strains integration. If there is suspicion or animosity, states stay away which makes integration impossible.

major impediment to the implementation of [...] development and integration agenda.” (Clause 6 of Sirte Declaration). Conflict over territory or border conflict takes lion’s share in Africa. As pointed out in Chapter 2 and 3 of this work, territorial or border conflict is very sensitive and can unexpectedly flare up into armed confrontations. Therefore, avoiding root causes of territorial or border conflict has been the most important concern of the continental organization (AU and even the predecessor OAU).¹⁵⁷

For the purposes of solving existing territorial or border conflicts and tackle other multifaceted *intra* or *inter-* state disputes, that may obstruct political integration of Africa, the Constitutive Act of African Union has created an organ that is responsible for overseeing the maintenance of peace and security in Africa.¹⁵⁸ The protocol for setting up of African Peace and Security Council was initiated in Lusaka Conference of 2001 at which the structure of AU was designed.¹⁵⁹ This means the architectural design of main constitutive organs of AU was devised at the Lusaka Conference of July 2001. At the Lusaka Summit, African Heads of State and Government have “ [...] decided to incorporate Central Organs of the OAU Mechanism for Conflict Prevention, Management and Resolution as on of the organs of the Union in accordance with Article 5(2) of the Constitutive Act [...]”¹⁶⁰ At the Durban Conference, 23 Member States of AU have signed the Protocol, which was ultimately ratified in Maputo Summit.¹⁶¹ The Protocol Relating to the Establishment of Peace and Security Council came into force on December 26, 2003.

¹⁵⁷ *Id.*

¹⁵⁸ Jeremy I. Levitt, *The African Union and the New Pan Africanism: Rushing to Organize or Time Shift: The Peace and Security Council of the African Union: The Known Unknowns*, 13 *TRANSNAT’L L. CONTEMP. PROBS.* 109 – 137 (2003).

¹⁵⁹ Decision of AHG/Dec. 160 (XXXVII) adopted at the 37th Ordinary Session of the Assembly of Heads of State and Government of the OAU 9 – 11 July 2001.

¹⁶⁰ Preamble to Draft Protocol Relating to the Establishment of the Peace and Security Council of the African Union (9 July, 2002, Durban South Africa).

Peace and Security Council (PSC) is one of the core organs of AU that is responsible to speed up the realization of the visions of AU by working for “prevention, management and resolution of conflicts.”¹⁶² It is “ [...] the African Union’s standing decision-making body responsible for maintenance of continental peace and security.”¹⁶³ PSC is analogous to the Security Council of UN. Members of PSC are elected from each zone. The number of members of PSC is equal to the members of Security Council of UN, but PSC bestows neither permanent membership nor veto power – all the Member States have equal role and power. Five of the Member States from each zone elected for 3 years terms and the rest 10 members elected for 2 years. Re-election is possible.¹⁶⁴

PSC is entrusted with multifaceted powers that are assumed to make immense contribution in the endeavor to maintain peace and security in Africa. As the name suggests the PSC Department of AU has the objective of promoting peace, security and stability in Africa.¹⁶⁵ The three objectives of PSC are vital to the conflict-ridden Africa. Africa is blessed with natural resources and hard working people on whose labor enriched “others”, but ironically at present Africa is struggling to feed its people. It is puzzling to import food from Europe while Africa is endowed with fertile land and hard working people. The driving force behind Africa’s poverty is not secret. Since heyday of

¹⁶¹ See Ahlegh Leznd , Valuing Integration, AFRICAN INVESTOR (Ai), July 1, 2004, <http://www.africaninvestor.com/article.asp?id=468>

¹⁶² See www.peacau.org, The creation of PSC decided by the declaration AHG/Dec160 (xxxvii) of Lusaka Summit of July 2001.

¹⁶³ Art. 2(1) PROTOCOL REALTING TO THE ESTABLISHMENT OF THE PEACE AND SECURITY COUNCIL OF THE AFRICAN UNION. See also Peace and Security Council (PSC) – African Union – Peace and Security Department, www.peacau.org

¹⁶⁴ Art. 5 PROTOCOL REALTING TO THE ESTABLISHMENT OF THE PEACE AND SECURITY COUNCIL OF THE AFRICAN UNION. AU’s Peace and Security Department will be assisted by the Commission, council of Wise (POW), a continental Early Warning System (CEWS), African Standby Force (ASF) See Art. 2 (2) PROTOCOL REALTING TO THE ESTABLISHMENT OF THE PEACE AND SECURITY COUNCIL OF THE AFRICAN UNION

¹⁶⁵ Art. 3 PROTOCOL REALTING TO THE ESTABLISHMENT OF THE PEACE AND SECURITY COUNCIL OF THE AFRICAN UNION

its independence Africa has been messed with unending international or civil wars.¹⁶⁶ Needless to say, Africans will reap a better life by using resources that the continent is endowed with if peace and security prevails in the continent. Admittedly, no external force can change the prevailing African situation – only Africans can transform Africa. To this end, Africans should get united and use all available resources and power at disposal to fight colonial and neocolonial evils that have been “embarrassing” Africans and strain peaceful coexistence. With this goal in mind, PSC has set a road map to tackle causes of conflict being assisted with other organs of AU.¹⁶⁷ Currently, PSC is reactive, which exposes weakness of Africa to resolve its problems. But PSC has to be proactive which will enable Africa to anticipate potential conflict situations and contain it before it actually flares up. PSC has the responsibility not only to make peace in Africa but also it is entrusted with peace building role which also includes “[,..] post conflict reconstruction activities to consolidate peace and prevent the resurgence of violence” by coordinating and harmonizing continental efforts.¹⁶⁸

PSC respects “[...] the sovereignty and territorial integrity of Member States.”¹⁶⁹ One may fairly question how PSC may intervene without encroaching sovereignty of a state? Non -

¹⁶⁶ Abdalla Burjua surmises that almost all interstate conflicts in Africa are border conflicts. See Abdalla Burja, *African Conflicts: Their Causes and their political and social Environment*, DMPF No. 4 5, 1 – 49 (2002). See also Johson Oalaosebikan Aremu, *Conflict in Africa: meaning, Causes, Impact and Solution*, 4(4) AFRICAN RES. REV. 559 550, 549 – 560 (2010). Aremu aptly observes, “The history of Africa as a continent is replete with conflict.” *Id* at 549. The Moroccan war against the neighboring states and the expansionist policy Somalia are repeatedly as wars among Africans even before colonial boots completely left Africa. The current chaotic situation in South Sudan explains how seeds of colonialism spoil internal and external relationships. The cause for split of Sudan is the divisive polity of Great Britain, which favored the Arab north. Sudan experienced a clear visible division in terms of education, power sharing, culture, religion etc. On top of this, administrative boundaries were porous. The South and North Sudan could not see each other as brothers; as a result they battled for separation. After getting independence, the North Sudan and South Sudan fought over undefined boundary lines and border resources. Antagonistic relationship with North and South Sudan compounded with internal ethnic division, power trust, lack of good governance and poverty.

¹⁶⁷ *Id.* Art. 4(b) , Art. 5(b) See also Art. 7 (1) a Early Warning System and assessment and advice of Wise Men, armed force that can take quick action in case of grave atrocity are some of the organs of Au that can assist in realization of the objective of PSC.

¹⁶⁸ *Id.* Art. 3(b) (c) PROTOCOL REALTING TO THE ESTABLISHMENT OF THE PEACE AND SECURITY COUNCIL OF THE AFRICAN UNION *Id.* Art. 6(e).

¹⁶⁹ *Id.* Art. 4(e).

intervention in domestic affairs is one of the basic pillars upon which principles of AU are built. There are certain preconditions that need to be satisfied before PSC intervenes. First, PSC will not intervene unless a grave situation that is thought to adversely spoil peace and security (like mass atrocity) surfaces and a Member State that is primarily responsible to protect its people and either unable or fails to discharge its responsibility.¹⁷⁰ The other important oversight is the need to get authorization. Before intervening in the affairs of a Member State, PSC has to secure the go ahead from Assembly of Heads of State and Government pursuant to Art. 4(h) of the Constitutive Act.¹⁷¹ The failure of AU to deploy peacekeeping mission in Burundi was the first challenge that PSC has confronted with. The Government of Burundi strongly condemned AU's decision to keep peace threatening to fight peacekeeping mission. This has halted the plan.

4.5.2. African Union Border Program (AUBP)

As border conflict takes lion's share of Africa's interstate conflicts and wars,¹⁷² AU has launched a special programmatic approach called African Union Border Program (AUBP) specifically meant to focus on border problems.¹⁷³ AUBP is the most significant innovative approach of AU. As Ambassador Lamamra remarks:

Africa is finally waking up to the fact that the absence of visible boundaries on the ground can hamper the co-existence and trade that are driving Africa's demographic and economic dynamism. The African Union Border Programme (AUBP) is a vital factor in importing and modernizing the continents border regimes.¹⁷⁴

¹⁷⁰ The intervention mechanism of PSC are identical to R2P when gross human rights violation occurs and the State that has the primary responsibility to protect is the perpetrator or is unable or unwilling to stop it. See DAN KUWALI AND FRANC VILJON (Eds.) AFRICA AND THE REponsibility TO PROTECT ARTICLE 4(h) OF THE AFRICAN UNION CONSTITUTIVE ACT (2014) Forward by Justice Richard Goldstone.

¹⁷¹ Id. Art. 4(j).

¹⁷² According to Francis Ikome, since 1950 – 1990 over 50% of African states involved in some form of boundary conflict with neighboring states. Ikome *supra* note 2 at 3.

¹⁷³ AUBP is entrusted with a two-prong objectives: the task of delimitation and demarcation as a strategy for conflict prevention and a tool facilitating integration process. See Report of the Chairperson of the Commission on The 3rd Conference of African Ministers in Charge of Border Issues (EX. CL/726(XXI).

¹⁷⁴ AFRICAN UNION COMMISSION, DELIMITATION AND DEMARCAITON OF BOUNDIERS IN AFRICA: GENERAL ISSUES AND CASE STUIDES FORWARD BY AMBASSADOR RAMTANE LAMAMRA, (2013). See <http://www.peaceau.org/uploads/au-2-en-2013-delim-a-demar-user-guide.pdf>

Dealing with African borders is a conflict avoidance or conflict prevention strategy. As has been repeatedly pointed out, African boundaries are not only arbitrary and divisive, but also poorly defined and not precisely demarcated or impossible to demarcate. It is often said that porous nature of African boundaries has been source of protracted conflict and seed hatred among the neighboring States and their subjects. To avert divisive effect of the boundaries and create friendship among the Africans Pan Africanists moved to unite Africa by abolishing colonial boundaries, but in fear of presumed chaotic situation, the founding fathers of Organization of African Union have trashed the revisionist agenda of abolishing colonial boundaries. The Assembly of African Heads of States and Governments has concluded that any attempt to revise borders to go back to the pre-colonial state would cost more than it would benefit. Now, it appears neither possible nor desirable to redraw African borders in way reconnecting the balkanized ethnic or tribal groups back to the original form, but it is possible to unit the partitioned people by changing the nature and effect of borders.

As Lord Curzon rightly observes boundaries hold two opposing scenarios: war and peace. Lord Curzon when asked to lecture at his former University on any topic of his interest, his first choice was to lecture about frontiers. The points of Lord Curzon's famous lecture of 1907 are still relevant to the 21st century Africa.¹⁷⁵ He rightly said, "Frontiers are indeed the razor's edge on which hang suspended the modern issues of *war or peace* of life or death to nations."¹⁷⁶ (Emphasis mine). Borders thus have potential to ignite war or are channels for building peace among bordered people. Needless to say we have to avoid the "war" side of borders and build the "peace" aspect– it

¹⁷⁵ Conflicts involving frontiers is an old issue and it was so hot in late 19th and 20th in which European colonial powers were rushing to occupy territories of Africa and Asia. The rush and competition to occupy African territories has sawn permanent wound in Africa that is not easy to treat. Therefore, boundary issue is still current in Africa and has been consuming lives and resources. Border issue is still hot in Africa in 21st century. To build peace in Africa and thereby change lives of perishing Africans there is no priority than settling with border issue.

¹⁷⁶ Lord Curzon, *Text of the 1907 Romanes Lectures on the Subject of Frontiers*, <https://www.dur.ac.uk/resources/ibru/resources/links/curzon.pdf> accessed 10/30/15 at 11:43 A.M

is not a matter of choice, but it is a matter of death or life, which any perceptive mind cannot take a second to choose.

The current state of African boundaries points the length of journey that AUBP has to go in order to attain its goals. African borders are still elusive and remain as battle ground that still bear poisonous fruits that destroy Africans. In 2007 only 25% of African borders were demarcated and in 2012 this figure moved upwards by 10% (totally 30% African borders were demarcated).¹⁷⁷ In order to realize a viable political integration this situation has to be changed. Being aware of the fact that undefined boundaries can hamper the move for political integration AU has set up African Union Border Program (AUBP) as a unit under the Peace and Security Department.

AUBP is mandated to build peace in Africa by changing the nature of borders in a way it could be used to bear integrated, prosperous and peaceful Africa. Changing the current state of African borders is not easy, but it is possible. African Union, under AUBP has been intensively working to change barrier nature of borders that has been source of animosity to bridges that would serve as points of contact and cooperation. Numerous conferences of African boundary experts, council of ministers and Assembly were held and declarations were passed.¹⁷⁸ Transforming African borders from points of separation to the points of contact is one of the objectives of African Union Border Program (AUBP). At the time of liberation of Ethiopia from five year so Italian occupation an author remarked, “ The tendency today must be towards integration, not partition. The balkanization of Africa can hardly be the aim of enlightened statesmanship.”¹⁷⁹ By shaping borders from barriers to bridges, it is certainly possible to reunite the partitioned ethnic or tribal

¹⁷⁷ Report of 3rd Conference of African Ministers in Charge of Border Disputes, Niamey, Niger 14 – 16 May 2012. (EX.CL/726 (XXI) Annex I The goal of demarcating all African boundaries is postponed until 2017 but no current data publically available.

¹⁷⁸ The Conference of March 2007 of African boundary experts was held in Addis Ababa, Ethiopia. The Addis Ababa Conference of June 2007 passed the first declaration on African border program, the July 2007 Conference that was held in Niamey, Niger that passed the second declaration, and 2010 Addis Ababa declaration that passed the third declaration.

groups thereby resolving the age old question of free passage to their ancestral land or grazing field or water sources.

AUBP is entrusted with a huge and difficult task of assisting coordinating the making of clear boundaries within the defined time framework. There was a plan to delimit and demarcate the whole African boundary by 2012, but little gains were achieved.¹⁸⁰ As a result, the time framework has been extended to 2017. So far there is no data indicating further work or it is not publicly available. Given the volume of work and outstanding border conflicts and shortage of resource, it is not hard to assume further extension of time framework. The border conflict of horn of Africa is simply suspended. Ethiopian and Eritrean troops are extremely vigilant expecting to full trigger at any moment. Almost the same scenario is expected in border between Eritrea and Djibouti. The Ethiopia Sudan border though appear settled as a result of the current friendly relationship between the two governments, imprecise border (Non-demarcated) border has been source of tension.¹⁸¹

AUBP is empowered to enforce African border related laws since heyday of OAU, resolution of African Heads of State and Government, Declarations of Council of Ministries, AU Constitutive Act, and other continental and international principles of that meant to keep peace and security. Brief overview of the governing principles, mandates, achievements, and challenges of AUBP are briefly summarized below.

¹⁷⁹ Robert Gale Woolbert, *The Future of Ethiopia*, 20 FOREIGN AFF. 546, 537 – 551 (1941 -1942).

¹⁸⁰ A continental survey revealed only 35% of African boundaries demarcated (See Report of 3rd Conference *supra* note 177.

¹⁸¹ SUDAN TRIBUNE, *16 Sudanese Killed by Ethiopian Gangs in El Gardref: Minister*, Oct. 28, 2015, http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=56884

4.5.2.1. Legal Authorities and Guiding Principles¹⁸²

1. At present, the supreme legal authority governing border delineation in Africa is the Constitutive Act of AU. The Act has reaffirmed *the Cairo Resolution of 1964 in which African Heads of States and Governments* adopted to respect borders existing on independence and incorporated into the AU Constitutive Act.¹⁸³
2. *The principle of negotiated settlement of border dispute* is one of the guiding principles of AU as a successor of OAU.¹⁸⁴ In accordance with the Resolution CM/Res/1069 (XLIV) adopted by the 44th Ordinary Session of Council of Ministries of OAU in 1986, Member States of AU should endeavor to resolve all territorial disputes peacefully.
3. AU's *affirmation to carry out delimitation and demarcation all African boundaries for the purpose of building peace and security* in Africa with the goal of achieving socio-economic progress (affirmed in Resolution CM/Res.1069(XLIV)).
4. *The Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa (CSSDCA)* that African Heads of States and Governments have adopted to delimit and demarcate African boundaries in first ordinary session of AU, Durban 2002.
5. The *mission and vision of AU* that derives all constitutive organs to work for the ultimate end of political integration of Africa. In this regard legal framework for cross border cooperation that would accelerate the integration of Africa.¹⁸⁵
6. *The Declarations on the African Union Border Program* adopted by the Conference of African Ministries in charge of border issues.
7. *African Union decisions related to border issues* including Decisions EX CL/370 (X) and Ex, CL/Dec.461 (XIV) adopted by the 11th and 14th Ordinary Sessions of the Executive Council of the African Union in June 2007 in Ghana and January 2009 in Addis Ababa.

¹⁸² Agulbou Diarrah, *An Overview of the African Union Border Programme*, in DELIMITATION AND DEMARCATION OF AFRICAN BOUNDARIES: GENERAL ISSUES AND CASE STUDY, DEPT OF PSC, COMMISSION FOR AFRICAN UNION 8(2013). See also AUBP, FROM BARRIERS TO BRIDGES: COLLECTION OF OFFICIAL TEXTS OF AFRICAN BORDERS FROM 1963 – 2012 7(2013). <http://www.peaceau.org/uploads/au-1-en-2013-barriers-to-bridges.pdf> (Accessed 4/16/15).

¹⁸³ Resolution of First Ordinary Session of Assembly of the African Heads of State and Government, AHG/Res. 16(1) on principle of respect of borders existing at the time of accession to national independence (Cairo July 1964). This Resolution directly succeeded by Art. 4(b) of AU Constitutive Act. See also Peace and Security Department, *Declaration on the African Union Border Programme and The Modalities for the Pursuit and Acceleration of Its Implementation*, 3 (2010), <http://www.peaceau.org/uploads/aubp-dec-e.pdf>

¹⁸⁴ Peace and Security Department, *Declaration on the African Union Border Programme and The Modalities for the Pursuit and Acceleration of Its Implementation*, 3 (2010), <http://www.peaceau.org/uploads/aubp-dec-e.pdf>

¹⁸⁵ Niamey Convention on African Union Convention Cross-border Cooperation May 17, 20012.

8. *The Resolution of 8th ordinary Summit of Heads of States and Governments* the need to work conflict prevention through AUBP.
9. The International initiatives on the delimitation and delineation of maritime borders and provisions of the United Nations Convention on the Law of Sea.

4.5.2.2. AUBP Mandates¹⁸⁶

1. *Facilitate and Support Delimitation and Demarcation of African Boundaries.*

AUBP is expected to play a vital role in African integration by working to avoid border related disputes by facilitating and supporting the effort of AU and Member States to build peace and harmony. Creation of smooth relationship among the Member States is the most important strategic tool for regional or continental integration. Therefore, all causes and cases of conflict that may strain relationship among the Member States should be tackled. The most usual source for interstate dispute is elusive colonial boundary, which so far has caused almost all international conflicts in Africa. It is not exaggeration to say that the end of border issue in Africa would mark the end of interstate dispute.

To this end AUBP is set to fulfill “two pronged objectives.”¹⁸⁷ One is “Structural Prevention of Conflict” and the other is the need to “deepen the integration process.”¹⁸⁸ Fulfillment of these two interrelated objectives is one of the core objectives of the AU. Other organs of AU are also mandated to work for fulfillment of anyone or both of these objectives. The main agenda of PSC, for instance, is maintaining peace by preventing and resolving disputes in Africa. As most inter-states conflicts in Africa arise from problems related to borders, AUBP, being at the forefront

¹⁸⁶ See AUBP, ROM BARRIERS TO BRIDGES: COLLECTION OF OFFICIAL TEXTS OF AFRICAN BORDERS FROM 1963 – 2012 7(2013). <http://www.peaceau.org/uploads/au-1-en-2013-barriers-to-bridges.pdf>

¹⁸⁷ Report of the Chairperson of the Commission on the 3rd Conference of African Ministers in Charge of Border issues (EX – CL/726(XXI))

¹⁸⁸ *Id.*

of issues involving borders, is very pertinent to the attaining of objectives of PSC, AUC and the other organs of AU.

Success of the objectives of AUBP, therefore, would cut the roots of “poisonous tree” that was planted during colonial era, which makes African “brothers” fight each other.¹⁸⁹ To root out toxic effects of arbitrary boundary lines (the colonial seeds), establishing unambiguous point of separation (delimitation and demarcation) is vital. It may appear weird to suggest projecting to draw dividing lines while campaigning for political integration. It has been repeatedly pointed out that to have a true economic or political integration, a cooperative environment has to be created. Settling border issues by drawing unambiguous limits of borderlines would stimulate cooperation among the bordered states. The adage of “Good fence make good neighborhood” really works. It is possible to mingle good neighbors. In the words of Ikome:

“ [... B]order delimitation and demarcation is seen as a precondition for successful integration, because a non-defined border is susceptible to being a source of contention, even conflict. Border demarcation therefore should be seen as having the potential to open rather than close the doors of cooperation and integration.”¹⁹⁰

Currently, less than half of the Africa’s boundaries are unambiguous.¹⁹¹ This suggests that most of the African boundaries are still susceptible to fuel conflict or actually ignited one. In this scenario Colonel Gadhafi’s move for immediate political integration was impracticable. As a result, founders of AU have rightly decided to prepare grounds through AU for the ultimate political integration.

¹⁸⁹ Describing Ethiopia and Eritrea war, Western Media titled, “... brothers at war.” It is true that Ethiopians and Eritreans are brothers. Just based on facial or physical appearance it is not easy, if not difficult at all to distinguish an Ethiopian or an Eritrean. The two nations have common culture, practice identical religion, speak common language and intertwined by marriage. Today, due to the secession of Eritrea, has separated families no less than colonial boundaries did at the beginning of 19th century. One can notice a situation in which parents Eritreans while their children are Ethiopians.

¹⁹⁰ Ikome *supra* note 2.

¹⁹¹ According to Ikome, 1/3 of African boundaries were not delimited or demarcated. *Id.* According to the Report submitted by the Chair person of AUBP, “ A little more than one third of African borders have been delimited and

AUBP is entrusted with the task of facilitating the intended integration by building fences that would contain destructive colonial seeds. The fences are temporary measures and will be destroyed when the actual integration takes place.¹⁹² Therefore, as means of clearing ground for political integration, ABUP has to work for complete delimitation and demarcation of African boundaries. This solution is not easy to attain, but it is possible. The prevailing reality (socio-economic and political situation) may not be conducive enough for contesting parties to devise an amicable solution of African border problems. It may take painstaking journey to secure agreement of contesting parties, but there is no better option to obviate boundary conflict other than drawing an acceptable boundary line (delimitation and demarcation). Member States of AU have agreed to speed up delimitation and demarcation where not already done. These processes include maintenance of already demarcated borders, and densify boundary beacons, if necessary. Neighboring states should be willing to compromise their interest with a view to make life more comfortable to their people by avoiding possibilities that would ignite wars that often consume lives and resources. With full understanding of possible response from the contesting parties and prevailing reality on the disputed area, AUBP has to endeavor through the PSC to support contesting parties to comply with the AU's mission of peaceful dispute settlement objectives. To tackle actual or potential border disputes or disputes that may arise while attempting to delimit or demarcate borders, African States are required to apply all possible options for peaceful resolution disputes peacefully (negotiation, mediation, conciliation, inquiry, regional and international arbitration or use of Intentional Court of Justice).

demarcated.” See also Report of the Chairperson of the Commission on The 3rd Conference of African Ministers in Charge of Border issues (EX – CL/726(XXI)

2. *Coordinate Cross Border Cooperation as strategy for African Integration.*

By facilitating the processes of setting clear and acceptable boundary lines, AUBP can achieve its objectives of preventing conflict and promote cross border cooperation. In vicinities where there is no border issue, AUBP has to work for enhancing cross border cooperation with the ultimate objective of changing the nature of borders from barriers to bridges. Cross-border cooperation is:

[...] any act or policy aimed at promoting and strengthening good neighborly relations between border populations, territorial communities and administration or other stakeholders within the jurisdiction of two more States, including the conclusion of agreements and arrangements useful for this purposes.¹⁹³

Take, for example, the boundaries between Ethiopia and Kenya. The boundaries of two Eastern African countries are almost settled though sporadic conflict among neighboring nomads can be observed as a result of cross border crimes. Nomadic people of South Omo region of Ethiopia sometimes cross Kenyan border and raid cattle from their Kenya counterparts. Kenyan nomads may take the same action. This has nothing to do with the boundary and cannot change the prevailing smooth relationship between Ethiopia and Kenya. Building cross border cooperation can change the situation. The border people can effectively police cross border criminals.

Residents of Ethiopian Moyale town and Kenyan side freely cross the border even noticing there was border or freely transact without thinking they belong to a different State. Thus, for some residents of Moyale town, Ethiopianness and Kenyanness is simply a term on their IDs and borders are simply check points sometimes may be used to filter unwarranted persons and goods. Nowadays, numerous cross border activities are taking place. Kenya is set to get hydroelectric power that will connect both countries. Similarly, the relationship between Djibouti and Ethiopia goes beyond port use. After Ethiopian and Eritrean relationship is spoiled due to border conflict,

¹⁹² Ikome, *Id.*

Ethiopia has stopped using Assab port and has shifted to port of Djibouti. Now Djibouti gets free under ground water from Ethiopia. Train lines, oil pumps and regular inland and air transports are some of the projects that link Ethiopia and Djibouti. Similar to Eritrea, Djibouti was separated from Ethiopia as a result of colonization. The two main ethnic groups of Djibouti have their kinsmen in Ethiopia who speak the same language, have almost identical culture and practice the same religion and pursue identical way of life. The relationship of Ethiopia and Djibouti now appears well cemented on mutual advantages. As a result of strong economic and cultural links, both States have been assessing the possibility of future economic and political integration to reunion the two brotherly people. The Ethiopia Sudan border is not fully demarcated, the two countries have agreed to respect the colonial delimitation and demarcate the boundary line. This agreement has enhanced Ethiopia Sudan relationship. There is regular land and air transport that link the people of Sudan and Ethiopia. Ethiopia has been importing oil from Sudan and agreed to use Port Sudan for its import and export.

Thus, “[f]acilitating the development of cross-border integration dynamics sustained by local stakeholders” is one of the prime objectives of the AUBP. AUBP should enhance such good border relationship and cross border projects that would ultimately enable integration of the whole Africa. The Niamey Convention on Cross Border Cooperation will boost AUBP in effectuating its mandate of promotion and coordination of cross border relationship, projects and commercial activities. The Niamey Convention has been ratified by some Member States and expected to come into force after fifteen ratifications.

The on going work on regional integration will facilitate much needed continental integration. Africa has about 10 REC’s and all African States are members one or more of the

¹⁹³ See African Union Peace & Security, <http://www.peaceau.org>

Regional Economic Communities.¹⁹⁴ In some cases membership is overlapping and “characterized by ambitious targets.”¹⁹⁵ Though REC’s enjoy considerable support from African Governments and can possibly play huge role eventually, in African political and economic integration.¹⁹⁶ Though more is expected from REC’s currently the performance of REC’s is unsatisfactory.¹⁹⁷ For example, East Africa Economic Community (EAC) long planned for economic and monetary integration, but so far not implemented. This also affects the intended political integration.

In addition to the support of Members States, African Economic Community and other stakeholders, AUBP has the objective to support REC’s as an important tool that can contribute for the African integration. Some Regional Economic Communities are moving for economic integration, monetary and aiming for ultimate political integration is an important aspect of AUBP.

With a view to effectively coordinate cross border cooperation and integration agenda, member States have agreed to enable AUBP make “comprehensive inventories of existing border cooperation initiatives and agreements [...]”¹⁹⁸ Assisting member States to enhance cross border initiatives, cross border cooperation including preparation of appropriate legal instruments, border commissions, cross border resource management.

The need to fight cross border crime is another area that demand cooperation of bordered communities. As African Heads of States and Governments declared, “the strengthening of cross-border cooperation in the area of the prevention and fight against terrorism and cross-border crime,

¹⁹⁴ Alemayehu Geda and Haile Kibret, *Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA*, WORKING PAPER, www.soas.ac.uk/economics/research/workingpapers/file.28853.pdf (last accessed 10/21/15 at 9:05 PM. See also Jaime de Melo and Yvonne Taskata, *Regional Integration in Africa: Challenges and Prospects*, WIDER WORKING PAPER, 2014/037 U.N. University UNU-WIDR, (2014) www.imvf.org/ficheiros/filewp2014-037_1.pdf

¹⁹⁵ Trudi hartenber, *Regional integration in Africa*, WORKING PAPER, (2011), www.wto.org/english/res_e/reser_e/ersd201114_e.pdf

¹⁹⁶ Manone Regina Madyo, *The Importance of Regional Economic Integration in Africa*, MC DISSERTATION, University of South Africa, (2008) Unpublished uir.unisa.ac.za/bitstream/handle/10500/2075/dissertation.pdf

¹⁹⁷ Trudi Hartzenber *supra* note 130.

¹⁹⁸ AUBP. *Declaration on African Union Border Programme and The Modalities for the Pursuit and Acceleration of its implementation*. <http://www.peaceau.org/uploads/aubp-dec-e.pdf> (Accessed 4/16/16).

including drug trafficking, and other cross border threats, such as piracy and other illicit acts on sea, [...]”¹⁹⁹

3. *Capacity building, awareness creating and net working*

Designing or encouraging the emergence of special border related education and encouraging research programs is one of the strategies of AUBP. It includes “harnessing” existing African skills and experiences with a view to develop indigenous knowledge.²⁰⁰ To coordinate existing experience and skill in border management, AUC under the auspicious of AUBP is mandated to make inventory of experts and training institutions in Africa. Partnership, networking and experience sharing among international, continental, and national institutions that deal with border related issues are vital. Networking and partnership with EU, and United Nations, is detrimental for experience sharing and resource mobilization.

African states have also agreed to develop institutions for border study programs. Border related training is not only confined to civilian but training of immigration security and defense personal will make immense contribution. Strengthening institutional capacity of AUBP by recruiting additional personal and developing structure.

AUBP is mandated to popular itself among the African people. Local awareness of the objectives of AUBP is vital for efficacy of border management. Though African leaders have acclaimed the contribution of AUBP, the actual beneficiaries of the Program should understanding the goals of AUBP and accept its mission and vision. Local people both at the center and borderland should know and accept neutrality and methodologies of AUBP. The best way to

¹⁹⁹ Declaration on the African Union Border Programme and the Modalities for the Pursuit and Acceleration of its Implementation on Occasion of Second Conference On African Union Border Program, March 25, 2010, Addis Ababa, Ethiopia

²⁰⁰ Report of the Chairperson of the Commission on The 3rd Conference of African Ministers in Charge of Border issues (EX – CL/726(XXI)

popularize AUBP in Africa is close working with the communities, religious leaders, and tribal chiefs. AUBP's agenda and goals are noble and, if successful, would benefit the whole continent, but should not imposed on the local people. Translation of materials developed under the auspicious of AUBP in various African languages and dissemination of the work and importance of AUBP in mass media is another way of awareness creating. All actors, therefore, should know and accept AU's border program strategies and goals.

4. Implementation and the way forward

AUBP is an innovative African formulation. The main objectives of AU that are geared toward integration of Africa are being steadily implemented under the auspicious of AUBP. Political and economic integration of Africa will certainly root out colonial footsteps that have been spoiling peaceful coexistence. Though AUBP has to go a long distance in attaining its goal of border delimitation and demarcation, preliminary activities that have been implemented so far are greatly appreciable and demonstrate AU's dedication and ground works to achieve the vision of ultimate political integration of African nations.

In the implementation of African Border Program every one in Africa is expected to involve. AUBP boundary making is basically a bottom top approach. The most important beneficiaries and actors are Member States. As Professor Asiwaju rightly remark, “[...] border delimitation and demarcation under the AUBP cannot afforded to be the kind of top-down operations used in the era of European imperialism and colonialism [...]”²⁰¹ The border programs are expected to be implemented at continental, regional, and national levels. The most important beneficiaries and in worse cases the immediate victims are border resident. Involvement and consultation of border residents and local administrations of both contesting States is vital to build

confidence and trust of local people. Asiwaju attests this view stating,“ [...] sensitivity to the interest and rights of locally affected indigenous communities, [...] consultation and collaboration of national and sub national authorities each side [bordered states]”²⁰² is essential. The important consideration afforded by AUBP to local people makes the program very different from colonial boundary making. This is a way to build an acceptable boundary that will bridge relationship in the future when the barrier nature of border changes to point of contact.

AUBP, being an umbrella program, has been coordinating regional or national initiatives. Fund raising, capacity development programs, and technical support that have been afforded by AUBP are very crucial for the success of the regional and national endeavors. It is true that each level has to exert its effort including fund raising and capacity building to the extend possible. Though not uniform in all regions, and the level of financial and capacity hindrance is not identical, REC’s are doing great in smoothing regional integration. Working for efficacy of free trade, free movement of good and services, monetary integration, easing of avoiding custom barriers are some of the important tasks being carried out by the REC’s.

Fulfillment of the vision of AU demands extra effort from Member States. The most crucial step that Member States should expert is willingness to find out solution to address conflict of interest that would spoil peaceful coexistence. Porous borders are the usual causes that vitiate good neighborhood. Member States of AU should honestly endeavor to define their respective borderlines in a way acceptable to their people. National and regional politics often influence the will and readiness to define borders. It is also influenced by the divisive mechanisms that were planted by the colonial powers and takes time to change that setting. Former colonial powers are

²⁰¹ A.I. Asiwaju, *The Factor of Affected Local Populations*, in DELIMITATION AND DEMARCATION IN AFRICA, GENERAL ISSUES AND CASES STUDIES (AUBP) 149 (2013). <http://www.peaceau.org/uploads/au-2-en-2013-delim-a-demar-user-guide.pdf>

²⁰² *Id.* at 150.

still attempting to rule their former colonies stretching their hands from Europe indirectly under the guise of economic or security assistance. Personal interest of selfish leader who indirectly guided and backed up by the colonial powers may not be willing to settle boundary issues in a way address the interest of Africa. This is another colonial evil that takes time to root out and African leaders and the umbrella organization has to change all effects of colonialism and neocolonialism to find out African solution for the African problem.

It is true that AU and other continental organs cannot compel or instruct Member States either to define or demarcate their respective borders or accept the definition offered by AU, as it is illegal being contrary to the principle of AU that respects sovereignty and independent existence of Member States, AU has the responsibility to make follow up and venture to persuade unwilling Member States to cooperate with their neighbors so that they should devise solution to their own problem thereby create conducive environment to avoid border issues for the purposes of moving to change borders from barrier to bridges. There should be continuous interaction of bordered people to resolve all border problems that may emerge.²⁰³ Border issues cannot be resolved overnight. It takes time and should be tackled step by step. Therefore the work has to be planned, implemented, and assessed periodically. Most importantly, Member States should organize a joint border commission that can resolve emerging issues *in give and take way*.²⁰⁴ Unless states are

²⁰³ Regarding the role of Member State in facilitating delimitation and demarcation in setting joint border commission, raising fund and organizing technical tools, and sensational meeting with bordered people thereby building trust and confidence of local people see Issa Coulibaly, *Demarcating Africa's Post – Conflict Boundaries: The Burkina Faso – Mali Experience*, in DELIMITATION AND DEMARCATION IN AFRICA, GNERAL ISSUES AND CASES STUDIES (AUBP) 180 (2013). <http://www.peaceau.org/uploads/au-2-en-2013-delim-a-demar-user-guide.pdf> According to Coulibaly, “Site Based Sensitization meetings for cross border communities were organized with the support of village chiefs and local leaders” *Id.* The State of Burkina Faso and the Republic of Mali demarcation exercise proves how an acceptable boundary may be created where national leaders have honest will to solve the problem. After delimitation by the contested boundary line by ICJ both States reveal exemplary cooperation. As Coulibay vividly remarks, “The political will on both sides meant all obstacles could be overcome.” *Id.*

²⁰⁴ For example, in demarcating the contested borer between Cameroon and Nigeria, leaders of both States demonstrated a political will after both leaders initially negotiated in presence of Secretary of United Nations. The leaders organized a mixed commission that “[...] mandated to consider all the implication of the [ICJ] decision, including the need to protect the rights of the affected population in both countries.” See Ali Toure and Sani M. Isa,

willing to compromise for the ultimate benefit of their people in win-win bases, no one can effectively settle issues.²⁰⁵ AUBP can play a great role by working to bring unwilling parties to the negotiation table and assist them to resolve their own problem through mutual and constructive dialogue.

So far AUBP has been doing vital businesses of AU. Without being impeded by the personnel and resource constraints, AUBP has exerted efforts to alleviate deep-rooted African border problems. As a measure of awareness creation and capacity building objectives, AUBP has conducted numerous regional sensitization workshops on the AUBP.²⁰⁶ Held international symposium on management of land, river and lake boundaries in Maputo Mozambique (Dec. 2008), conference on Maritime boundaries and the continental shelf in Accra, (Nov. 2009), Bamako conference on cross border cooperation (Nov 3 – 4 2009) to discuss on drafting Convention on Cross Border Cooperation, as well as national initiatives on bilateral and regional levels to promote cross border cooperation. Each region took part in the workshop and got full awareness of the businesses and goals of AUBP, the vision and mission of AU, the strategies and mechanisms of effectuating the vision of ultimate political integration of Africa by tackling all barriers that may hinder friendship, and peaceful coexistence in Africa.

For the purposes of planning, follow up and audit, AUBP has to know facts of African borders. Given financial, technical and manpower constraints, AUBP cannot physically visit all

Post Conflict Demarcation of African Boundaries: The Cameroon-Nigeria Experience, in DELIMITATION AND DEMARCATION IN AFRICA, GENERAL ISSUES AND CASES STUDIES (AUBP) 190 (2013). <http://www.peaceau.org/uploads/au-2-en-2013-delim-a-demar-user-guide.pdf>

²⁰⁵ Involvement of third parties may not only delay solutions, but also has cost implications. For example, the involvement of United Nations as third party during demarcation of Cameroon-Nigeria border, it was actually a problem than a solution. See Ali Toure and Sani M. Isa, *Post Conflict Demarcation of African Boundaries: The Cameroon-Nigeria Experience*, in DELIMITATION AND DEMARCATION IN AFRICA, GENERAL ISSUES AND CASES STUDIES (AUBP) 201 (2013). <http://www.peaceau.org/uploads/au-2-en-2013-delim-a-demar-user-guide.pdf>

²⁰⁶ Kampala conference of 2008 for East Africa, Algiers Conference of October 2008 for North Africa, Ouagadougou Conference of 2009 for West Africa, Libreville Conference of May 2009 for central Africa, and Windhoek conference of 2009 for Southern Africa.

African borders or collect data from Member States. The easiest and cheapest method of collecting African border information is by channeling Member States. To this end, AUBP has conducted survey of African Boundaries. But suddenly only 32 of the 54 African States replied to the survey that indicated only 35% of the African borders were actually demarcated in 2012. Since then AUBP has been working to collect information for the rest of states.

The establishment of a specialized Unit that is in charge of implementation of AUBP under the PSC and publication of resources books on African borders are significant in building capacity. The books and other publications that are published under the auspicious of AUBP are useful tools that can guide and assist boundary making. Theories and procedures of border making are briefly stated in the books. In partnership with GIZ and resource mobilization for implementation of AU programs AUBP has effectively leveled the playground to resolve African Border issues. The books were products of thorough research and contain valuable insights of highly skilled international professionals in the field of boundary making. It is thought that the books will successfully guide boundary making from beginning to end. The processes, procedures, and technicalities of border negotiation, treaty making, delimitation, demarcation, and maintenance of border are succinctly outlined in the books. The books are useful tools of boundary making not only in Africa but can guide boundary making anywhere around the world and can serve as reference materials in training centers.

CHAPTER FIVE

Pre-1998 Ethio - Eritrea Affinity and Boundary Arrangement

5.1. Introduction

The boundary between Ethiopia and Eritrea is a colonial “seed” that has been jeopardizing close affinity and peaceful co-existence of the two intertwined people. It has not only separated the brotherly people of Ethiopia and Eritrea, but also has been source of conflict and sown animosity and hatred – incurable diseases. Put simply, if properly enforced, the elusive colonial boundary between Ethiopia and Eritrea would distance the people of Ethiopia and Eritrea that have been living together for thousands of years, interwoven in marriage, have common culture, profess the same religion, and originated from the same historical route.¹ Close affinity between Ethiopians and Eritreans is not hard to appreciate, even to a stranger. One easily can comprehend the close affinity just by spotting lifestyle or even physical features.² Physical appearance and facial features of Ethiopians and Eritreans prove “oneness” of the two brotherly people. It is equally hard to differentiate an Ethiopian and an Eritrean on account of social or cultural life, language, and ethno-historic background.³ It is, therefore, fair to question, “[...] how such closely related people

¹ TEKESTE NEGASH & KJETIL TRONVOLL, BROTHERS AT WAR: MAKING SENSE OF THE ERITREAN-ETHIOPIAN WAR, 10(2000).

² Hoyle attests close affinity of the two inter-related people stating, “The Eritrean highlanders, the Tigriyans were culturally and linguistically related to the Tigreans of Tigray of Ethiopia, and these peoples even referred to each other by a common name, the “Habesha”. See also Peggy A. Hoyle, *The Eritrean National Identity: A case Study*, 24 N.C.J. INT’L 7 COM. REG. 381, 381-416 (1998 – 1999). However, some Eritrean politicians tend to question this fact by opting to side themselves with Egypt or other former colonial powers. For instance, Merhaw Hagos Mesghina poses unrealistic conclusion stating, “Even according to ancient history, Eritrea and Ethiopia didn’t have much in common as indicated by the different names that Eritrea was called by.” See Merhaw Hagos Mesghina, *Eritrea Under Fire: Synopsis of Eritrean History from Turkish Colonization to the present and the Genesis and Contributing Factors to the Current Conflict between Eritrea and Ethiopia*, WWW.dehal.org/conflict/articles/merhawai.html. Accessed Jul.30, 2015:12:43 pm. Surprisingly, Mr. Mesghina, takes Ethiopia as one of the colonizers of Eritrea. *Id.*

³ Tigriya speaking people of Eritrea (the majority in Eritrea) and the people of Tigray Regional State of Ethiopia are Semitic and originally migrated from South Arabia. It is hard to find out cultural or linguistic distinction, especially among Ethiopian Tigreans and Eritrean highlanders. The two people are still brothers. They are intermingled in marriage and other sort of social bond. The colonial boundary treaty was not demarcated and known to local

could be considered a separate nation?”⁴ It is an obvious fact that the separation of Eritrean people from their Ethiopian brothers was a colonial disease from which most African people have been suffering. Colonial powers have deliberately planted a divisive seed that has created antagonism, which in turn has been vitiating historic kinship.⁵

Appalling effects of the 1998 border war and wrong political judgment of inapt and selfish leaders of Ethiopia and Eritrea have further complicated the situation. This chapter briefly explores the relationship of Ethiopia and Eritrea from pre-colonial time to the moment of reunion and cooperation until the boundary conflict in May 1998. A closer look at historical kinship, and socio-economic and political ties of the two brotherly people will help appreciate the nature of boundaries and problems involving in boundary setting of the two nations.

5.2. Pre-Colonial Relationship between Ethiopia and Eritrea

Ethiopia is the second most populous nation in Africa comprising numerous ethnic groups with diverse languages and cultural background. Today's Ethiopia is about ten times Eritrea and comprises of nine regional states with the power of self-administration: Afar, Amhara, Beneshangul/Gumuz, Gambella, Harari, Oromia, Southern Nations and Nationalities and Tigray

people. The only known natural demarcation was “Mereb River”. Even the “Mereb Melash” separation line assumed by the local people as a kind of administrative boundary. Some Eritreans accept the overall similarity between Tigreans and Eritrean highlanders but deny overall similarity between the people of Ethiopia and Eritrea. According to Berhane Woldegabriel, Eritrean lowland was under the control of Baja State which was outside the jurisdiction of Axumite Kingdom. See Berhane Woldegabriel, *A War for National Unity*, in LEENCO LATA, (ed.). THE SEARCH FOR PEACE: THE CONFLICT BETWEEN ETHIOPIA AND ERITREA (Proceedings of Scholarly Conference on the Ethiopia and Eritrea Conflict Held in Oslo Norway, 5-6 July, 2006 31(2007).

⁴ As a result, Hoyle states that the international community shares Ethiopian community's concern regarding separation of Eritrea from Ethiopia. *Id.* The Ethiopian communities concern was impossibility of separation of the two entwined people. Today there are so many instances in which a mother viewed as Eritrean and allowed to stay there while children regarded as Ethiopians and either expelled to Ethiopia or simply followed their father to Ethiopia. During the war Ethiopia also expelled some people of Eritrean origin without their wish. Wrong political judgment to separate naturally interlinked people may worry any neutral mind, let alone Ethiopian community.

⁵ For instance, Italy used ideological differences between Eritrean lowland Muslims by giving them special treatment and sown hatred between Christians and Muslims.

along with two chartered cities of Addis Ababa and Diredawa. Before secession in 1991 (*de facto*) and 1993 (*de jure*) Eritrea was one of the provinces of Ethiopia.⁶

Until separated by the Italian colonialism 1890, Eritrea was integral part of Abyssinian kingdom. As Rubenson succinctly puts, “ There was no question locally about the sovereignty over *Midre Bahir*, ‘the land on the sea [renamed Eritrea by Italy].’ This ancient Ethiopian provinces had at least for one century [...] been ruled as one or several sub provinces of Tigre.”⁷ Currently Eritrea comprises of nine ethnic groups, some either migrated from the current territories of Ethiopia or have kinsmen in Ethiopia that still make close contact. The Eritrean highland region, which was popularly captioned by Ethiopians as “ *Mereb Melash*” (the land of river Mereb) or (*Kebessa*) is culturally, religiously, or linguistically very close to the people of northern Ethiopia. The people of *Kebessa* region are Tigrinya speaking Orthodox Christians having no apparent distinction from Tigreans in Ethiopia. *Kebessa* regions consist of Hamasaiyen, Seraye, and Akale Guzai were integral part of Abyssinian Kingdom that vigorously battled to reintegrate with Ethiopia after liberation of Eritrea from Italian occupation. In addition there are Kunama, Afar, Tigre and other lowland residents, which are dominantly Muslims that were not substantially integrated with highlanders before the Italian occupation.⁸

⁶ See SEVEN RUBENSON, THE SURVIVAL OF ETHIOPIAN INDEPENDENCE, 51(2003). Today Ethiopia comprises of more than 80 ethnic groups that have their own language, culture but share enormous common Ethiopian values. Most of the Eritrean ethnic groups have their own kinships in Ethiopia.

⁷ Rubenson *supra* note 6. See Negash and Tronvoll, *supra* note 1 at 6. See also RICHARD PANKHURST, THE ETHIOPIAN BORDERLANDS, 101(1997). According to Professor Pankhurst, the ruler of the current territories Eritrea was known as “Bahr Nagash” (the ruler of Sea) that was granted wider power under the charter granted by King Zara Yacob. (*Id*). Northern part of the nation, especially the current territories of Eritrea was very important to the ancient Ethiopian empire. The northern highland was very important economically and important route for international trade. The port of Massawa and Hergigo mainly used to export ivory, gold, and other products of the time. *Id* at 156. See also Kidanu Atinafu and Endalcachew Bayeh, *The Etio-Eritrean Post war Statement: An assessment on the Causes & Prospects* 96, 96 – 101 SCI. PG, (2015). Available at: <http://article.sciencepublishinggroup.com/pdf/10.11648.j.hss.20150302.15.pdf> (Jan. 13/2016 5:35 PM).

⁸ ROBERTO MIGUEL RODRIGUEZ, THE BORDER DISPUTE BETWEEN ERITREA AND ETHIOPIA; LEGAL CONSIDERATIONS 7(2011). According to Rodriguez, “Most Christians (50% of the populations) live in the highlands, and Sunni Muslims and adherents of traditional beliefs (the other half of the population) live in the lowland region.). Seyoum Yohannys, *Eritrea-Ethiopia Arbitration: A ‘Cure’ Based on Neither Diagnosis nor*

The ethnic affinity of the people of Tigray region of Ethiopia is so strong to the Tigrinya speaking highlanders of Eritrea. In the words of Negash and Tronvoll, “[A]s many scholars define it, the Tigrinya in Eritrea and Tigreans in Ethiopia belong to the same ‘nationality’. [...and] *Tigrinya speaking population (who straddle both Eritrea and Ethiopia) are one and the same people.*”⁹ (Emphasis mine). In addition to the linguistic and cultural affinity, the people of Tigray region of Ethiopia and Eritrean highlanders are intertwined by marriage. The close familial relationship between the former Prime Minister of Ethiopia, Melese Zenawi and the President of Eritrea, Isias Afeworki, proves this fact. Both former “camaraderie” were cousins. It is common to have members of a given family both in Ethiopia or Eritrean.¹⁰ The People of Tigray Regional State of Ethiopia and Tigrinya speaking highlanders of Eritrea speak the same language, practice almost identical religion and have common culture. Almost 50% of Eritrean people speak Tigrinya, a language along with Amharic derived from Ge’ez, which is also official language of Tigray Regional State of Ethiopia. Majority of the Eritrean highland residents are members of Coptic Christians while lowland residents of Eritrea are Muslims. These are also the two major religions in the Tigray Regional State of Ethiopia. Both Tigray and Eritrean people are not friendly to the followers of Protestant Christianity, *albeit*, no legal prohibition in Tigray Ethiopia. To a politically neutral person, apart from difference in geographic location, there is no basic distinction between the people of Tigray and Tigrinya speaking highlanders of Eritrea (the majority). This

Prognosis 6: 2 Miz. L. Rev. 163 - (2012).. See also Kjetil Tronvoll, *Borders of Violence-Boundaries of Identity: Demarcating the Eritrean Nation- State*, 22:6 ISSN 1042, 1037 – 1060 (1999).

⁹Negash and Tronvoll *supra* note 1 at 10. *Id.* at 8 see also Seyoum Yohannes, *Eritrea-Ethiopia Arbitration: A Cure neither Based on Diagnosis nor Prognosis* 6 MIZAN L. REV. 168, 163-199 (2012)

¹⁰ Kjetil Tronvoll, *Borders of Violence – Boundaries of Identity: demarcating the Eritrea Nation-State*, 22 ETHNIC & RECIAL STUD. 1037, 1037 – 1060 (1999).

similarity and frequent cross border interaction has produced a complex boundary setting that is hard to draw a clear separating line.¹¹

Majority of the Eritrean people and the people of northern Ethiopia, including Tigray and Amhara, are from the same root – Semitic people who migrated from the South Arabia.¹² Eritrea's strategic location and proximity to Asia and Europe had attracted migration of various categories of people to the eastern Africa. Long before the emergence of powerful Kingdom of Axum, the Sabaeen people migrated to the northern Ethiopia and the current territories of Eritrea during first millennium B.C.¹³ While some settled in the northern Ethiopia, the rest proceeded to the interior, west and southwards. The immigrants, in some cases, pushed indigenous people to the unfavorable territories like lowlands and deserts. Before arrival of the newcomer, there were Negriod, indigenous people, now settled in the lowlands of western regions of Ethiopia and Eritrea.¹⁴ The people of Kunama repeatedly pushed to the western low land villages that were not conducive for the powerful immigrants to claim. As Professor Abbnik witnesses, “[...Kunama] were politically marginalized and lived under domination. Much of their lands were gradually taken for resettlement of other groups [...]”¹⁵

The name “Ethiopia” was coined during Axumite Empire but not formally used as a name of nation. According to legend, “Cush the son of Ham and the founder of the Axumite Kingdom”¹⁶

¹¹ Yacob Haile Mariam who knows the two people very closely attests, “[...] there are no other two people who are so irretrievably intertwined as Eritreans and Ethiopians [...] If there are any two people who should not be separated, Eritreans and Ethiopians perhaps provide the best example. We are after all “ Habesh” historically speaking.” See Yacob Haile Mariam, *Dialogue between Eritreans and Ethiopians: An idea whose Time Has Come*, A paper presented at a conference organized by ESAT, October 25, 2015. Washington DC, United States.

¹² W.M. FLINDERS PETRIE ET EL, *THE BOOK OF HISTGORY, A BOOK OF ALL NATIONS FROM EARSLIEST TIMES TO THE PRESENT* 1915 (Tropical North Africa –IV Abyssinia, 2251(1915).

¹³ *Yacob HaileMariam supra note 11.*

¹⁴ NIAZ MULTAZA, *THE PILLAGE OF SUSTAINABILITY IN ERITERA* 1600 – 1990s 45(1998).

¹⁵ Jon Abbink, *Creating Borders: Exploring the Impact of the Ethio-Eritrean War on the Local Population*, 4 Africa LVI, 452, 447 – 458 (2001).

¹⁶ Tsegaye Beru, *Brief History of the Ethiopian Legal Systems – Past and Present* , 41 INT’L J. LEGAL INFO 335, 335 – 388 (2013).

named his son *Ethiopsis*¹⁷– from which the name “Ethiopia” derived and formally substituted the traditional name of Abyssinia. In the words of Flinders Petrie et al, “ From a son of Cush named *Ethiopsis* it received the name of Ethiopia, which it divided with Meroe at an earlier period; and it appears to the present day in the official title of the Abyssinian ruler.”¹⁸ Thus, there is no doubt that the name Abyssinia had encompassed the current territories of Eritrea and Ethiopia (the Habesh or Habesha). Even today, some diaspora Ethiopians and Eritreans use the expression, “Habesh” to connote an Ethiopian or Eritrean.¹⁹

Today major ethnic groups of Ethiopia are classed in the main ethnic category of Cushitic, Semitic, Hermetic, Omotic.²⁰ Cushitic group comprises several ethnic groups that are settled both in Ethiopia and Eritrea. For instance, the Cushitic people of Afar reside both in Eritrea and Ethiopia. The Amhara ethnic group, which mainly settled in the Amhara Regional States of Ethiopia, and Tigreans are Semitic people having the same origin, as Semitic people of Eritrea.

¹⁷ The name Ethiopia was derived from the Greek word “burned face” *Id.*

¹⁸ Flinders Petrie *et al supra* note 12.

¹⁹ Multaza *supra* note 14. See also Yacob Haile Mariam *supra* note 11. In United States it is not uncommon to confront a query: “Are you Habesh or Habesha?” The question often posed to a person having Habesh facial features. If the person responds positively, then Amharic or Tigrinya communication continues. In some cases second generation immigrants may speak both languages but they even understand either Amharic or Tigrinya. The query whether a person is an Abyssinian or Habesha is a common strategy that is often used to differentiate an Eritrean or an Ethiopian from “others”. Irving Kaplan, et al also portray the citizens of Abyssinian (the Habesha) See IRIVING KAPLAN ET AL, AREA HANDBOOK FOR ETHIOPIA 3(1971). One may also fairly query why Ethiopian and Eritreans are called “Habesha” or “Habesh”? There are various interpretations of the term “Habesha”. Some local Ethiopian and Eritrean people in some case use the term to mean non -“Ferenj.” In this sense, all Ethiopians and Eritreans, being not “Ferenj” are “Habesha.” Still non-Semitic tribes can still denounce the term, as it referred to mean Semitic people of northern Ethiopia and Semitic Eritrean people. See Magn Nyang, *The difference between being an Ethiopian and being Habesha*, SUDAN TRIBUNE, Feb. 18, 2009. The noun “Habesha” probably derived from the name of Arab coast Kingdom. It is said that the Kingdom of Axum “[... rose as an offshoot of the Arab coast Kingdom of Habashat, about beginning of the Christian ear.” see Flinders Petrie *et al supra* note 12. Thus, the name “Habesha” is very relevant to the Semitic speaking areas of Ethiopia and Eritrea. It is an expression of “oneness” of interrelated Semitic people of Ethiopia and Eritrea. According to Sven Rubenson Ottoman Turks called the island Massawa as “Habesh or Habeshtan.” See Rubeson *supra* note 6 at 30.

²⁰ Both Ethiopia and Eritrea have distinct ethnic groups that are classed under Cushitic, Semitic, Hamitic or the groups. Take, for example, the main ethnic group, Oromia, which is Cushitic which situated in Ethiopia and Kenya. Eritrea has about 13 ethnic groups that either under Cushitic, Semitic, or Hamitic category. Similarly, Ethiopia comprises of numerous ethnicities that may be classed in anyone main categories. Listing all ethnic groups of Ethiopia and Eritrea is out of scope of this work. The main objective here is to show close affinity between major Eritrean ethnic groups and ethnicities in the northern Ethiopian.

The official language of Axumite Empire was Ge'ez.²¹ It was a language from which the current Semitic languages of Amharic and Tigrinya were derived. According to Flinders Petrie *et al*, "A Semitic language eventually become the universal idiom, the Geez, which is now dead and is used only in church services but represented by two daughter languages, the Amharish and the Tigrish."²² After fell of Axumite Empire in 7th century due to foreign invaders, especially Jewish that lead by Judith, subjects Axumite Empire dispersed and Ge'ez was substituted by different regional dialectics.²³

Residents of coastal areas, especially the Red Sea lowlanders were subjected to frequent invasion and occupation of foreign aggressors.²⁴ Suppression by highlanders and foreign influence has created cultural and religious differences. While highlanders remained followers of Ethiopian Orthodox Church, lowlanders converted into Islam due to frequent invasion of Islamic jihadists and occupation by Ottoman Turks.²⁵ Orthodox Christianity remained as an official religion since 333 AD until Jewish occupation in 9th century and restored after restoration of Abyssinian power in 13th century.²⁶ As a result, Coptic Orthodox Christian remained as a dominant religion both in Ethiopia and Eritrea. Vandoren explains the cultural and political dominance and the cause of fell of Axumite Empire as follows:

Ethiopia evolved from Axum, a highly developed Christian slave owning kingdom. Axum was located in the area now occupied by the northern Ethiopian province of Tigre and former province of Eritrea. Nearly all the lands of Modern day Ethiopia were Axumite vassals.

²¹ Multaza *supra* note 14.

²² Flinders Petrie *supra* note 12.

²³ Amharic and Tigrinya are offspring of Ge'ez,

²⁴ Ottoman Turks and Egyptians were among common aggressors that occupied Eritrean lowlands before the arrival of European colonizers in late 19th century.

²⁵ According to Flinders Petrie *et al*, in 1527 Turks occupied Massawa and United with the Muslim prince of Harar, Mohammed Grange who destroyed Axum to the grand. See Flinders Petrie *et al supra* note at 2254.

²⁶ King Ezana of Axumite Kingdom was baptized by Frmentius, the apostle of the Abyssinians at the time. King Ezana was so powerful who ruled not only the current territories of Eritrea and northern Ethiopia but large areas in Southern Arabia. See Flinders Petrie *supra* note 12. at 2252. As regards Christianization of Axumite Empire see PANKHURST *supra* note 7 at 21. According to Pankhurst, Hamasen and Saraye (Southern Eritrea districts) adopted Ethiopian Orthodox Christianity at early time and considered the "paramountcy" of oldest church in Axum (Tsion Maryam) in Axum. *Id.*

Maintaining economic, political and cultural ties with Egypt, Persia, Arabia, Greece and India. Axum reached its peak of development, between the 4th and 6th centuries A.D. The decline of Axum triggered by the 7th century Muslim Arab conquest, marked the beginning of a long period of conflict.²⁷

According to the folklore that is supported by the Bible²⁸ Abyssinian kingship since Axumite Empire had King Solomonic lineage.²⁹ The then famous queen was inspired by the wisdom of King Solomon and travelled to Jerusalem to visit the “wise king”. As a result of close personal relationship with King Solomon, Queen Sheba was conceived and gave birth to King Minilik I.³⁰ Ethiopian kings generally known as “King of Kings the Lion of Judah”, the name which conveys a message that Abyssinia had several kings and the central king was regarded as above all the regional kings (the king of kings). In the words of Lady Herbert, “The country known by the name Abyssinia is governing by an Emperor, formerly calling himself “King of Kings; for his empire extended from Kaffa which is close to the mountains of the moon [...]”³¹ Lady Herbert, thus, proves the fact that boundaries of Abyssinian Emperors extend beyond northern Ethiopia to the very long regions of Kaffa. The Kingdom of Axum had wider contours, which extended to the South Arabia, south Egypt and north Sudan. At the time that Queen Shaba visited King Solomon, her capital situated in South Arabia³², before it moved into the notorious ancient city of Axum in which a new city of Axum built on the ruins of the old city.

It is an obvious fact that the current territories of Eritrea were part and parcel of Abyssinia/Ethiopia under the rule of Abyssinian kings with no clearly set boundary.³³

²⁷ John W. Vandoren, *Positivism and the Rule of Law, Formal System or Concealed Values: A case Study of The Ethiopian Legal System*, 3 J. TRANSNAT'L & POL'Y 167 - 168, 165 – 214 (1994) Pankhurst remarks, “The Kingdom [Axum...]included the highlands north of the Marab river (which were subsequently to constitute the Country of the Bahr Nagash, and much later present-day Eritrea). *Id.*

²⁸ Bible, 1Kings 10 KJB

²⁹ Flinders Petrie *supra* note 12. at 2252.

³⁰ LADY HERBERT (Trans.), *ABYSSINIA AND ITS APOSTLE*, (1867)

³¹ *Id.*

³² *Id.*

³³ It is not just ethnic lineage but geographic location proves that Eritrea was a component of Axumite Empire, as boundaries of the Kingdom of Axum goes beyond territories of Eritrea in all directions. The port of Adulis and

Administrative or ethnic boundaries depended on private land holding. The boundaries of northern Tigrinya speaking group (currently majority in Eritrea) and the southern Tigrinya speaking group (the current Tigray Regional State of Ethiopia) is very difficult to delineate, as there was no basic fact that distinguishes the two groups of people apart from the elusive classification as north and south that has no clearly cut point of separation. In the case of other ethnic groups like Kunama, Afar, Saho, boundary setting was done on the basis of peripheries of ethnic groups known by the landholding of the last person of the ethnic group or sometimes traditional method of delineation of villages may be marked by natural features of land like rivers and mountains.

After his coronation in 1872, Emperor Yohannis continued to strengthen the unity between Ethiopian regions which was already started by Emperor Thewodros.³⁴ Internal rivalry and foreign aggression however, hampered this effort. Yohannis IV was Tigre and had no Tigrean rivalry both in current territories of Eritrea or in the territories of Tigray. Even most of his southern or western rivalries were either defeated or submitted to his administration.³⁵ After short confrontation in Lasta, Minilik II, the king of Shoa, submitted himself to Yohannis IV and pacified relationship by arranging marriage of his daughter to Emperor Yohannis's son. The Harar Prince also acknowledged King Yohannis's Emperorship of Abyssinia. Most international wars were fought in current territories of Eritrea. The main reason was foreign interest in coastal regions, especially commercial routes and ports. Turks and Egyptians were the major invaders that occupied northern

Massawa were used by the Axumite kingdom for its imports and export. The destruction of Adulis port by invaders weakened the Kingdom and caused its ultimate demise in 7th century. According to Irving Kaplan *et al*, the people of Tigray (north and south or in another way Eritrean and Ethiopian Tigre) were the "founders" of Kingdom of Axum "some 2500 years ago." See Kaplan *et al supra* note 19 at 5

³⁴ There was little tie with the far south though some regional kings paid tribute to the King of Kings. However, most of the Southern regions of Ethiopia stood at the side of their northern brothers when Italy attempted to colonize Ethiopia in 1896.

³⁵ In a way consolidating his power, Tigre Kassa (King of Kings Yohannis) defeated Gobeze, the governor of Lasta and Gojam. See Flinders Petrie *supra* note 12 at 2256.

and coastal areas of Eritrea. Egypt's interest to move to the hinterlands was failed by defeat of Egyptians by Emperor Yohannis at *Gundet* and *Gura* (both now in Eritrea).³⁶

Ethiopian/Abyssinians never considered territories making up Eritrea as foreign land. Unless it was beyond their power, Abyssinian kings used to defend Eritrean coastal regions against foreign aggressors. For instance, King Yohannis's notable General, Alula, as recent as 19th century fought and restrained Italians who attempted to move to the hinterland but on account of the death of Yohannis IV in fight with Mahdists of Sudan³⁷, Ras Alula did not absolutely stop Italians who reoccupied hinterlands of Eritrea.³⁸ In five month's time since death of Yohannis IV since March 10, 1889 Italy occupied substantial portion of current territories of Eritrea.

After death of Yohannis³⁹, Minilik II of Shoa was crowned as King of Kings of Abyssinia/Ethiopia, and was expected to defend all the territories making up Abyssinia. In some peripheries, foreign occupiers were already settled for long time. Strategically, due to multifaceted restraints, some occupiers left unchallenged as far as they stayed in the coastal areas. For example, there were Turks or Egyptians in coastal areas of Red Sea, Massawa for long time. When Egyptians crossed the tolerable level of the line, Yohannis IV fought them with great victory.⁴⁰

³⁶Rubenson *supra* note 6 at 318 -329. See AFRICAN AMERICAN REGISGRY, Ethiopia Wins the Battle of Gundet, (Tue, 11/16/1875), www.aareqistry.org See also AGAI ERLIKH, THE CROSS AND THE RIVER: ETHIOPIA, EGYPT, AND THE NILE 70(2002). See also Esayas Girmay, *Ethiopia: The "Nile Factor" and Pragmatic Opportunism in Egypt-Eritrea Relations*, THE REPOTER (Oct. 4, 2014)

³⁷Mahdits were Dervishes (Sufi Muslims) who conquered Sudan and occupied Kassala after Egypt occupied by Great Britain. After occupying Kassa Dervishes moved to the Ethiopian territory and fought with Yohannes IV who lost his life in the battle. See W.B. Stern, *The Treaty Background of the Italo-Ethiopian Disputes*, 30 AM. J. INT'L L. 190, 189 -203 (1936).

³⁸Minilik who enjoyed Italy's support in his effort to reunify Harar in 1886 and strengthen his power against other rivals in Ethiopia opposed Italia's occupation of Massawa. Minilik thought it was under his sovereignty. This appears contradictory to the spirits of Wichale (*uccalli*) treaty In Italy's refusal to surrender Massawa, Minilik sought the assistance of Queen Victoria which "proved to be unsuccessful." In the mean time Italians appeared to be peaceful and appeared to be friendly with a subtle motive of pacifying the relationship with Minilik. See Stern *supra* note 37. *Treaty Background of the Italo-Ethiopian Disputes*, 30 AM. J. INT'L L. 190, 189 -203 (1936).

³⁹Yohannis IV was a Tigrinya speaking King of Kings who ruled Abyssinia for 18 years. Negash and Tronvoll *supra* note 1 at 6

⁴⁰History of Eritrea, See www.eritrea.be/old/eritrea-history.htm.

Numerous factors had enabled Italians to consolidate their occupation of Massawa and surrounding areas. The most important factor was the competition to occupy Abyssinia against another European rival – French (during the Scramble Africa). Internal political turmoil, like death of Yohannis IV and competition to throne by multiple contenders was another cause that created conducive ground to Italians. Minilik II needed Italian support to prevail other possible contenders including Yohannis’s heirs. Moreover, Minilik’s naïvely assumed that Italy’s occupation of Kassala as advantage that repeatedly attacked the current territories of Eritrea. As a result, Italians were able to quickly occupy western lowlands of Eritrea and further moved to the highlands. Cognizant of internal politics, and shortcomings and interest of Minilik II to consolidate his power towards South, Italians tricked him⁴¹ by offering gifts of guns that helped Minilik soldiers to fight southern kings like the King Tona of Wolayta.

The thwarted treaty of Wichalle (also written as *uccalli*) often cited to prove Minilik’s acceptance of Italy’s occupation of territories of Eritrea.⁴² But he actually protested against Italy’s occupation of Massawa and used all possible peaceful methods including appealing to Queen

⁴¹ Robert Klonsky, *Internaitonal Law Background in the Itlalo-Ethiopian Dispute, 1935 -1936*, 5 NATIL B. J. 152, 151 -183 (1947). According to Klonsky,

Italy first appeared during a turbulent period of Ethiopian politics, shortly after John IV from the Tigre seized the Ethiopian throne in January, 1872 which had reminded in dispute [...] In furtherance of a secret pact with Minilik, King of Shoa, Italy supported the pretensions of Minilik over the heir of John. The Italian candidate became Minilik II, Negus Negasti of Ethiopia in 1889, and “then began a systematic effort to acquire Ethiopia as a protectorate by Treaty arrangement with Minilik. See *Id.*

⁴² *Id.* at 153. According to Klonsky, the “ill –fated treaty was consummated on May 2, 1889 between Minilik II and Count Antonelli, representative of Crispi, Prime Minister of Italy, whereby the Italian version reduced Ethiopia to the level of a protectorate, with Italy to represent that Empire in its foreign affairs.” *Id.* It is rightly said that history should be judged on facts of a time, but on the basis of current facts, Minilik’s agreement with Italians appear shocking to give portion of a nation to an alien power. Several African traditional chiefs had sold land or entered into treaty of protection, but it was unusual to deal with a colonial power to peacefully take substantial portion of a nation cutting sea root in exchange of arms that would be used to force internal rivalries to submit power. This often claimed as justification by some Eritrean people for separation from Ethiopia, but Eritrean should note that actions and decisions of Minilik II was not the taking of their Ethiopian brothers. It is true that Minilik was powerless given backward transpiration and hard geographic condition. This claim may easily be challenged on account of defeat of Italians in Aduwa later and absence of minimal attempt to expel Italians from Eritrea after death of Yohannis IV.

Victoria's mediation, which was unsuccessful.⁴³ Minilik's interest to consolidate his domestic power by reunifying Southern, Western and Southern kingdoms and his reliance on Italy for arms and economic assistance has blinded him not to fight Italians against occupation of Eritrea.

5.3. Creation of Italian Sphere of Interest

As it was the case in other parts of Africa, Italy established its sphere of influence in Abyssinian soil through missionaries and under the guise of land transaction for commercial shipping company.⁴⁴ An Italian missionary called Fr. Giuseppe Sapeto had facilitated purchase of a piece of land near the then small town of Assab from a local chief apparently for the Italian national shipping company known as Rubattino Shipping Company.⁴⁵ Later the Italian government took over administration of land.⁴⁶ Italian interest in Abyssinia was so intense after the Berlin Conference. After taking direct administration of the land near Assab, Italy moved to occupy Massawa. In order to avoid possible French occupation of Massawa, Great Britain favored the Italian occupation. At the time Egypt was under control of Great Britain and there was no major confrontation with Egyptians and Italy.⁴⁷

⁴³ Stern *supra* note 38 at 189 see also History of Eritrea *supra* note 32.

⁴⁴ Purchasing land from naïve and ignorant local chief's was the easiest way to step in to African nations with the ultimate objective of occupying the whole nation. With a view to avoid the threat of occupation, during heydays of the modernization of laws, Ethiopia prohibited ownership of immovable properties by non-Ethiopians. No foreigner can own building in Ethiopia. As there is no private ownership of land in Ethiopia today, the prohibition is relevant only to buildings. Nowadays, however, there is lenience with regard to foreigners having Ethiopian blood. These are persons having foreign nationality but may be considered as Ethiopians for investment purpose as Ethiopians. A person who was by birth Ethiopian but naturalized into another nationality, or person having some kind of Ethiopian tie like children born to Ethiopian parents abroad and having foreign nationality and can buy immovable properties in Ethiopia.

⁴⁵ Stern *supra* note 38 at 189

⁴⁶ According to Tekeste Negash opening of Suez Canal in 1869 arose the interest for Eastern African territories and Italy acquired the port of Assab "which had been purchased by a shipping company in a tacit agreement with the Savoy dynasty, was bought by the government in Rome in 1882." See TEKSTE NEGASH, ERITEA AND ETHIOPIA THE FEDERAL EXPERIENCE, 13(1997).

⁴⁷ British encouraged and facilitated Italy's occupation of Massawa fearing France would extend its holding from French Somaliland. As Egyptians who occupied the coast after Ottoman Turks left were under control of British, its preference of Italy over France made the occupation easier, but confronted with Ethiopian resistance. *Id.*

But Italy's attempt to further expand to the hinterland was confronted with a huge battle with Ethiopians. At the moment Ras Alula was at high time, as a prominent general and administrator of King Yohannis IV, who moved with his brigade to expel the steadily expanding Italians. Alula's forces defeated Italians at Dogali in 1887, which made the expansionist enemy to retreat. However, Alula and his forces did not stay there to keep Italians at the periphery. In the mean time, Yohannis IV confronted with Mahdists of Sudan in the Western front and lost his life. Since his coronation, Yohannis IV never peacefully sat at his throne. He spent most of his emperorship by repelling foreign invaders (Egyptians and Italian or Mahdists) or restoring internal union battling with regional rivalries like Minilik II who later submitted. Minilik II, however, did not abandon the ambition to get the power of king of kings. He had been dealing with Italians for arms ceding territories.⁴⁸ After death of Yohannis IV, Ras Allula apparently left alone. Though he defeated Italians at Dogali in 1887 and made them to retreat, he moved to Tigray leaving the periphery unguarded.

5.4. Colonization of Eritrea as a Prelude to Occupy Ethiopia

Emperor Yohannis's death coupled with Alula's move to Tigray had created a conducive situation for Italians who already did not go far waiting for a best moment to come back. After Yohannis's death Italians came back from peripheries and occupied substantial portion of current territories Eritrea.⁴⁹ Moreover, internal power struggle created another best opportunity to Italians. Italians had cheated Minilik promising to work together and enable him get the title of emperorship. In 1889 Minilik II of Shoa was coroneted as King of Kings of Abyssinia. In the

⁴⁸ “ As early as 1887, Minilik, the king of Shoa, had expressed readiness to negotiate with the Italians for the supply of arms in the exchange for cession of territory, if this would ensure his speedy accession to power [...]” *Id* at 13.

⁴⁹ Italians realized the attitude of the lowland Eritreans who were tired of Eritrean highlanders and Ethiopians who occasionally plundered their cattle. Italians thus continued occupying territories where they welcomed in order to

mean time, Italians quickly moved to the highlands of Eritrea occupied Karen and then Asmara in July 1889.

Italy occupied territories it could possibly consolidate its power and named it “Erythraea.”⁵⁰ The name “Eritrea” was derived from the Greek term called Erythraea, which literally means red.⁵¹ Thus, the Biblical terminology of Erythraean Sea Red Sea.⁵² As a result, one author surmises, “ Eritrea, however, existed as a historical fiction created by the Italians in the late nineteenth century.”⁵³

Italy used variety of deceptive mechanisms to silence Minilik II against Eritrea’s occupation.⁵⁴ Numerous ostensive peace, friendship, and cooperation treaties were signed.⁵⁵ After establishing its power in current territories of Eritrea, Italy concluded an infamous treaty with Minilik II at Wichalle (some times called *Uccalli*, but herein after we will use only Wichalle) with intention to extend its power to other territories of Ethiopia.⁵⁶ The most important aspect of this treaty was Minilik’s formal acceptance of occupation of Eritrea. It is true that Minilik II by determining boundaries beyond which Italy cannot claim had produced an appearance of legality

restrain Eritrean highlanders and Ethiopians from raiding their cattle. According to Tekeste Negash, “By the end of 1888, the Italians had established contacts with the Tigre, Hababa and Beni Amer leaders.” See *Id.*

⁵⁰ Negash and Tronvoll *supra* note 1 at 5.

⁵¹ The noun “Erithraean Sea” had been in use long before the birth of Christianity. For instance, Agatharchides, a Greek historian and geographer who lived in 169 BC authored a book entitled, “On the Erithraean Sea” in which the limits of the boundaries of Saudi Arabia was described. See <http://www.bible.ca/archeology/bible-archeology-exodus-red-sea-agatharchides-of-cnidus-on-the-erythraean-sea-169bc.htm>

⁵² See Exodus 10:19, Acts 7:36, The Amharic version still uses the expression “Eritrean Sea” while the contemporary English versions changed it into “Red Sea”. Some even doubt the meaning of “Red Sea”, stating that the original meaning of the Sea of Reeds, which is derived from common reeds (salt grass around the sea) For closer assessment of the origin of Erythraean Sea or Red Sea or Reed Sea, see, William F. Tanner, *Did Israel Cross Red Sea?*, 50 FSCF 211 -215 (1998), available at <http://www.asa3.org/ASA/PSCF/1998/PSCF9-98Tanner.html>

⁵³ Robert Eale Woolbert, *The Future of Ethiopia*, 20 FOREIGN AFF546, 537 – 551 (1941 – 1942).

⁵⁴ It was assumed that the Wichalle Treaty would create perpetual peace and friendship between Ethiopia and Italy but the Italy’s motive was far from Minilik’s thought. Italy attempted to peacefully occupy the whole Ethiopia under the guise of assistance in foreign relationship was apparently.

⁵⁵ The Treaty of October 20, 1887, a treaty of friendship and alliance, In Art. 2 of the Treaty Italy, among other things declared not to occupy Ethiopia’s territory. This treaty later including in Wichale Treaty of 1889. Stern *supra* note 38. See also History of Eritrea *supra* note 32.

⁵⁶ The Italians offered Minilik 30,000 Musket rifles and 28 cannons and also loan, See Ethiopian Foreign Policy (Jan. 30, 2014) ,www.ethiopianforeingpolicy.com.

to Italy's occupation of territories *hitherto* Ethiopian kings had defended for centuries apart from some coastal spots that used for dockyard for commercial ships and the medieval Ethiopian port of Massawa.

Minilik's apparent acceptance of the occupation of Eritrean territories by Italy was not actually free from doubt. First, Minilik *protested* against Italy's occupation of Massawa and hinterlands⁵⁷, *albeit* he enjoyed overwhelming Italian support against his rivals including Yohannis IV.⁵⁸ In Italy's refusal, Minilik sought the mediation of Queen Victoria, which "proved to be unsuccessful."⁵⁹ In addition to the deceits and apparent help Minilik had enjoyed considerable financial and arms gift that was crucial for consolidation of Minilik's power to continue reunification of other kingdoms. Italy had also intention to weaken the power of Yohannis IV and support Minilik to acquire Emperorship with the objective of occupying the whole Abyssinia peacefully. The other was Italy's superiority and the assumption of future backup in case of internal and external threat, presumably, had silenced Minilik to accept the treaty. Furthermore, previous silence to contend of occupation of Massawa by Ottoman Turkey and some villages like Bogos by Egyptians had created an impression that occupation of border territories was not threatening.⁶⁰

The Treaty of Wichale was concluded after Minilik's coronation as *Negus Negest* (King of Kings) of Abyssinia/Ethiopia.⁶¹ The Treaty included important pillars of the Treaty of 1887 that

⁵⁷ According to Stern when Ethiopians were "preoccupied with other affairs, the Italians occupied Massawa and Beilul. They soon advanced their posts into the hinterland. In a letter to Queen Victoria, Minilik protested against the Italian invasion [...]" See Stern *supra* note at 190.

⁵⁸ For instance, Minilik was supported by Italy when he conquered and restored Harar to the Abyssinian. See Stern *supra* note 38.

⁵⁹ *Id.*

⁶⁰ Ottoman Turks had occupied Massawa for long period. It confined to the port collecting fees. This presumably created an impression that their presence at the Port of Massawa was not a threat.

⁶¹ The Treaty of Wichale is very important in the history of colonial treaties. First it practically proved deceptive practices of colonial powers and its abandonment after the colonial power was defeated by the native people whose sovereignty might have been taken under the guise of deceitful treaty terms.

was concluded between Minilik II and Italy before his coronation.⁶² The Treaty of Wichale was written in Italian and Amharic versions. Art. III of the Treaty of Wichale had provisions to establish frontier commission that assumed to delimit and demarcate boundaries between Ethiopia and the occupied territories that later named as Erythraea. The treaty set boundaries of Ethiopia “to run south of Arafali, Halai and Asmara.”⁶³ It did not only provide Italy’s extraterritorial jurisdiction over Ethiopia, but proclaimed “the creation of monetary union between Italian colonies and Ethiopia.”⁶⁴ However, Article 17 of the Treaty rendered the rest of the terms meaningless as it put Ethiopia under Italian protectorate.⁶⁵ The Amharic and Italian versions of the treaty were not congruent. It simply offered Minilik the option to seek Italy’s assistance if needed. Then after Italy declared to the other European powers that Ethiopia was under its protectorate and any foreign government wishing to deal with Ethiopia could do so only by channeling Italy.⁶⁶

Realizing facts of the deceptive wordings of the Treaty of Wichalle, Minilik attempted to have the treaty wordings to be fixed, but at vain. Italy, rather attempted to appease him by bribing through ammunition, which this time did not silence Minilik II.⁶⁷ After wards Minilik II repudiated the treaty thereby declining any kind of contact with Italy.⁶⁸ Italians moved to occupy Ethiopia by force. Minilik II deployed his people and troops to the north Ethiopia and fought the invading

⁶² This was a treaty of friendship and alliance. In this treaty the Minilik II and Italy promised to support each other (Art. 2 of the Treaty). Italy promised arms to Minilik who promised not to turn the arms against Italy (Art. 5). Most importantly to Minilik II, Italy promised not annex any Ethiopian territory. See Stern *supra* note 38.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ This means, “ His Majesty the King of Kings of Ethiopia consents to make use of the Italian Government for any negotiation which he may enter into which other Powers or Governments.” *Id.*

⁶⁶ Italian version of the Treaty reads “*Sua maesta il Re dei Re d’Etiopia consente di servirsi del Governo di Sua Maesta il Re d’Italia per tutte le trattazioni di affair che avesse con alter Potenze e Governi.*” *Id.* at 191. Italy telegraphed thirteen leading powers about Art. 17 of the Wuchale Treaty. *Id.*

⁶⁷ Italy sent 2,000,000 cartridges that finally served to fight Italians at Aduwa. *Id.*

⁶⁸ After Italy refused to fix the deceptive provision demanding direct negotiation, Minilik apparently sent a telegram stating boundaries of Ethiopia. This telegram proves Minilik’s takings of Ethiopian territories. He stated that Ethiopia’s territories “ran from south of Arafali on the Red Sea eastward through territories which is today Eritrea and through large part of Sudan to Lake Rudolf in South.” *Id.* at 192. In the east it goes to Ogaden and parts of Djibouti. *Id.* Thus, Miniik’s Ethiopia was large enough than today’s Ethiopia.

forces in Aduwa in 1896. Though Minilik's forces were tired walking to the northern Ethiopia from Addis Ababa by the help of people of Tigray and the best geographic condition that was conducive for defense, his forces humiliated Italians army making history.⁶⁹

After defeating Italy, however, Minilik forces did not move to the extent of freeing the previously occupied territories of Eritrea. Given lack of logistics, ammunition, backward transportation and difficult geographic condition, it was hard to Minilik II pursue towards Eritrea. Minilik's fighters were already exhausted by the fight and long journey from Addis Ababa. Some Eritrean villages, especially, Muslims supported Italy on Ethiopia's conservative religious grounds.⁷⁰

Italy ultimately opted for peaceful resolution by renegotiating with emperor Minilik II. On October 26, 1896 a peace treaty was signed in Addis Ababa thereby formally annulling the whole treaty of Wichalle.⁷¹ At this treaty Italy recognized Ethiopia's sovereign and independent existence.

5.5. "Boundary Treaties"

After battle of Adwa (also known as Aduwa), apparently, as a step for peaceful existence, Italy sought delineation of boundaries between Ethiopia and Eritrea.⁷² Accordingly, in addition to the peace treat of October 1896, three successive boundary treaties were concluded in 1900, 1902 and 1908. These were the treaties that Eritrea-Ethiopia Boundary Commission (EEBC) was authorized to delimit and demarcated boundary between Ethiopia and Eritrea. Brief overview of

⁶⁹ Minilik's forces killed 4600 Italian army and captured 2000. *Id* at 193, see also Negash *supra* note 46 at 14.

⁷⁰ Eritrean highlanders and most Ethiopians were followers of Ethiopian Orthodox Church that had suppressed the Muslim minority. In fear of cooperation between Orthodox brothers Muslims favored Italians. Thus, any further move to wipe out Italians from Eritrea may not be easy to Minilik even if his forces were not already exhausted. Fighting on Tigray land was easy and favorable as Tigreans were absolute supporters of the Emperor.

⁷¹ It was not only the contentious provision Art. 17 but also the October 1896 treaty was discarded. *Id* at 193.

⁷² Art. III of the Addis Ababa Peace Treaty of October 1896.

each of the treaties presented in the following sections. Controversies and point of contention as a result of wordings of the treaties and associated problems will be dealt in the next chapter.

5.5.1. 1900 Treaty

The 1900 treaty was concluded in the aftermath of Italy's defeat at the battle of Adwa. Italy apparently lost its hope of occupying the whole country and set to secure a portion of Ethiopian territory that it captioned as *Erythraea*. As has been pointed out elsewhere, the validity and fairness of historical actions have to be gauged on the basis of facts prevailing at a time, (application of the doctrine of contemporaneity), but the current generation may query why the Ethiopian king negotiated with Italy to legally and freely surrender a territory that had been under the sovereignty of Ethiopia for thousands of years. Given the legality of coercive occupation of African territories, especially after the notorious Berlin Conference and coercive expansionist policies of Italy, Minilik II had to be assured by confining Italians at a given point. It is true that Ethiopia won the war with Italy that had superior military hardware and highly trained military personnel, but that victory by itself could not guarantee that Italians would be completely restrained. Repeated Italian inducement, and Minilik II's desire to reintegrate the southern kingdoms were some of the causes that dictated Minilik II to accept Italy's offer to establish a borderline that Italians could not further claim.

The 1900 treaty was very significant as it attempted to define boundaries of a substantial portion of central and western regions of Ethiopia and Eritrea. This treaty is also vital as it dealt with the localities at which the 1998 dispute arose. However, the confusion arising from 1900 and subsequent treaties has caused unending conflict. The treaty was signed on July 10, 1900 in Addis Ababa, which is far away from the border areas. Either the treaty or accompanying statement of signatories does not reveal the reason for setting boundaries at stated locations. Apart from few

squares of land that were purchased from tribal chiefs near Assab under the guise of commercial shipping company, the rest of territories were taken by force. Turning back to 1900 Treaty, one may also questioned that why Italy chose a particular land to be an end of its Eritrean territory? The plan to set boundary was totally Italian initiative that freely determined the point of separation. It is true that Italy was defeated and signed a peace treaty in October 1896, but no rationale was justified to draw the boundary at a point.

Moreover, either the treaty, accompanying statement of statesmen, or literature in the field does not disclose whether pre-negotiation survey was conducted. Given communication and transportation restraints at the time, it was hard for Ethiopian leaders to know the details of local geography and ethnographic facts before setting the boundary. The colonial power, on the other hand, was in a better position to know facts on the ground, but had a hidden motive for further expansion to acquire more territories by any means, if not possible to occupy the whole Ethiopia.

It is doubtful to regard the 1900 treaty as “treaties” in true sense. It was a one-page “note”⁷³ having simply two provisions. While Art. I of the treaty stipulates the supposed boundary spots, Art. II declares obligation on Italy not to cede or transfer the territories bounded by said boundary points to any power.⁷⁴ Thus, only a single provision was meant to set boundary line proper. Mentioning only names of rivers as boundary line, the treaty was excessively vague. Art. I of the treaty states, “The line *Tomat-Todluc-Mareb-Belesa-Muna*, traced on the map annexed, is recognized by the two contracting Parties as the boundary between Erythrea and Ethiopia.” *Tomat*

⁷³ Professor Larebo calls the treaties as “notes.” See Haile M. Larebo, *Colonial Treaties in the Context of the Current Eritrean Border Dispute and Settlement*, Paper presented to the 14th INTERNATIONAL CONFERENCE OF ETHIOPIAN STUDIES, Addis Ababa, November 6 – 10, 2000. The 1902 treaties itself has applied the term, “note” to mean the treaty. See ¶ three of Art. II of 1902 which states, “[...]His majesty Edward VII, king of the United Kingdom of Great Britain and of the British Dominions beyond the Seas, Emperor of India, and his successors, have signed the present note [...]”

⁷⁴ It is not clear why Minilik II cautioned Italy not to transfer the territory to another power. It is not lease in which case the territory to be returned back to Ethiopia. But is it possible to read Minilik’s intention. Italy could possess the territories as far as it needed, but if Italy no more needed them the territories should be returned back to Ethiopia.

and Todluc are not nearby locations. *Tomat* is located on the treaty map at very west, which borders Sudan, whereas *Todluc* was at very north, and the other boundary rivers are in the central regions. The treaty does not mention how the boundary line to be drawn. That is, whether the spots mentioned in the treaties to be linked by straight-line or the actual borderline to be drawn on the basis of individual landholding of residents or ethnic and other facts on the ground to be considered.

The treaty of 1900 was not only arbitrary and unconscionable, (Ethiopia surrendered its territories for no consideration and boundaries were set without survey of facts on the ground) but also influenced by the wishes of Italy.⁷⁵ At this time, Minilk II was already aware of dishonest character Italy.⁷⁶ An inquisitive mind may also query why Italy moved to set a point of separation between its people while Italy did not abandon its expansionist policy? It may be taken that boundary setting was simply a deceitful act that meant to pacify Minilik II to subtly submit the whole territories. Italy knew that the boundary was a temporary quelling practice, as its ultimate goal was to colonize the whole Ethiopia. This fact was proved by the 1935 invasion and incorporation of the whole Ethiopian territories to the Italian East Africa colonies.

The other reason for arbitrariness of Ethio-Eritrean boundary was ignorance of contracting parties to consider ethnographic and geographic facts on the ground. Given absence of quick transportation, modern communication channel, and distance from urban centers at the time, contracting parties supposedly relied on information supplied by third parties. Consequently, we have today an elusive treaty that remained hard, if not impossible to execute, as facts on the ground and treaty wordings could not match or facts referred in the treaty or their naming appears wrong

⁷⁵ Unilateral drawing of maps and applying a straight line, which has planted confusion and animosity among the neighboring ethnic groups and the two bordered nations. It was the effects of expansionist dishonest policies of Italy.

or non-existing. As Tomat-Todluc issue was resolved by the 1902 treaty, “Mereb – Belesa – Muna” is still outstanding and has been source of conflict. Non-existent river or wrong junctions were invoked by the Parties and unacceptable and impracticable decision was passed. Italy had intentionally set a vague boundary with a view to effectuate its expansionist policy, assuming a clear boundary would make some kind of restraint on her long run motives of stretching its long hands to the Ethiopian territories.

The 1900 treaty was backed by the treaty map, which further complicates the situation. Subsequent attempts by Italy to fill the treaty lacunae have further inflicted Ethiopian interest, as Italy repeatedly draw boundary map that influenced EEBC to pursue a path designed by Italy. Italian agencies or cartographers unilaterally mapped border areas.⁷⁷ This added unsolvable complexity that staled all efforts of peaceful settlement of Eritrea-Ethiopia boundary issue.

The next spots of boundary were defined by river route. The straight line connects *Tekezze* river with *Mereb* river at *Mai Ambessa*. The border then follows *Mereb* River in the central highlands.⁷⁸ “When the *Mareb* joins on its right side by Belessa river, the border follows Belessa”⁷⁹ Though modified by the 1902 Treaty, the 1900 Treaty still covers substantial portion of the disputed boundaries.⁸⁰

5.5. 2. 1902 Treaty

The 1902 Treaty was a tripartite agreement that was concluded between Great Britain on behalf of Anglo Egyptian Sudan, Italy and Ethiopia. The 1902 Treaty was a fruit of conspiracy between Great Britain and Italy for peaceful taking of Ethiopian territory under the guise of treaty.

⁷⁶ A clear boundary would stagnate expansionist move or the Ethiopian king might not sign the treaty if all the contours of territory lines were known.

⁷⁷ Robdriguez *supra* note 8 at abstract.

⁷⁸ Jean _Louis Peninou, *The Ethiopian – Eritrean Border Conflict*, IBRU OUNDARY AND SECURITY BULLETIN 46, 46 – 50 (1998).

⁷⁹ *Id.*

⁸⁰ It covered about 1/3 of the boundaries between Ethiopia and Eritrea.

Both great powers made a secret arrangement to place the Kunama into Eritrean territory. Apparently it was meant to set meeting point of three States: Ethiopia, Eritrea and Anglo Egyptian Sudan. The confusion dwelling in 1902 treaty is hard to cure. It was the source of most of the Ethio-Eritrean boundary conflict. First, it did not actually set borderlands that regarded as Kunama territories, and the other was confusing nomenclature of River Maiteb. The 1902 Treaty has two provisions that basically meant to annex Kunama territories to Italian colony of Eritrea. The 1902 Treaty declares:

Commencing from the junction of the Kbur Um Hagar with the Setit, the new frontier follows this river to its junction with the *Maieteb*, following the latter's course so as to leave Mount Ala Tacura to Erythrea, and joins the Mareb at its junction with the Mai Ambessa.

The line from the junction of the Setit and *Maieteb* to the junction of the Mareb and Mai Ambessa shall be delimited by Italian and Ethiopian Delegates, so that the *Cunama tribe belong to Erythrea*.⁸¹ (Emphasis added).

As shown in Map 2 that was submitted to the EEBC by the parties, after few miles from *Kbur Um Hagar* through courses *Setit* river there is a river that flows to the northwards known as *Maieteb*. As the 1902 Treaty makes a juncture of *Sitit* River and *Maieteb* then proceeds to the confluence of *Mai Ambessa* to the northeast, and then follow river courses of *Mereb* in accordance with 1900 treaty. Ethiopia claims that paragraph I of the 1902 treaty mentions about the junction of the *Maiteb* that flows up ward in western region and the boundary line follows *Maiteb* and at the end of *Maiteb* the boundary goes by straight line to *Mai Ambessa* which for sure puts Badme on Ethiopian side. To the worse, an old map shows a stream known as *Maiten* or in some cases spelled as "*Meeteb*" long away from the boundary line that Ethiopia claims.⁸² In the Map, *Maieteb* can be spotted at least in three locations. Each party takes a location that supposedly affords more

⁸¹ Art. I of 1902 Treaty Between Ethiopia, United Kingdom and Italy for the Delimitation of the Frontiers between Ethiopia and Eritrea and The Sudan. 191 C.T.S. 180 XCV B.S.S.P. 469 (Eng. It)

⁸² At the time of the treaty most of the claimed territories were vacant and naming supposedly not settled or it may also be translation problem or a mere ignorance or may also deliberate action of colonial Italy with the motives of further expansion.

territory. While Ethiopia chose the first *Maieteb* not far from Sudanese border, Eritrea opted *Maieten* in the very southeast in the central section, which locates *Badme* to Eritrea. No one claimed *Meeteb* that was in the middle.

The other ambiguity lies on the question of leaving *Kunama* (some times written as *Cunama*) to the Eritrean side. As pointed out above, Kunama continuously relinquished their territories and had been moving to unfavorable desert regions. Therefore, delineation of clear territories of Kunama land is hared unless through on spot study is conducted. Cognizant of this problem, contracting parties pledged to determine territories of *Kunama* on the basis site visit but no further action was taken. Thus, it is possible to surmise that delimitation work of 1902 Treaty was not complete. Moreover, *Kunama*'s were never been evacuated, as it was required in the treaty.⁸³ Now we have *Kunama*'s on Ethiopian side of the border, and also on the Eritrean *Kunama*. To sum up, unless Ethiopia and Eritrea renegotiate with a view to clearly delineate an exact line of separation in accordance with facts on the ground and accepted practice of local people, no acceptable boundary line may be drawn.

5.5.3. 1908 Treaty

The 1908 Treaty delineates the Eastern regions. It starts from the boundary set by the 1900 treaty and goes to eastwards up to the territory of Djibouti.

From the most easterly point of the frontier established between the colony of Eritrea and the Tigre by the convention of 10th July 1900 the boundary proceeds in a south easterly direction, parallel to and at a distance of 60 kilometers from the coast, until it joint the frontier of the French possessions of Somalia.

The two governments undertake to fix the above-mentioned frontier-line on the spot by common accord and as soon as possible, adapting it to the nature and variation of the ground.

⁸³ *Id.* at 191.

The two governments undertake to establish by common accord and as soon as possible the respective dependency of the limitrophe tribes on the frontiers on the basis of their traditional and usual residence.⁸⁴

The first paragraph of the 1908 Treaty sets out the Eastern boundary. It starts from the eastern end of 1900 treaty line. It goes then to the southeasterly direction within the 60 kilometers gap until the line reaches to the French Somali (now Djibouti). As usual no rationale was apparent for deciding the boundary to be with 60 Kms limit. This plausibly arises a speculation that Italy sought to make Ethiopia stay away from sea route. The two contracting parties agreed to make the actual boundary on the ground but no action was taken so far. The 1908 Treaty purports to give room for consideration of geographic factors like establishing common accord regarding borderland tribe (limitrophe tribe) in setting frontier that aligns with their tradition and usual residence.

5.6. Ethio-Eritean Boundary (1935 – 1991)

5.6.1. Annexation of Ethiopia to Italian East Africa Colonies

In the Wake of WWII, in 1935, fascist Italy invaded Ethiopia disregarding all the prior treaties including the October 1896 Peace Treaty, and boundary treaties of 1900, 1902, and 1908 that were concluded with a view to create friendship and peace by setting defined boundary lines.⁸⁵ Italy's invasion was also contrary to the international law as embodied in the Convenient of League of Nations in which both Ethiopia and Italy were signatories.⁸⁶ The Italian invasion of Ethiopia and the invasion of Manchuria by Japan demonstrated the failure of League of Nations. Italy deployed all its available resources including modern fighter jet on the people largely untrained and armed with traditional tool like spear and some old guns that were acquired from Italy. Italy has used prohibited poisonous gas to disperse courageous Ethiopian fighters.

⁸⁴ 1908 Treaty between Ethiopia, and Italy for the Delimitation of the Eastern Frontiers between Ethiopia and Eritrea.

⁸⁵ TOYIN FALOLA AND ADEBAYO O.OYEBADE, HOT SPOT SUB SAHARAN AFRICA 138 (2010).

The then Ethiopian king, Emperor Haile Selassie fled Europe through Djibouti with a view to advocate Italy's invasion of as a member of League of Nations contrary to the provisions of the Covenant of League of Nations.⁸⁷ The League, however, failed to enforce Art. 11 of the Covenant of League of Nations that required collective action against invasion on Member States.⁸⁸ Emperor Haile Selassie stayed in Great Britain while patriotic Ethiopians guerrilla fighters were courageously fighting the invaders. After Italy occupied Addis Ababa, there was no widespread direct confrontation, but patriotic guerrilla movement that was spread all over the country did not give time to peacefully operate all over the country.⁸⁹

However, as there was no direct confrontation with the invaders, the colonial power was able to incorporate Ethiopia into the Italian East Africa Colonies. Within five years of occupation of Ethiopia, Italy effectively altered Ethio-Eritrean boundary lines thereby mingling both nations again under a single political authority - Italy. Italy redrew a new colonial map that annexed a large portion of territory from Ethiopia to Eritrea. This map has also influenced EEBC to incline to the Eritrean side of argument. Richard Cornwell sums:

It appears that the Italian colonial map issued in 1934, may have exaggerated the extent of Eritrean territory with a view to providing Mussolini with the excuse for an assault on Ethiopia. It has therefore been rejected by some advocates of Ethiopia's case, who also point out the difficulty of using the imprecise treaties signed at the turn of the century.⁹⁰

⁸⁶ See Art. 10 The Covenant of League of Nations

⁸⁷ Francesco Marino, *Military Operations in the Italian East Africa 1935 – 1941: Conquest & Defeat*, (MTS Thesis Unpublished Marine Corps University1 (2009)

⁸⁸ Art. 11 of the Covenant of League of Nations states, "Any war or threat of war [...] affecting any of members of League or note, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations [...]"

⁸⁹ Any attempt by Italy to divide Ethiopians, as they succeeded in Eritrea did not work. For instance, Italians dropped leaflets promising to hire Ethiopian fighters to earn regular salary as Eritreans who fight on behalf of Italy did not get acceptance. Even victims of Minilk fighters, for instance, the people of Southern Ethiopia did not support Italian invaders. I cannot forget what my own father summed stating, "Minilik fighter were cruel to the people of Wolayta, and Italians were also no good."

⁹⁰ Richard Cornwell *Ethiopia and Eritrea: Fratricidal Conflict in the Horn*, 7:5 AFR. SEC. REV. 4, 1 -7 (1998).

The Fascist Italian occupation has not only rendered colonial treaties and boundaries they supposed to create null and void, but also abolished international and administrative boundaries of Ethiopia. Large territories of current Tigray State of Ethiopia and the northern portion of territories of Afar Regional State were annexed to Eritrea. Internal administrative boundaries of Ethiopia were also redrawn into four regions. The present territories of Southern Ethiopia, Gambella and Oromia regions were lumped together and captioned as “Gala –Sidamo”. The Harer Region, Shoa, and Amhara were other regional states that were designed by Italian colonial power. Thus, during the short-lived five years of Italian occupation, there was no question of international boundary between Ethiopia and Italy.

After occupying all the Ethiopian territories, during WWII, Italy proceeded to annex British Somaliland, which brought WWII to the Horn of Africa by initiating Great Britain to take action against fascist Italy. With assistance of Great Britain, Emperor Haile Selassie landed in Sudan and successfully coordinated the ongoing patriotic movement. Great Britain aligned with the already battling Ethiopian guerrilla forces under the leadership of Emperor Haile Selassie. Haile Selassie seized the opportunity to liberate Ethiopia by effectively leading patriotic forces with British fighter jets dropping bombs on the Italians who surrendered shortly in the northern Eritrea. Emperor Haile Selassie also attempted to coordinate Eritreans who had been fighting on behalf of Italy by dropping leaflets and sending messages to align with Ethiopian and British forces to turn their arms to the colonial power and stand on behalf of their Ethiopian brothers and liberate Ethiopia. In April 1941 Eritrea was liberated and within a month, in May 1941 the whole Ethiopia got freedom.⁹¹

⁹¹ Negash & Tronvoll *supra* note 1 at 8.

5.6.2. *British Trusteeship and Eritrea's Federation to Ethiopia*

While Emperor Haile Selassie I was back to power and took administration of Ethiopia, British Military Administration (BMA) continued occupation of Eritrea as caretaking government for 10 years. Haile Selassie's repeated attempt to reintegrate Eritrea with Ethiopia was not accepted.⁹² After defeating Italian colonizers, Great Britain's cooperative spirit was changed in a way harming Ethiopia's interest for regaining Eritrea and territorial integrity. This can be justified by the initiation and support that BMA lent to anti unity movements in Eritrea. For instance, BMA manifestly challenged "*Mahber Fikiri Hager*", which was pro-unionist party by organizing rival organs that oppose unification agenda of Unionist Party (hereinafter UP).⁹³ For many Ethiopians and pro-unionist Tigrinya speaking Eritreans BMA's position was hard to accept.

Great Britain, however, considered Eritrea⁹⁴ as an enemy territory and stayed there until the fate of Eritrea was legally determined by the Allied powers. The changing nature of the wind of colonization, and the emerging international commitment that prohibits occupation has dictated BMA not to legally claim occupation of Eritrea as an enemy territory. Since League of Nations, legality the policy of annexation of enemy territory has been changed. The only legal possibility to occupy enemy territory is to hold it until national actors are able to take over power. Thus, the only legal possibility to hold an enemy territory was in the form of trusteeship.

During the period of British trusteeship, there was no boundary change, nether boundary issue. The colonial boundary was elusive; it was not only fully delimited, but it was not demarcated. Therefore, borderland resident did not know the existence of boundary line. The

⁹² On his first official visit to Eritrea in October 1952 Emperor Haile Selassie I disclosed his government's relentless effort to reintegrate Eritrea with Ethiopia even before the end of WWII. The Emperor disclosed how he helped Eritrean brothers to get land in Ethiopia and establish their home and educate their children both at home and abroad. See Negash *supra* note 46 at 78.

⁹³ For instance, "[...]British were deliberately poking the fire of cultural and political diversity in order to counterbalance the dominant position of the UP. The BMA resented the presence of the UP." *Id.* 39.

supposed boundary line was simply remained on the paper, not known to the local people – the local people were not aware of what Italy was doing and never cared about boundary line, as border was not walled or changed social interaction. Put simply, to the local people there was no boundary issue, as there was no change on the ground. There was no pillar, beacon, or boundary wall. To ordinary people political separation was nothing, as it did not restrain socio-economic interaction among people. There were Ethiopian monasteries in the main land of Eritrea that Ethiopian people travelled without noticing emerging boundary. Debre Bazen and Debre Maryam monasteries are live memoires proving the true affinity of Eritreans and Ethiopians.⁹⁵ Thus, in terms of political administration for the past 50 years the supposed boundary separated Eritreans from their Ethiopian brothers, but social relationship was not absolutely bared: Economic transactions, intermarriage, religious services, market transactions continued.

During British Military Administration (BMA), in Eritrea socio-political situation was not settled. There were numerous conflicting moves and competing interests. The diplomatic wrangling between Ethiopian government and British administration, involvement of interest of Allied Forces, direct and indirect interference of Italy to regain and perpetuate its influence in Eritrea⁹⁶, the battle to reunion Eritrea with Ethiopia (especially by the members of UP), or divide

⁹⁴ According to Tekeste Negash, “[...] the BMA’s treatment of Eritrea and its subjects as belonging to Italy had complicated relations between the UP and the BMA.” *Id.*

⁹⁵ See Pankhurst *supra* note 6 at 38. This can be justified by the huge number of Eritreans living in Ethiopia after the end of Italian colonial administration. In 1944 about 100,000 Eritreans were living in Ethiopia considering themselves as Eritreans. See Negash *supra* note 46 at 55. This is not surprising as an Eritrean (Lorenzo Teazaz) was the most important advocate for Ethiopia before League of Nations together with Empower Haile Selassie. Later after independence of Ethiopia Lorenzo Teazaz served as Minister of Foreign Affairs of Ethiopia. Moreover, about 1500 Eritreans battled Italian colonizers together with their Ethiopian brothers. *Id.* at 50) Furthermore, the two Eritrean heroes Abraha Deboch and Mogos Asgedom attempted to assassinate Rodolfo Graziani in Addis Ababa while Graziani planned to celebrate birth of an Italian royal baby: the prince of Naples. See Aregawi Berhe, *Revisiting Resistance in Italian –Occupied Ethiopia: The Patriots Movement (1936 – 1941) and the redefinition of Post War Ethiopia* in JON ABBINK et al (eds.) RETHINKG RESISTANCE REVOLT AND VIOLENCE IN AFRICAN HISTORY 104(2003).

⁹⁶ With a view to disrupt UP’s activism to reintegrate Eritrea with Ethiopia, Italy distributed funds to anyone with exchange of UP’s party cards. See *Id.* Italy also attempted to persuade Allied Force to put Eritrea under Italian trusteeship. (*Id.* at 50). Moreover, the Italian Community in Eritrea (RIE and CAS) formed pro Italian party by

Eritrea between Ethiopia and Anglo Egyptian Sudan (British later move), or the move for creation of independent Eritrea. Until these issues fairly decided, boundary question was not important.

Professor Tekeste Negash remarks, “[...] the BMA officers did not believe that Eritrea was culturally homogenous and already had vague notions as to how to dispose of the colony at the opportune moment.”⁹⁷ As a result, the British Military Administration favored Eritrea’s separation rather than union with Ethiopia.⁹⁸ This was a real challenge to the Unionist Party (*Mahber Fikri Hager*) that aggressively worked for unconditional union with Ethiopia. With a view to tackle the insistent move of UP to reunion with Ethiopia, BMA, exerted variety of initiatives that aimed at counteracting UP. First BMA initiated formation of competing parties, which demanded independence of Eritrea. The Eritrean Party for Eritrea, and Muslim League were formed to challenge unionist agenda of UP. When this strategy failed because of UP’s continued strength and support even from prominent personalities from Muslim community,⁹⁹ BMA attempted to split Eritrea into Ethiopia and Sudan.

Residents of Eritrean western and lowland regions were predominately Muslims and nomads. These were areas where expansionist or religion-backed wars were repeatedly fought. Due to logistic problems, even Ethiopian fighters raided their cattle,¹⁰⁰ which prompted lowlanders to support Italian occupation. Moreover, Ethiopian and Eritrean highlanders repeatedly invaded lowlands in search for food, cattle, crops, and slaves.¹⁰¹ On top this external invaders like

transforming former Italian colonial soldiers Association into political party whose explicit program was to put Eritrean under Italian trusteeship. In addition to these manipulations, Italy continued distribution of funds. (*Id.* at 51)

⁹⁷ *Id.* at 39.

⁹⁸ *Id.* at 40

⁹⁹ For instance, Muslim League’s prominent figure, Said Baker al Morgani defected to UP adversely affected ML and BMA’s counter action plan. See Negash *supra* note 46 at 53.

¹⁰⁰ Negash & Tronvoll *supra* note 1 at 4. For instance, King Ezana’s brothers Saizana and Adefan invaded Beja’s who rebelled King Ezana of Axum and raided 3112 heads of cattle, 6224 sheep. See Pankhurst *supra* note 26 at 26.

¹⁰¹ *Id.* at 5.

Egyptians, Turks, and jihadist movement had spread their own culture and ideology, which has distanced lowlanders from their highland brothers. Thus, residents of lowland regions had no good relationship even with their Eritrean kinsmen who were members of Ethiopian Orthodox Christians and have huge resemblance to Ethiopians. Italian colonial power seized this divisive opportunity and gave more freedom to Muslims and protected their resources and their interest. This has nurtured sense of difference, but actually, Muslims and residents of lowland territories were not different from their hinterland brothers.

UP's strong and persistent battle for union with Ethiopia,¹⁰² had forced BMA partially to accept the objectives of UP by integrating some of the strategically important vicinities with Ethiopia and to annex western lowland regions with Anglo Egyptian Sudan.¹⁰³ Great Britain's supposed split of Eritrea was largely based on cultural and religious affinity with neighboring people.¹⁰⁴

In February 1947 Italy concluded numerous treaties called "Treaty of peace" with the winners of WWII and associated nations. Ethiopia was also party among associates of allied Forces. The Treaty of Peace, specifically, delineated European boundaries of Italy with the Allied Forces. With regard to Italian Africa colonies, Italy agreed to abandon all rights it had in Africa. Thus, Italian rights and privileges created in Africa were absolutely voided. Art. 23 of the Peace Treaty states, "Italy renounces all right and title to the Italian territorial possessions in Africa, i.e.

¹⁰² Unionist Party (UP) was very organized and vigorously worked for political union with Ethiopia. It celebrated Emperor Haile Selassie I's birth day and celebrated Ethiopian independence date and prayed in the church for unity of Ethiopia and Eritrea again. UP had uncompromising Youth League. It has also Women's League. UP repeatedly conducted demonstrations against BMA for its direct or indirect initiation against Eritrea's union with Ethiopia. The demonstration and actions taken by Sudanese Defense Forces (SDF) that were acting for BMA resulted loss of life. One SDF soldier and 47 Eritreans were dead. Angry mob destroyed properties and robbed stores of Italian Asmara residents. See Negash *supra* note 46 at 42.

¹⁰³ In 1943 Great Britain devised this plan, but waited until the end of WWI, as Allied Forces have to seal it. *Id.* at 41.

¹⁰⁴ This position later accepted by the Allied Forces and even by the General Assembly of United Nations. The idea of splitting Eritrea was failed at the last minutes of U.N. deliberation Details are mentioned in 5.6.3.

Libya, Eritrea and Italian Somaliland.” (Art. 23(1)). Thus, Italy has legally abandoned its rights and privileges that were created in consecutive boundaries treaties with Ethiopia.

Though Italy legally renounced any right in Eritrea, its laws, Institutions, and Italian community in Eritrea continued irritating the society of *Mahber Fikiri Hager*. Frequent strike and violent demonstration that was exerted by the activities demanding immediate and unconditional union with Ethiopia dictated Allied Forces decided to dispose Eritrea from care taking administration.¹⁰⁵ The allied forces set up an Enquiry Commission to assess the interest of Eritrean people either to unite with Ethiopia or get independence. Majority of the Tigrinya speaking highlanders chose for unconditional union with Ethiopia while lowlanders opted for Eritrea’s independence.¹⁰⁶ But the Enquiry Commission could not decide as interest of Eritreans and Allied Forces was divided. The division of interest of Eritreans was largely based on religious grounds, preconceived Italian divisive politics, and the interest of BMA, which did not favor Eritrea’s reunion with Ethiopia. The Muslim population in western regions and lowlanders feared suppression by Christian highlanders in collaboration with Ethiopia, in which Orthodox Christianity was government religion and the Ethiopian Orthodox Church was granted one third of land in Ethiopia. When the Enquiry Commission of the Allied Forces failed to reach at a binding decision, the fate of Eritrea was passed onto United Nations General Assembly in 1948.¹⁰⁷

¹⁰⁵ Up was tired of indirect control of Italy even after its political administration was removed by the British Forces. During BMA, Eritrea was governed by the Italian law, Italian bureaucracy, and Italian system. According to Tekeste Negash, “[...] UP saw little difference between Italian colonial administration and that BMA.” This triggered frequent strike and demonstration. See Negash *supra* note 104.

5.6.3. Reintegration of Eritrea with Ethiopia

5.6.3.1. U.N. mandated Federation

In 1949, in accordance with the recommendation of allied forces, the United Nations General Assembly deliberated on ways of disposing Eritrea from trusteeship. The BMA interest to split Eritrea into Ethiopia and Anglo Egyptian Sudan again dominated the deliberation.¹⁰⁸ Not only Great Britain, but also Italy and Ethiopia have voted for annexation of highland Eritrea and Danakil regions to Ethiopia and western lowland regions to Sudan. This plan thought to solve Ethiopia's pressing quest for sea access, as it allocates both the port of Massawa and Assab to Ethiopia. However, annexation of Western Regions to Sudan could not win a required vote. As a result the whole proposal was failed. At this time Italy changed its stance and vigorously "[...] campaigned for complete and immediate independence of Eritrea."¹⁰⁹ The General Assembly was about to postpone disposition of Eritrea for the next General Assembly, but due to Great Britain and Ethiopia's opposition, the General Assembly set up an Enquiry Commission to assess facts on the ground with a view to reconsider taking the interest of people of Eritrea.

The Enquiry Commission conducted a thorough scrutiny to devise a realistic proposal that would best satisfy interest of the people of Eritrea. The Commission, however, could not reach consensus in its finding. It came up with three different proposals: for complete political union with Ethiopia, federation of two countries, and independence after 10 more years of trusteeship

¹⁰⁶ *Id.* at 9

¹⁰⁷ *Id.*

¹⁰⁸ This was in accordance with a plan known as *Bevin-Sforza deal* (A plan to administer Italian colonies in Africa). JOHN H. SPENCER, *ETHIOPIA AT BAY: A PERSONAL ACCOUNT OF THE HAILE SELASSIE YEARS*, 211(2006). See also Negash *supra* note 46 at 45

¹⁰⁹ *Id.* at 52.

under United Nations.¹¹⁰ Three of the five member of the Enquiry Commission proposed Eritrea's integration with Ethiopia (one for unconditional political union and two members for federation with Ethiopia) while other members (the minority) recommended for independence of Eritrea after 10 more years of trusteeship.¹¹¹

United Nations General Assembly ignored the minority view, accepting the majority suggestion to integrate Eritrea with Ethiopia in federation.¹¹² In other words, the General Assembly federated Eritrea with Ethiopia under the sovereignty of Ethiopian emperor as an autonomous constituent unit having its own local government.¹¹³ The decision to federate Eritrea with Ethiopia was formalized by the resolution of United Nations General Assembly (Resolution 390 (V)A of 1950). A Memorandum of United States Department of States indicates the significance of federation and the role played by United States as follows:

The resolution recognizes that the disposal of Eritrea should be based on its close political and economic association with Ethiopia and assures the inhabitants of Eritrea of the fullest respect and safeguards for their institution, traditions, religions and languages, as well as the widest possible measures of self-government. At the same time the resolution respects the constitutions, institutions, traditions and the international status and identity of the Empire of Ethiopia.¹¹⁴

On the basis of current and historic affinity between the people of Ethiopia and Eritrea, United States believed that federating Eritrea with Ethiopia would best satisfy the interest of the

¹¹⁰ See United States, Principal aspects of Relations of the United States with Ethiopia: The question of Providing United States Military Equipment to Ethiopia: Interest of the United States in the Former Italian Colony of Eritrea, 5 THE NEAR EAST AND AFRICA 1251, 1982 1237 1982 (1951).

¹¹¹ *Id.* See also Bereket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian – Eritrean Experience* 29 Colum. Hum. Rts. L. Rev. 106, 91 – 142 (1997 – 1998).

¹¹² Negash and Tronvoll *supra* note 1 at 9. The United Nations Commission was set from five member States. Norway proposed for political union of Eritrea with Ethiopia, South Africa and Burma suggested for federation of Eritrea with Ethiopia, but other two members (Guatemala and Pakistan) suggested for continued trusteeship for 10 years by U.N. and then independence of Eritrea. See United States, Principal aspects of Relations of the United States with Ethiopia: The question of Providing United States Military Equipment to Ethiopia: Interest of the United States in the Former Italian Colony of Eritrea, 5 THE NEAR EAST AND AFRICA 1251, 1982 1237 1982 (1951).

¹¹³ G.A. Res. 390(v) U.N. GAOR 5th Sess. Supp. No. 20 at 20 U.N. Doc A. 1775 (1950). see also Negash and Tronvoll *supra* note 1 at 9

¹¹⁴ Memorandum of Depart of States, *Id* at 1252.

people of Ethiopia and Eritrea and enhance welfare of the two nations.¹¹⁵ Accordingly, after facts on the ground were assessed by the United Nations mandated Commission, United States sponsored a resolution for federation of Eritrea with Ethiopia.

In September 15, 1952 Eritrea was formally federated to Ethiopia having its own autonomous legislature, executive and judiciary.¹¹⁶ Eritrea at the time had two dominant political parties. The Union Party that was largely represented by highland residents (*Kabessa* region) that speak, Tigrinya and largely members of Ethiopian Orthodox Church.¹¹⁷ The Unionist Party, as the name suggests, was pro-Ethiopian and had advocated for unconditional and complete political union with Ethiopia.¹¹⁸ The Muslim League represented lowlanders, on the contrary, repeatedly endeavored to distance Eritrea from Ethiopia or integrate with eastern Sudan.¹¹⁹

A month after federation of Eritrea with Ethiopia, Emperor Haile Selassie visited Eritrea thereby formally abolishing colonial boundary. Emperor Haile Selassie made an historic speech on the supposed colonial boundary that had separated Ethiopia and Eritrea. After thanking Almighty God for reuniting Ethiopia and Eritrea the King proclaimed: “...*The Mareb no longer as from today has the role of separating brothers.*”¹²⁰(Emphasis added).

After Eritrea’s reintegration with Ethiopia by the UN mandated federation, Sheik Ali Redai, a member of Muslim League (ML), was appointed President of Constitutional Assembly

¹¹⁵ *Id*

¹¹⁶ G.A. Res. 390(v) U.N. GAOR 5th Sess. Supp. No. 20 at 20 U.N. Doc A. 1775 (1950).

¹¹⁷ This does not, however, mean that all the UP members were Christians and highlanders. There were some Muslims and people from lowlands.

¹¹⁸ Unionist Party (UP) was association of people who supported integration of Eritrea with Ethiopia. The Party was launched on the very date of Ethiopian independence. After Ethiopian flag was raised in Addis Ababa, on May 5, 1941 resident of Asmara expressed their joy and support in demonstration that was held in Asmara. On the same date UP was launched under the name *Mahber Fikiri Hager* (The Association of Nation Lovers).

¹¹⁹ Though past suppression and plunder by Ethiopian and Eritrean highlanders much contributed for the assertions of Muslim League, difference in religion and to some extent cultural disparity. Cognizant of sentiments of Muslim Italians quickly occupied lowland and coastal regions before proceeding to the highlands. Muslim Eritreans had enjoyed better privilege during Italian occupation and professed their religion freely. Tekeste Negash calls this as, “Italian policy of wooing the loyalty of Moslem Communities had more success. Italian colonialism protected and encouraged the revival and consolidation of Islam.” Negash *supra* note 46 at 18.

whereas, Mr. Tedla Bairu, the head of Unionist Party, was appointed as chief executive officer of Eritrea. Political wrangling, suspicion, fear of complete reunion with Ethiopia was continued among the parties.¹²¹ Lack of good governance, mismanagement, favoritism, budgetary deficiency to meet the needs of “overcrowded bureaucracy”, and alleged internal and external interference “widened” the gap between Unionist party and Muslim League.¹²² In the words of Professor Tekeste Negash, “ For the majority of the people federation marked a deterioration of their economic conditions rather than an improvement.”¹²³ Members of Muslim League argued that federal institutions in Eritrea were filled only with Ethiopians.¹²⁴ Moreover, the Muslim League repeatedly blamed the executive chief for plotting with Ethiopia to abolish the federation and make Eritrea an Ethiopian province.¹²⁵

After nine months of the formation of the Federation, leaders of ML in the Western Region expressed their stand stating that in the event of union with Ethiopia to campaign for formation of a new state including “Western Province of Eritrea and Eastern Province of Sudan.”¹²⁶ Due to

¹²⁰ New Times and Ethiopia News (NTEN), No. 859, Nov. 01, 1952 quoted in Negash *supra* note 46 at 78.

¹²¹ While the federation was alive the leader of ML, Ibrahim Sultan wrote to Pakistani Political Organization that “ Moslems in Eritrea would struggle to establish another Pakistan.” NTEN no. 854 Sep. 29 1952, as cited in Federal experience p. 80. Mr. Ibrahim who was the second top official in the federation did not trust the viability and actual working of the federation rather than challenging the legality and validity of the federation.

¹²² For instances, Woldeab Wolde Mariam, the founding member of the Association of Eritrean Workers alleged that the leader of Unionist party attempted to murder him for sole reason that a member of Constitutional Assembly, Abba Habte-Mariam opposed the move of federal government to register foreigners in Eritrea contending that was the power of Eritrean government. Moreover, life and economy deteriorated after federation as Ethiopian government could not fill all economic demands of Eritrea. See. Negash *supra* note 46 at 81.

¹²³ It is true that to fill gaps of “generous” subsidies of colonial power the new Eritrean government allegedly increase taxes and custom duties raised. Within one year of its formation in 1953 the federation faced with serious problems and budgetary deficient, which created “economic recession” with increased tax burden on the population. See *Id* at 82.

¹²⁴ The Muslim League and some Christians required to federation should be equally staffed by Ethiopians and Eritreans irrespective of the proportion of Eritrean population to the Ethiopian people. This stand also put the federation in doubt.

¹²⁵ Strongly worded comment of the speaker of the Assembly discerns this fact. Sheik Ali Redai, remarked: “ a hyena had been put with a goat and the result was obvious.” See. Negash *supra* note 46 at 83. This stand proves the position of Muslim League that the federation was dangerous as the “hyena” would swallow the “goat” at any moment. See *Id.* at 85.

¹²⁶ There was repeated declaration and plan to form “Baja State” after amalgamation of Western Eritrea and Eastern Sudan) *Id.*

persistent opposition of ML and some Christian Eritreans either explicitly or implicitly coupled with inexperience in implantation of federalism, lack of good governance, undemocratic administration, weakness of the chief executive, prevailing authoritarianism, and domination of powerful Unionist Party together with budgetary deficiency and possibly to avoid the influence of opposition party and foreign interference, the federation virtually weakened.¹²⁷ UP from the outset had the agenda of unconditional union with their Ethiopian kinsmen that were irrationally separated by the Italian colonial power. Understanding of the meaning and consequences of federation both by the Ethiopia and Unionist party gave rise to the ignorance of the repeatedly plea of ML for observance of the United Nations Resolution and the Eritrean Constitution. Finally the Muslim League and other parties petitioned to the UN pointing violation of the federation arrangement, which further intensified the suppression of dissent in Eritrea.¹²⁸

5.6.3.2. *Abolition of Federation and Complete Merger with Ethiopia*

The actual working of Eritrean federation not only demonstrated troubled relationship among dominant political parities, the Federal Council, and the Emperor, but also it has revived sectorial gap among the Coptic Christians and Muslim Eritreans.¹²⁹ Peaceful petition by the ML to the Emperor,¹³⁰ the foreign consuls, and UN did not return any good solution. Consequently, early

¹²⁷ The prominent supporter of federation, Abraha Tessema witnessed that Eritreans did not dislike Ethiopians on racial grounds but because “they were not going to fill the economic gaps” left by the Italian and the British.” Negash *supra* note 46 at 88. Therefore, one of the compelling reason for the opposition for integration with Ethiopia was economic rationale. For example, Abraha regretted “for the demise of Italian colonial era, [...] stating that [...] “the departure of every Italian meant an average of three more unemployed Eritreans.” *Id.*

¹²⁸ *Id.* at 86.

¹²⁹ Muslim Eritreans started aligning with Arab world stationing in Cairo, Egypt. Saud Arabia started making generous contribution that enabled exiled ML activities to finance and strength bandits that had been working in Eritrea. Bandit (Shifta) Idris Awate of Bin Amer who had some fighters was motivated and encouraged to continue guerrilla warfare.

¹³⁰ See, for instance, FO371/118744. Memorandum submitted by the Moslem League to H.I.M. The Emperor of Ethiopia, Asmara, 3.1.1956 corresponding to 20 Jamad Awal, 1375, Negash *supra* note 46 at Appendix 4.

1960's exhibited wide spread demonstration, rebellion and exile.¹³¹ Numerous factors have contributed for the frustrated relationship among the political actors that ultimately caused demise of the federation. First, the very agenda of UP has lion's share for the complete political union between Ethiopia and Eritrea disregarding the Federal Act or the Eritrean Constitution. Complete integration with Ethiopia was the preconceived political agenda of UP that was never abandoned even after UN Resolution. Until that goal was achieved, UP considered the rest of the work including federation as a prelude to the ultimate integration. In the words of Professor Tekeste Negash, "[...] the majority of the Unionist activists saw federation as a temporary hindrance to complete union with the motherland or as a plot by Ethiopian enemies to weaken the country."¹³² The programs and goals of UP reflected the wishes of the people of Eritrean highland regions, which were largely Christians who believed that Italy had separated them from their Ethiopian kinsmen.¹³³ Thus, any means that would take them to the complete integration with Ethiopia assumed a vehicle taking them to the desired goal.

Second, inexperience and unfamiliarity with the working, principles and effects of federation both by Ethiopia and the Eritrean government led to the failure of the federal system.¹³⁴ Both "the Emperor and his representative professed to see little difference between federation and

¹³¹ In practice, cultural and sectorial influence made the actual working of Eritrean federation hard to implement. In the words of Professor Tekeste Negash, "[...] the Eritrean Christians found it very difficult to translate the federal system that was embodied in the Eritrean constitution into a workable political framework." *Id.* at 125. Though there was difference in religion, UP had Muslim members but during actual working of the federation Muslims felt that UP and its followers were the actual beneficiaries. *Id.*

¹³² *Id.* at 91.

¹³³ Eritrean political actors pose a biased and unsubstantiated remark stating that the Ethiopia induced the UP and highland Christian Eritreans to work for the complete political integration. It may be fairly believed that the Ethiopian government might have wished for complete reunion, but UP's relentless effort for complete political reunion was not simply the work of Ethiopia. The May 5 1941 demonstration in Asmara that led into formation of *Mahber Fikiri Hager* and expression of joy of the Eritreans for the restoration of Emperor Haile Selassie to the throne (later converted into UP) was purely the independent initiative of the Eritreans. This motive may have been fueled by the spiritual activities of Coptic Churches in Eritrea. FPC while assessing the best political solution 48% of the Eritrean people, "the overwhelming majority of them Christians had expressed a desire for unconditional union." *Id.* at 71.

complete union.”¹³⁵ The two distinct systems, federation and unitary, were wrongly perceived synonymous by the Emperor and his representatives.¹³⁶ ML members repeatedly cried that the executive chief and his departments had simply respected orders of the Emperor in lieu of the Eritrean Constitution. This was not surprising as the executive chief was one of personalities who “had campaigned for speedy and complete absorption of Eritrea by Ethiopia.”¹³⁷

On top of this, lack of good governance, dictatorship of the executive chief, and lack of commitment to respect and enforce the Eritrean Constitution compelled ML leaders to look for alternative means to redress repeated failure of the Eritrean Assembly to protect the interest of Muslim Eritreans by working to maintain the federation.¹³⁸ There was a kind of subtle discrimination apparently targeting Muslims. One simple justification was the “exclusion of Muslims from vital departments.”¹³⁹ Due to authoritarianism of the executive chief and wide spread nepotism, Muslim Eritreans experienced hard time and considered as second-class citizens in their own country.

The appointment of Asfaha WoldeMikael in effect intermingled the power of chief executive and deputy representative of federal council.¹⁴⁰ After resignation of Tedla Bairu, the Assembly elected Asfaha Woldemikael who had been serving as a deputy representative of Federal

¹³⁴ Both the Ethiopia and UP had blurred understating of the meaning and actual working of federalism and unitary system. While the unionist party worked for ultimate complete integration with Ethiopia, the Ethiopian government “did not like the federal solution, but there [...] were prepared to give it a fair chance.

¹³⁵ A speech from the Throne Delivered by the Representative of H.I. M to the Eritrean Assembly, April 27, 1953, RDC/BOX 1 ACC. No. 14002/EA/ADM Eritrean Assembly Minutes No. 144, Monday 27th April 1953 in Answar Seid Suleiman, *Imagining the Nation: Assessing the Role and Function of the Eritrean Assembly in the Eritrean – Ethiopian Federation (1952 – 1962)* 77 (2013) (Masters Thesis Leiden University, Netherlands Unpublished). See also Negash *supra* note 46 at 90.

¹³⁶ *Id.* at 93. See also Answar Seid Suleiman, *Imagining the Nation: Assessing the Role and Function of the Eritrean Assembly in the Eritrean – Ethiopian Federation (1952 – 1962)* 77 (2013) (Masters Thesis Leiden University, Netherlands Unpublished).

¹³⁷ Negash *supra* note 46 at 90.

¹³⁸ Abraha Tessema, a political dissent views Tedila Bairu, “[...] as merely the stooge of the Emperor.” *Id.* at 87.

¹³⁹ *Id.* at 125. There was widespread discrimination among Muslims and Christians. Muslims for instance, were denied with business license. (*Id.*) The office of interior was filled only with Christians.

¹⁴⁰ In some cases Emperor’s representatives attempt to indulge in nomination of local election. Suleiman *supra* note 136 at 87.

council. In 1957 by the approval of the representative federal agent, Andergachew Messai, Asfaha formally started working in both offices contrary to the Eritrean Constitution.¹⁴¹ This indicates prevalence of conflict of interest between the interest of monarchy and the interest of Eritrean government, which weakened the federation. Moreover, during Asfaha's election the Emperor's Consul General stressed that it was not possible to draw a hard line between "Federalist" and "Unionist".¹⁴² To the surprise of ML, Asfaha Woldemikael, at the beginning of his term proposed for abolition of Eritrean flag, substitution of Eritrean Seal with that of the Emperor and making Amharic as the official language. The bill amending the Eritrean Constitution was adopted in 1958.¹⁴³

The sectarian attitude of Muslim League had some impact in the deterioration and ultimate demise of the federation. While UP generally worked and assumed as unionist ML invoked federation because they were "always on the brink of breaking away from Eritrea and Ethiopia."¹⁴⁴ In 1953 where maladministration, nepotism and authoritarianism at high time, ML considered all non-Muslim Eritreans favoring decisions and actions of the executive chief and the federal council. The "fight" between ML and UP which was primarily based on ideology rather than national interest, had its share for the ultimate failure of the federation.

Finally, after commencement of the session of second Assembly, political condition for efficacy of the federation was steadily changed, as barriers for complete political integration were weakened. The number of UP was increased in the Assembly, a unionist president and executive chief easily silenced ML and other federalist elements. Representatives of ML and supporters of federation appealed to the UN, as the repeated petition to the Ethiopian Emperor did not change

¹⁴¹ FO371/131292.BCA to BEAA, Sep. 26, 1958 cited in Negash *supra* note 46 at. 133. In last weeks of 1958 the Eritrean Constitution virtually ceased to work. *Id.*

¹⁴² FO371/113520 BCA to BEAA, 11.8.55 cited in Federal at 112.

¹⁴³ Negash *supra* note 46 at 132.

facts on the ground.¹⁴⁵ In the eve of complete disregard of the Eritrean Constitution, members of ML who were in exile, supported by Egypt set up an armed opposition forming Eritrean Liberation Front (ELF) in Cairo, Egypt.¹⁴⁶

In May 1960 the Eritrean Assembly formally started dismantling the Constitution by changing federalist titles in a way revealing the State of Eritrea was formally marching toward one of the provinces of Ethiopia. Accordingly the title of chief executive was changed to chief administer, whereas the title of the Government was renamed as administration.¹⁴⁷ The UP dominated Assembly easily approved constitutional change.¹⁴⁸ Disregarding several student, opposition, civilian protests and demonstration against the move to abolish the Eritrean federation, the Eritrean Assembly unanimously voted to dissolve the federation thereby making Eritrea 14th administrative province of Ethiopia.¹⁴⁹

5.6.4. *Downfall of the Monarchy and Military Regimes: Independence of Eritrea*

In early 1960s the ongoing rebellion against the government in Eritrea was intensified under the leadership and coordination of ELF. It was further fueled in early 1970s, as a result of political turmoil due to Students' Movement against the monarchical regime. The ultimate removal of the monarchy by the military that usurped fruits of the Student Movement,¹⁵⁰ and the resultant political and social destabilization afforded a fertile ground to the liberation movement in Eritrea.

¹⁴⁴ *Id.* at 91

¹⁴⁵ One of the petitioners, Omar Kadi, after returning home from United States was charged and arrested. This intensified widespread demonstration and protest.

¹⁴⁶ See Hussien M. Adam, *Eritrea, Somalia, Somaliland and the Horn of Africa*, in AMARE TEKLE (ed.), ERITREA AND ETHIOPIA, FROM CONFLICT TO COOPERATION 145, 139 - 168(1994)

¹⁴⁷ Negash *supra* note 46 at 135.

¹⁴⁸ 43 deputies voted for the constitutional change with labsetention and no opposition. *Id.*

¹⁴⁹ As prominent figure of the ML either exiled or jailed, on November 15, 1962 the UP dominated Assembly abolished the federation in procedural correct way. See *Id.* at 138.

¹⁵⁰ See Merera Gudina, *Party Politics, political polarization and the Future of Ethiopian Democracy*, A paper presented at the International Conference on African Dev't , Center for African Dev't Pol'y Res. WMU, 8/2007. http://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1119&context=africancenter_icad_archive See Selassie *supra* note 113 at 106.

The 1974 Ethiopian Revolution had generated wide opposition movements and stimulated formation of numerous political parties.¹⁵¹ There was rampant extra-judicial killings and expropriation of personal properties including land and private buildings.¹⁵² Activists of political parties, especially member of EPRP were hunted by the military regime and summarily executed. The military that unexpectedly removed the monarchy and took power did not tolerate dissent of any kind. In fear of summary execution under the infamous campaign of Red Terror, members opposition groups, especially activists of EPRP either exiled or took part in armed struggle against the military regime.

Political instability, sense of insecurity and fear had motivated not only secessionist movements like ELF and other domestic rebellion groups, but also inspired external forces that had been looking for best moment to disintegrate Ethiopia. Somalia invaded Ethiopia with the aspiration to create a Greater Somalia by ceding certain territories that were occupied by ethnic Somalis.

Domestic political turbulence and external invasion had further strengthened ELF, which was already well organized, by the ideological and logistic backing from Arab nations.¹⁵³ Consequently, ELF quickly swelled by the influx of people marching in all directions in fear and opposition of aggressive military actions looking for safe haven or possibly involve in fight against the military regime. As a result, the Front was able to liberate western lowland territories, and afforded shelter and training to the fleeing opposition party members, former officials, students

¹⁵¹ Student and intellectual centered political organization known as Ethiopian Peoples' Revolutionary Party (EPRP) was the most prominent one that started armed struggle in the cities and later conventional war in certain Amhara and Tigray peripheries, Ethiopian Democratic Unity (EDU) MEISION, SEDED etc. *Id.*

¹⁵² Losing all they had, property owners left with limited options. Prolonged detention with the possibility of summary execution after surrendering everything they had or armed rebellion against the government. Rebellion also paved a way to get into safe haven in exile.

¹⁵³ Apart from Egypt and Saudi Arabia that supported ELF in the heydays of ELF several neighboring States such as Somalia, Sudan and Yemen assisted ELF in its fight against Ethiopia. According to Hussien Adam, Yeman

and intellectual who risked their life. It was at this time that students and intellectuals of Tigray province joined EPLF to get military training and logistic support. As Shumet Sishagn witnesses, “The first group of TPLF fighters were trained in and launched from Eritrea. [EPLF] commanders initially played a prominent role in assuring the viability of the fledging insurgency.”¹⁵⁴

In early 1970s, due to internal conflict, ELF was split into factions from, in which a strong group known as Eritrean People’s Liberation Front (EPLF) was formed.¹⁵⁵ The friction initially arose on account of ideological grounds, as ELF was primarily dominated by the former ML activities, which were largely Muslims.¹⁵⁶ ELF did not fully trust Christian highlanders including President Isias Afworki. This caused hostility, which led to the demise of ELF in 1981. Though dominant actors of EPLF, including the Isias Afwerki were Christians; unlike ELF, EPLF was a secular liberation front, which ended Islamic inspiration of ELF. It then quickly gained ground in the northern Eritrea. After seven years of internal fighting, EPLF completely drove ELF from Eritrean territories and mobilized all its resource to fight against the military regime. TPLF’s assistance in fight against ELF was incredible. The cold war afforded a good moral and material support that tremendously empowered EPLF. The collaboration and powerful assistance of TPLF had further strengthened EPLF to liberate substantial territories of Eritrea from the Ethiopian

transported U.S.S.R arms through Sudan to Eritrea and Somalia provided passport to the rebels. See Adam *supra* note 147 at 146.

¹⁵⁴ Shumet Sishagn, Book Review (Brothers at War: Making Sense of the Eritrean – Ethiopian War by Tekeste Negash and Kjetill Tronvoll (2000)) 7:3 NOR.EAS. AFR. STU.212-214 (2000). See also Selassie *supra* note 157 at 104

¹⁵⁵ Kjetil Tronvoll, *Borders of Violence-Boundaries of Identity: Demarcating the Eritrean Nation- State*, 22:6 ISSN 1043, 1037 – 1060 (1999). See als Girma W. Senbet, *Perspectives on the Eritrean-Ethiopia Relations and Outcomes*, ETHIOMEDIA.COM (NOV. 1 2003).

¹⁵⁶ ELF initially took Islam as a tool for mobilization of resources and agenda for struggle against domination by Christian Ethiopia. Fighting on religious causes helped ELF to have aid from Iraq, Syria and other Muslim nations. This historical backing for the formation of ELF was the major cause for friction with highland Christians who later formed EPLF. See Kalewongel Minale Gadamu, *Ethiopia and Eritrea: The Quest for Peace and Normalization* 35(2007) M. Phil THESIS University of Tormso, Norway, (UNPUBLISHED).

military.¹⁵⁷ As Shumet Sihsagn succinctly puts, “ [...] EPLF won not only a potentially valuable military ally, but also unwavering supporter of Eritrean independence.”¹⁵⁸

During heydays of TPLF, ELF claimed substantial portion of northern Tigray, far beyond Badme, belonged to Eritrea and established its militia administration, but TPLF silently allowed the move with a view to get training and logistic support.¹⁵⁹ During fight between ELF and EPLF, TPLF assisted EPLF, as it was much closer to EPLF than ELF in terms of religion and blood and cultural affinity. After defeat of ELF by the joint effort of TPLF and EPLF, TPLF got ground to administer the borderland territories that were held by ELF. But later EPLF also posed boundary issue and demanded delineation, though it did not force TPLF to surrender the localities. TPLF convincingly argued that it lacked authority and appropriate documents to prove location of the true boundary line.¹⁶⁰ Both TPLF and EPLF agreed to deal with the boundary issue after liberation thereby leaving boundary issue dormant.

Despite logistic and training support afforded to TPLF, especially in the early days, and TPLF's support in fighting along EPLF when EPLF was in dire need for military help in 1983 during Red Star Campaign,¹⁶¹ later tension and confrontations reigned. Ideological difference, the issue of self-determination, differences in military tactics¹⁶², disparity in treatment of prisoners of war, *et cetra* are some of the grounds that made both parties to go in their own way. But in 1988

¹⁵⁷ EPLF trained TPLF and supplied them resources to fight the military regime of Ethiopia. See Negash and Tronvoll *supra* note 1 at 17. Though TPLF fighter assisted EPLF in critical moments when EPLF was highly weakened with military regime of Ethiopia, later disagreements arose. There were tensions and irreconcilable ideological and tactical differences.. It is also said that the marriage between EPLF and TPLF was based on necessity, not love. *Id.* at. 21.

¹⁵⁸ See Sishagn *supra* note 153. See also Jon Young, *The Tigray and Eritrean Peoples Liberations Fronts: a History of Tensions and Pragmatism* 34 J. MOD. AFRI. STU. 105, 105 – 120 (1996).

¹⁵⁹ See Gedamu *supra* note 157 at 38.

¹⁶⁰ *Id.* at 39. In early 1970s ELF occasionally cross Tigray border pursuing Ethiopian Militia men, but for the purpose of acquiring military experience and fighting common enemy, TPLF did not invoke boundary line. See Young, *supra* note 160 at 160.

¹⁶¹ Gedamu, *supra* note 157 at 38.

¹⁶² Young *supra* note 160 at 108.

when the possibility of overthrowing appearing known, TPLF and EPLF reestablished their military alliance by four days negotiation in Khartoum, Sudan.¹⁶³

Finally, as a result of famine, repression of military regime, and shortage of military supplies coupled with collapse of U.S.S.R, deteriorated the fighting capacity and determination of the military regime. On the contrary, EPLF and TPLF won abundant external and internal support, controlled substantial territories and weakened fighting ability of Dergue, which led Mengistu regime to fall. After Colonel Mengistu Haile Mariam fled Zimbabwe for safe haven, the Ethiopian army in Eritrea lost hope and fled to Sudan and the Eritrean fighters were able to walk into Asmara while TPLF marched into Addis Ababa and quickly occupied the whole Ethiopia.

At the end of May 1991 Eritrea was completely liberated and EPLF took administration thereby heralding *de facto* independence. After two years of transition, as a part of formalizing Eritrea's independence, a referendum was held that Eritreans overwhelmingly supported separation from Ethiopia. After *de jure* independence in May 24, 1993, EPLF was renamed as Peoples' Front for Democracy and Justice (PFDJ).

But TPLF remained as a governing party in Tigray Regional States of Ethiopia though Tigray constituted as a federal State of Ethiopia, and a member of the coalition of Ethiopian Peoples' Revolutionary Front (EPRDF). In early 1980s, due to apparent close collaboration between the Eritrean and Ethiopian parties most Ethiopians could not comprehend the basic distinction between TPLF and EPLF. Ideological differences and border issues between EPLF and TPLF was not publicly known and remained dormant.¹⁶⁴

¹⁶³ Gedamu *supra* note 157 at 38.

¹⁶⁴ The boundary issue that was raised during liberation movement kept dormant until 1997. It is true that both Parties had embarked on multifaceted task of maintaining peace and stability, before dealing with border issues. See Grima W. Senbet *supra* note 157. See also Gedamu *supra* note 157 at 39.

After *de facto* independence of Eritrea, cooperation between Tigreans all over Ethiopia and Eritreans, either residing in Ethiopia or in Eritrea was so great. All barriers, apart from regular checkpoints at the border, were removed that enabled free movement of goods and people. Some Eritreans or people of Eritrean origin had abused the privilege of free movement. For instance, fraudulent Eritrean traders used Ethiopian market to dump their duty free imports.¹⁶⁵ It was believed that the TPLF dominated Ethiopian government facilitated venues for Eritreans in Ethiopia to take part in the referendum, and Ethiopia was first nation to recognize Eritrea's independence even before the formal declaration of Eritrean independence.

With a view to create a smooth relationship that may ultimately lead into economic integration and political unity, the government of Ethiopia and Eritrea concluded numerous friendship agreements. Both states had agreed to cooperate in "trade and commerce, health, education, tourism, environment, finance, science, foreign affairs and defense."¹⁶⁶ Further, the two States agreed to "harmonize exchange rate policies,"¹⁶⁷ free movement of goods including re-exporting goods imported another countries.¹⁶⁸ Re-exporting Ethiopian goods to another country was prohibited. The two countries agreed to use Ethiopian currency (Birr), until Eritrea issues its own currency. The economic agreements, however, did not bear desired fruits, owing lack of institutional mechanisms to implement.

In contravention of the Friendship and Cooperation agreement, Eritrea started exporting Ethiopian coffee, which ranked Eritrea the 13th coffee exporter in the world though it did not have

¹⁶⁵ Some Eritrean traders imported commodities from Kenya stating that they use Ethiopia as only transit route. In this way they enter into Ethiopia without paying import duty and then sell the stuff in Ethiopian market hurting legal Ethiopian traders.

¹⁶⁶ Gedamu *supra* note 157, at 39.

¹⁶⁷ *Id.*

¹⁶⁸ Ethiopia was the only foreign destination for light industrial products of Eritrea, but it was completely lost after the border conflict with Ethiopia. See Sally Healy, *Eritrea's Economic Survival, Conference Proceeding*, THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, Apr. 20, 2007, <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/200407eritrea.pdf> (Jan. 23, 2016).

coffee plant. Moreover, Eritrea issued its own currency without knowledge of Ethiopia disregarding provisions of Friendship and Cooperation Agreement, and sought Eritrean currency, Nakfa and the Ethiopian currency, the Birr, simultaneously to circulate in both countries.¹⁶⁹ On top of this, there was disagreement on Port fee and price of oil that Ethiopia used to import from Assa refinery.

This motivated Ethiopia to look for other options. With a view to protect its economy, Ethiopia changed its own currency note which rendered Birr notes in Eritrea void and required all transactions with Eritrea above 2000 Birr to be effected in Letter of Credit that can only be opened in hard currency like any third nation. This was strange to Eritrea.

In 1997 Ethiopia pursued a rebellion group called Afar Revolutionary Democratic United Front (ARDUF) and stationed it at the elusive border. The rebellion group sheltered in Eritrea and had been creating havoc in Afar Regional State in Ethiopia. Eritrea was upset by unilateral action of the Ethiopian military, and demanded explanation and demarcation of the whole disputed boundary. Both States have agreed to demarcate all the disputed boundaries and set up a joint boundary commission. The Joint Border Commission, in turn, constituted a technical Sub Committee that would actually work the demarcation process under the supervision and guidance of the Joint Border Committee.

In the mean time, the Tigray Regional State had produced a regional map that included contested localities on Tigray side of Ethiopia. The Tigray map changed the old map by including disputed territories. It is not clear why Tigray has incorporated contested territory and released the map before the contested regions were not demarcated as it was agreed during the armed struggle between TPLF and EPLF in 1988.

¹⁶⁹ See Gedamu *supra* note 157.

Surprisingly, while the Eritrean members of Joint Border Commission were in Addis Ababa to conduct a regular meeting, Eritrea moved its military personnel to the territories that were under Ethiopian administration. A group of military personnel that were fully armed attempted to enter into Badme. The militia at the checkpoint required the Group to disarm. An argument arose and each side fired on another. From both sides life was lost, but from the Eritrean side a senior military officer was killed.¹⁷⁰

In summary, the people of Ethiopia and Eritrea are essentially “one” and inseparable. President Isias Afeworki admits this fact stating, “ [W]e cannot change the geographical and historical links that bind the peoples of the two countries.”¹⁷¹ The elusive Ethio-Eritrea boundary is a colonial creation, which has separated the inseparable people. The boundary was not only elusive, but was unilaterally altered by the Fascist Italy in 1935. The local people were not aware of the boundary treaties, neither the supposed boundary lines, as the boundary was not demarcated on the ground. Due to historic commingling of the two brotherly people it is not easy to set a clear separating line, as people had been moving in search for conducive environment. Unless renegotiated and an acceptable boundary line is drawn, any attempt to enforce colonial boundary line, in accordance with illusive boundary treaties, would continue to be futile. Bilateral dialogue and honest negotiation would also tackle socio-economic causes that trigger boundary issue as bargaining leverage.

¹⁷⁰ Subsequent actions by Eritrea, Ethiopia and international community will be discussed in the next chapter.

¹⁷¹ Negash and Tronvoll *supra* note 1 at 37.

CHAPTER SIX

Ethiopia-Eritrea Border Conflict and Arbitration

6.1. Outbreak of “Border Conflict”

The sudden outbreak of Ethio-Eritrea violent border conflict has puzzled everyone, including citizens of the former friendly and interdependent nations, neighboring states, and the international community.¹ The two former allies,² Eritrean Peoples’ Liberation Front (hereinafter EPLF), renamed as Peoples’ Front for Democracy and Justice (PFDJ) and Tigray Peoples’ Liberation Front (hereinafter TPLF), a core member in the coalition of Ethiopian Peoples Democratic Front (EPRDF) turned to be ruling parties after downfall of despotic communist regime (Dergue), had apparently magnificent relationship that was hailed by some as exemplary for peaceful co-existence in Africa.³ TPLF, had supported Eritrea’s quest for independence.

¹ The late Prime Minister of Ethiopia, Meles Zenawi was surprised by Eritrea’s unexpected military provocation and later invasion. After the invasion, Meles attempted to reach President Isaias Afwerki, by phone but at vain. See Jon Abbink, *Briefing Eritrea-Ethiopia Border*, 97 AFRICA AFFAIRS 551, 551-565 (1998); TEKESTE NEGASH & KJETIL TRONVOLL, BROTHERS AT WAR, MAKING SENSE OF THE ERITREAN –ETHIOPIAN WAR, 1(2000). See also Kevin Hamilton, *Beyond the Border War: The Ethio-Eritrean Conflict and International Mediation Efforts*, 11 J. PUB. & INT’L AFFAIRS- PRINCETON 114, 113 – 136 ((2000) Available at; <https://www.princeton.edu/jpia/past-issues-1/2000/7.pdf>. (accessed 03/23/16 8:28 PM); Nejib Jibril, *The Binding Dilemma: From Bakassi to Badme – Making States Comply with Territorial Decisions of International Judicial Bodies*, 19:3 AM. U. INT’L L. REV. 640, 633 -675 (2003). See also Sally Healy and martin Plaut, *Briefing Paper: Ethiopia and Eritrea: Allergic to Persuasion*, CHATHAM HOUSE, AFRICA PROGRAM AFP BP 07/01 (January 2007).

² The Eritrean liberation group had assisted TPLF during early years of its foundation and in turn until 1985 TPLF fought in Eritrea on behalf of ELPF against the Communist Regime. It is generally admitted that TPLF fighters saved the EPLF from a possible demise in Sahle region where the Ethiopian military force was fighting with vigor. See Seyoum Yohannes, *Eritrea-Ethiopia Arbitration: A Cure neither Based on Diagnosis nor Prognosis* 6 MIZAN L. REV. 172, 163-199 (2012). See also Redie Bereketgab, *Inter-State Conflicts in the Horn of Africa*, HORN OF AFRICA JOURNAL 2 (2011), <http://afrikansarvi.fi/issue2/25-artikkeli/62-inter-state-conflicts-in-the-horn-of-africa> accessed 03/23/16 4:57 PM). In Early 1990s some Ethiopians view both EPLF and TPLF as two sides of the same coin. See Leenco Lata, *The Ethiopia-Eritrea War*, 30:97 REVIEW OF AFRICAN POLITICAL ECONOMY 369, 369 - 388 (2003).

³ Abebe T. Khasay, *Ethiopia’s Sovereign Right of Access to the Sea under International Law*, (Jan. 01, 2007), (LL.M Thesis, School of Law, University of Georgia, (Unpublished)), Available at http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1078&context=stu_llm Leenco Lata remarks that Eritrean rules were seen behaving like co-rulers of Ethiopia.

Moreover, Ethiopia was the first country to recognize Eritrea's independence even before formal declaration by the very State of Eritrea.⁴

In a situation where there was no explicit hostility, nor noticeable tension, it was hard to “believe” the news heralding sudden armed confrontation among the ‘allies,’ as no assertive mind could fairly envision a destructive war to erupt in apparently peaceful setting. The then Ethiopian Prime Minister Meles Zenawi remarks:

I really can't make head or tail of this puzzling development. In fact I may have my own guesses but they cannot be satisfactory. As you all know there were certain misunderstandings between the two governments arising from measures taken after changes in currency on both sides. These were more or less certain misunderstandings even before this change, but it is very difficult for me to believe that the composite effect of all this would draw us into open conflict. This is why I still maintain I have no satisfactory answer for this baffling question.⁵

Both nations were victims of the longest civil war in Africa that had claimed lives of tens of thousands citizens, and rendered the two nations among the poorest in all measures of development indicators. Given unhealed wounds of the civil war, it is inconceivable to go back into war, at least before exhausting all possibilities of peaceful resolution of disputes.⁶ Invoking an “ill-managed military skirmish”⁷ that happened as a result of the provocation of the armed Eritrean military

⁴ Ethiopia formally accepted Eritrea's independence even before Eritrea formally declared its independence. Some Ethiopians blame EPRDF/TPLF for its failure to protect Ethiopia's interest by facilitating the Eritrean secession. (See Negash and Tronvoll, *supra* note 1 at 44). There was high public discourse that the inclusion of Art. 39 of the Constitution, which stipulates the right to secession was intended to legalize the Eritrean secession.

⁵ ETV Amharic Program May 21, 1998; See also BBC Monitoring May 22, 1998 quoted in Martin Plaut, *Background to War from Friends to Foes*, available at, <http://www.ascleiden.nl/Pdf/paper1108459195.pdf> (last accessed 02/25/16 10:38 AM). See also Negash and Tronvoll who attest, “The major Eritrean offensive came as a surprise to Ethiopian authorities in both Mekelle and Addis Ababa.” *Id* at 1.

⁶ Numerous sources speculate varied reasons for the sudden eruption of the war. The two former allies turned foes even during the battle against Dergue though they put aside their difference to fight their common enemy, heritage of neo patrimonial elite rule and lack of democracy and economic problems of Eritrea, see Abbink, *supra* note 1. As Khadiagala underlines, “Given the Wealth of formulas for resolving territorial tensions, escalation of the Ethiopian-Eritrean conflict makes clear a fundamental failure to construct institutions strong enough to stabilize authority.” Gilbert M. Khadiagala, Reflections on the Ethiopia –Eritrea Border Conflict, 23 FLETCHER F. WORLD ATT. 40, 39 – 58 (1999).

⁷ Jon Abbink, *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 ERITREAN AND ETHIOPIA 147 (2009).

personnel⁸ at the town of *Badme*, a territory administrated by Tigray Region of Ethiopia, Eritrea deployed its combat battalion that was armed with tanks and heavy gunship “[launching] an offensive on several fronts in order to retake what they claimed to be Eritrean territories controlled by Ethiopia.”⁹ Ethiopia never expected armed confrontation with Eritrea, and demilitarized the shared border – apart from the local police that were armed with light weapons – there was no Ethiopian defense force in the vicinity. Consequently, the Eritrean army easily crossed the border and occupied *Badme* and its environs.¹⁰

Ethiopia labeled the Eritrean move as a blatant aggression and demanded immediate and unconditional withdrawal from all the occupied territories.¹¹ In the mean time, Ethiopia moved its forces from other parts of the country and attempted to recapture the occupied territories, but it could not succeed, especially in the Western and Central regions, as Eritrean troops had already held major strategic positions, though Ethiopian troops got impressive successes, and restrained further move of Eritrean troops in the Eastern front. The Ethiopian Air Force bombed the Eritrean

⁸ A small number of Eritrean military officers fully armed attempted to enter into *Badme*, a village under Ethiopian administration. Local police force required the Eritrean military personnel to disarm before entering into Ethiopia. The Eritrean team refused to disarm but attempted to enter the town of *Badme* by force that prompted shooting from both sides, which resulted in loss of life. This was the immediate *Casus Belli* of border war. See Sally Healy and Martin Plaut, *The Ethiopian and Eritrea, Allergic to Persuasion*, CHAT AM HOUSE Africa Program 3 (2007). According to Negash and Tronvoll, the incursion from the Eritrean side was deliberate. (Negash and Tronvoll, *supra* note 1) “[...] the Eritrean government had expected such a reaction [...] and had made military preparation accordingly.” *Id.*

⁹ *Id.*

¹⁰ Surprised by the unexpected but dangerous move of Eritrean military the then Prime Minister of Ethiopia, Meles Zanawi, attempted to reach President Isias Afework on phone but at vain. President Isia’s provocative act went well as planned and after arranging military occupation, he went abroad for tour. After failure of communication with President Isias Afeworki, the Ethiopian Prime Minister was forced to present the matter to the Ethiopian Parliament that declared war and ordered Ethiopian defense force to defend the country from Eritrean aggression. See Hayat Adem, *Ethiopia- Eritrea: The Two Victimized Farmers*, JULY 18, 2015, Available at AWAT.COM accessed 03/09/16 at 7:19: PM

¹¹ Khadiagala *supra* note 6 at 39. The Ethio-Eritrean Claims Commission clearly labeled the Eritrean act as aggression, contrary to the U.N Charter. See Eritrea-Ethiopia Claims Commission, Partial Award, Jus Ad Bellum – Ethiopia’s Claims 1-8 (Dec. 19, 2005) (Available at www.pca.org/upload/files/FINAL%20ET%20JAB.pdf) The Security Council and Organization of African Union did not expressly termed it as aggression; but OAU’s fact-finding ambassadorial Committee concluded stating, “ We have reached the conclusion that *Badme* town and its environs were administration by the Ethiopian authorities before May 12, 1998.” ALLAFRICA.COM *OAU’s Facilitation and Eritrea’s Response*, <http://allafrica.com/stories/199808170040.html> (Aug 17, 1998).

Air Force base in Asmara and the Eritrean jets responded by dropping cluster bombs on the civilian area and on an elementary school in Mekalle killing a number of Ayder Elementary School children, their parents and teachers.¹²

After occupying strategic locations and building “impenetrable” trenches, Eritrea offered for negotiation to resolve the apparent border dispute. Eritrea had applied the same tactics in Greater Hanish Island by occupying the Island and then offered for negotiation.¹³ Within short period of its existence, the State of Eritrea has exhibited the policy of “occupy and negotiate” in almost all provocative wars that it launched with the neighboring State.¹⁴ Jon Abbink attests the “occupy” and “negotiate” policy of Eritrea stating, “[Eritrea] first create[s] military facts on the ground and then call[s] for neutral third party [to] unconditional face to face negotiation.”¹⁵ While the Ethiopian conflict was outstanding, Eritrea occupied border territories of Djibouti, though it consistently denied occupation of Djiboutian territory.¹⁶ Eritrea had also border issues with Sudan though it did not move to the existent of occupation.¹⁷ As the Institute of Security Studies notes, “Eritrea do not have good relations with any of its neighbours.”¹⁸ According to Tronvoll, “All these countries have during the post-independence period accused Eritrea of initiating armed

¹² Eritrea took the responsibility for dropping cluster bombs on Ayder school stating it was mistake, but the repeated action of bombing at the same school contradicts with the apology. The second bombing targeted parents and local people who were attempting to help those injured and evacuating others. The fictitious apology was meant to mislead the international community purporting it to be a sudden happening. The deliberate repeated action cannot be an accident or poor skill. Yohannes Woldegebruela, *Time to serve Justice for Poor Victims*, ADDIS FORTUNE, Vol. 14 No. 719 (Jan 19, 2014) Available at <http://addisfortune.net/columns/time-to-serve-justice-for-poor-victims/> Negash and Tronvoll, *Brothers at war* P. 1.

¹³ Daniel J. Dzurek, *Eritrea- Dispute Over the Hanish Islands*, IBRU BOUNDARY AND SECURITY BULLETIN 70 – 77 (1996).

¹⁴ Woldegebriel *supra* note 12.

¹⁵ Abbink, *supra* note 1 at 563

¹⁶ It appears that Eritrea considers it has a right to take law by its own hand against any sovereign nation when it thinks a neighboring state held a territory that appeared to belong to Eritrea. Eritrea gives no room first to peaceful dispute resolution so that the other party prove its title on the territory. It is a public secret that Eritrea captured and killed Djiboutian troops and has been occupying its territories. See AAAS, *Djibouti and Eritrea Cross Border Conflict: 2008*, Mar 11, 2015, available at, www.aaas.org/report/djibouti-and-eritrea-cross-border-conflict-2008

¹⁷ Kjetil Tronvoll, *Borders of Violence – boundaries of identity: demarcating the Eritrean nation-state*, 22 ETHNIC AND RACIAL STUDIES 1037, 1037 – 1060 (1999).

incursions and border violations, and of exhibiting an expansionist and aggressive foreign policy.”¹⁹

So far Eritrea has attempted to police neighboring States without giving a room for amicable solution to its perceived “violations.” Aggressive and invasive character of Eritrea is apparent in President Afeworki illustration, “*If [...] my neighbor destroys my fence and there is nothing I can obtain by taking him to the magistrate, then I will be obliged to destroy his fence.*”²⁰ (Emphasis mine.) How Mr. Afeworki can speculate what a magistrate would judge to take his own action of policing? It is a basic rule of due process that an alleged “wrongdoer” has to be afforded with a chance to be heard. Needless to say, if an allegation is lodged before a magistrate, s/he will investigate whether the accused has committed the alleged “violation” and declare a possible remedy, but President Afeworki’s rule of self-help is contrary to the established principles of justice.

The fallacy of President Afeworki’s statement was exhibited in Eritrea/Yemen dispute over the Greater Hanish Island.²¹ The President wrongly perceived that the Island belonged to Eritrea and invaded it before attempting peaceful resolution. The “occupy and negotiate” policy had worked in Hanish Island though Yemen initially insisted Eritrea’s unilateral withdrawal as a precondition for negotiation, but later consented to judicial settlement while Eritrea occupied the Island by expelling Yemeni residents.²² The Eritrean claim was unjustified, and it was held that the Island belonged to Yemen.

¹⁸ Berouk Mesfin, *The Eritrea – Djibouti border dispute*, ISS SITAUTION REPORT, (Sep. 15, 2008), Available at: <https://www.africaportal.org/dspace/articles/eritrea-djibouti-border-dispute> (last accessed 03/03/16).

¹⁹ Tronovoll *supra* note 17.

²⁰ *Id.* at 1046.

²¹ See Permanent Court of Arbitration, Eritrea/Yemen Award of Arbitration Tribunal in the First Stage of Proceeding dispute Available at, http://www.pca-cpa.org/showpage.asp?pag_id=1160.

²² Dzurek, *supra* note 13.

Before the Hanish Island case was resolved, Eritrea invaded territories that were under Ethiopian administration for centuries and demanded negotiation.²³ Ethiopia, however, consistently rejected any form of negotiation before Eritrea withdrew from the entire occupied territories and maintain *status quo ante bellum*.²⁴

Numerous international actors had attempted to mediate the conflict before it reached into a full-fledged war. United States and Rwanda came up with a novel mediation proposal that had influenced and dominated subsequent mediation efforts.²⁵ United States and Rwanda, expressing themselves as friends of Ethiopia and Eritrea, proposed a four-point Peace Plan.²⁶ *Status quo ante bellum* was the most important component of the Plan. Ethiopia immediately accepted the Peace Plan, but Eritrea declined refusing to withdraw its troops from the occupied territories asserting its forces had “... only retook [the] land that was already theirs and could not retreat from it.”²⁷ An assertion of Eritrean president reveals Eritrea’s determination to stay at the occupied territories despite international actors insistence or Ethiopia’s demand as a pre-condition for negotiation. President Isias Afeworki wrongly declared:

Insisting on pulling out of Badme may be likened to insisting that the sun [will] not rise in the morning. [...] It is unthinkable. It’s like telling the government in this country to migrate somewhere else with its own people and leave this land its sovereign territory to someone

²³ On Dec. 19, 2005 the Eritrea-Ethiopia Claims Commission declared that Eritrea “ [...] violated Article 2 of the Charter of the United Nations by resorting to armed force on May 12th, 1998 and the immediately following days by attacking and occupying the town of *Badme*, then under peaceful administration by the Claimant [Ethiopia], as well as other territories in the Claimant’s Tahtay Adiabo and Laclay Adiabo Weredas.” EECC, Partial Award, *Jus Ad Bellum – Ethiopia’s Claims 1-8* (2005), Available at <http://www.Pca.org/upoad/files/FINAL%20JAB.pdf> (Last accessed Jun 8, 2015).

²⁴ The then Ethiopian Foreign Minister formally demanded Eritrea’s unconditional withdrawal from the occupied territories before consideration of negotiation (*Id.*).

²⁵ Djibouti, Libya, Egypt, Uganda showed interest to mediate the conflict. The then Libyan leader Colonel Gadafi promised to send troops to disputed territories. Most mediation proposals reflected national interests of the proposing States. See Hamilton *supra* note 1 at 127.

²⁶ The first plan was a general one demanding both Ethiopia and Eritrea to agree on peaceful dispute resolution. Next, to agree on deployment of observers at *Badme* to oversee Eritrea’s withdrawal from territories occupied after May 6, 1998. Thirdly, the two countries reach into agreement for binding delimitation and demarcation agreement and lastly to demilitarize the border region immediately. *Id.* at 45

²⁷ Abbink *supra* note 1 at 554. In short period of its sovereign existence, Eritrea displayed the policy of occupy and negotiate policy. This weird policy does not offer priority to peaceful resolution.

else who is threatening to use force. Morally it's not acceptable. Physically it's never going to happen.²⁸

President Afeworki's words reveal Eritrea's firm-stand that it would not willingly withdraw from the occupied territories, but the international community did not stop attempting to convince both States to come to the negotiation table. While the then African Organization, OAU, IGAD, and other neighboring nations and international personalities were attempting to convince Eritrea to accept the United States – Rwanda Peace Plan, both of the countries “ [...] pursued a massive buildup of force on the border [...]”²⁹ In the mean time, both States deported huge number of civilian population under the guise of threat to national security.³⁰

In early November 1998, OAU offered a “Framework Agreement” which was more elaborate, but in effect coincides with the United States/Rwanda Peace Plan, and later issued Modalities of implementation, and Technical Arrangement.³¹ The Framework Agreement required Eritrea to withdraw its troops from *Badme* and its environs, which was unacceptable to Eritrea.³² In Eritrea's defiance to keep *status quo ante bellum*, and Ethiopia's rejection to negotiate before Eritrea withdrew from the “occupied territories”, in early February 1999 a devastating war broke

²⁸ President Isias Afwerki's interview at EriTV, 8 July 1998 and BBC News, 1 June 1998, Tronvoll, *supra* note 17 at 1040.

²⁹ Khadiagala, *supra* note 6.

³⁰ According to Gystuen & Tronvoll, Eritrea deported 70,000 Ethiopians, and Ethiopia deported 75000 Eritreans or persons alleged voted for the Eritrean independence. See Gro Nutuen and Kjetil Tronvoll, 26 *The Eritrean-Ethiopian Peace Agreement: Exploring the Limits of Law*, NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETTER 19 2008. See also Khadiagala, *supra* note 6 at 49.

³¹ MODALITIES FOR IMPLEMENTATION OF THE OAU FRAMEWORK AGREEMENT ON THE SETTLEMENT OF THE DISPUTE BETWEEN ETHIOPIA & ERITREA, 12 JULY 1999, and TECHNICAL ARRANGEMENTS FOR IMPLEMENTATION OF THE OAU FRAMEWORK AGREEMENT & ITS MODALITIES, Appendix 13, Negash & Tronvoll, *supra* note 1 at 142.

³² Recommendation 3 of Framework Agreement, Negash & Tronvoll, *supra* note 4 Appendix 7 at 122. Eritrea rather raises serious of questions that appear in context counter response to the Framework Agreement. Questions like justification for Eritreans redeployment to the position before May 6, 1998, “whose redeployment is it?” and so forth see Appendix 8, Negash & Tronvoll, *supra* note 1. Appendix 8 regarding Points of Clarification Raised by Eritrea On the OAU Framework Agreement. See Negash & Tronvoll, *supra* note 1 at 125.

out and Ethiopia was able to secure *Badme* – the flash point of dispute and its environs.³³ After suffering an unexpected defeat at *Badme*, the next day Eritrea declared acceptance of OAU “Framework Agreement.”³⁴ However, it was not a genuine acceptance; it was simply tactical game, as Eritrea refused to surrender villages that were not yet liberated by Ethiopia.

Eritrea disregarded Ethiopia’s plea for complete maintenance of *status quo ante bellum* in all occupied regions but also defied OAU’s Framework Agreement.³⁵ As the Framework Agreement required Eritrea to withdraw from “*Badme* and its environs” Eritrea played a word game and asserted that the Framework Agreement did not require withdrawal from *other* territories that were occupied after May 6, 1998. This was non-sense to Ethiopia, as its forces had already liberated *Badme* making huge sacrifice. At this point, technically, both States have accepted the Peace Framework, but Ethiopia refused to sign ceasefire asserting Eritrea’s reluctance to withdraw its troops from the remaining occupied territories.³⁶

In response to the Ethiopia’s full-scale war in all directions to liberate the rest of the occupied villages, the Security Council passed a resolution forcing both States to accept ceasefire and withdraw troops from all the contested territories.³⁷ This was the moment that Eritrea was losing ground, and immediately accepted the resolution, but Ethiopia declined to abide by the Security Council Resolution, claiming it had already paid enormous human and economic costs

³³ Eritrea’s unexpected defeat at *Badme* surprised even Eritreans who claimed Ethiopia’s human wave that overwhelmed and overpowered Eritrean defense force that were holding a well dug trench, in which dead Eritrean troops were buried. See Hamilton *supra* note 1 at 118.

³⁴ Though Eritrea expressed its acceptance of Framework Agreement, it took provisions selectively. It stated that the Framework required redeployment from *Badme* and environs and Eritrea no more in the stated area and required demarcation while occupying other areas. Ethiopian foreign minister released a press Release claiming that Eritrea’s acceptance was not honest and play of game.

³⁵ Fiona Lortan, *The Ethiopia-Eritrea Conflict: A Fragile Peace*, 9:4 AFRICAN SECURITY REVIEW 2 (2000).

³⁶ *Id* at 1.

³⁷ S.C. Res.1297 U.N. Doc. S/RES/1297 ((May 12, 2000) The Resolutions required both Ethiopia and Eritrea to stop war and withdrew their troops from the disputed territories.

due to Eritrea's defiance to keep *status quo ante bellum*.³⁸ The Security Council, however, imposed arms embargo on both of the States.³⁹ In short span of time Ethiopia liberated all the occupied territories, and entered deep into Eritrea beyond the contested territories and seized strategic hills for the purpose of defense.⁴⁰

6.2. The Algiers Peace Agreement

After liberating all the territories that were occupied after May 6, 1998 incidence, and maintaining defensive position, Ethiopia announced accomplishment of its military objectives and demanded international guarantee to accept ceasefire and withdraw its troops from uncontested territories of Eritrea.⁴¹ Eritrea, in turn, refused to accept ceasefire, it had been demanding while occupying Ethiopian territories, conditioning Ethiopia's withdrawal from its territories that were occupied in June 2000. However, bearing the brunt of war, enduring pressing issues of huge displaced and deported citizens, suffering from economic effects of the prolonged war, and due to continued pressure from international actors, Eritrea consented to ceasefire, thereby signing a peace agreement known as "Agreement on Cessation of Hostilities" on June 18, 2000 in Algiers, Algeria.⁴²

³⁸ Eritrea in its turn blamed Ethiopia claiming that its intent was territorial expansion. Stating that "Ethiopia's Intent on Waging War: Peace was Never on its Agenda." It further stated that "Eritrea's acceptance of the OAU framework has now exposed Ethiopia's bluff." Press Statement of 2march 2, 1999 from the Eritrean Foreign Ministry Accepting the OAU Framework Agreement & Explaining the Continuation of the War. Appendix 10, Negash and Tronvoll, *supra* note 1 at 133.

³⁹ S.C. Res.1298 U.N. Doc. S/RES/1298 ((May 17, 2000)

⁴⁰ Lortan *supra* note 35 at 5. See also Kievan E. Uchehara *Understating African Relationship: The Case of Eritrea – Ethiopia Border Dispute*, &:1 INT'L J. OF SOC. INQUIREY 66, 63 – 78 (2014).

⁴¹ *Id.* at 6

⁴² AGREEMENT ON CESSATION OF HOSTILTIES BETWEEN THE GOVENEMT OF THE FEDERAL DEMOCTRACIT REPUBLIC OF ETHIOPIA AND THE GOVERNMENT OF THE STATE OF ERIREA, JUNE 18, 2000, ALGIERS, ALGERIA. The most important aspect of this agreement was deployment of observation mission and coordination commission to facilitate and facilitate implementation of peace agreement, and establishment of buffer zone of 25 Kms within Eritrean territory and repatriation of troops of both States. See also Uchehara *supra* note 40 at 68.

The then President of Algeria, who was chairman of OAU at the time, played a great role in overall negotiation process. The Agreement on Cessation of Hostilities had leveled ground for conclusion of subsequent agreements. Cessation of Hostility was built on three pillars:⁴³ First, Parties have agreed to resolve dispute peacefully in accordance with the principles of OAU Charter. Second, they have consented to reject use of force as a solution to resolve dispute. Lastly, the Parties have expressed their commitment to respect borders existing at independence in accordance with the 1964 Cairo Resolution. This means the Parties will respect colonial boundaries as delimited by the colonial treaties.⁴⁴

By signing the Agreement on Cessation on Hostilities the Parties have reaffirmed acceptance of OAU's Framework Agreement and Modalities for its implementation, which were endorsed by the Assembly of Heads of State and Governments in 35 Session of OAU that was held in Algiers, Algeria from 12 -14 July 1999.⁴⁵

Parties have agreed to immediately cease hostilities just after signing the Agreement on Cessation of Hostiles, which set a 25 Kilometers buffer zone within Eritrean territory (Art. 12). While Eritrean civilians could resettle in the buffer zone, its armed forces were not allowed to enter into the buffer zone. To monitor implementation of the Agreement and delimitation and demarcation process both parties agreed for deployment of Peace Keeping Mission. The Peace Keeping Mission was mandated to monitor: "cessation of hostilities", redeployment of Ethiopian troops from Eritrean territories that were occupied for defensive strategy, "observance of security commitments agreed by both Parties", and the respect of buffer zone from military incursion.⁴⁶ In accordance with Art. 5 of the Agreement, the mandate of Peacekeeping Mission suspected to

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id. at Preamble.*

⁴⁶ AGREEMENT CESSATION OF HOSTILITIES *supra* note 42 Art. 14(b).

end after boundaries of two States delimited and demarcated completely. The Framework Agreement provided 6 months time frame for completion of delimitation and demarcation. This timeframe work was too short even to understand the complex boundary setting.

The Algiers Agreement was concluded at a moment that Ethiopia held a strong position removing Eritrean troops from all the invaded territories, but Ethiopia did not require modification on the initial OAU Framework Agreement. The only temporary advantage that was claimed by the Ethiopian negotiators was impeding Eritrea to sit for negotiation and the formation of Temporary Security Zone inside Eritrea. The Algiers Agreement cemented the permanence and full implementation of the cessation of military hostilities.

The Algiers Agreement heralded formation of arbitration tribunals under the auspices of Permanent Court of Arbitration.⁴⁷ The important task of delineating boundary was entrusted to Eritrea--Ethiopia Boundary Commission (hereinafter EEBC) while deciding on immediate effects of war and declaring compensation was the power of Eritrea - Ethiopia Claims Commission (herein after EECC). It was empowered to decide on the compensation to be awarded to redress the loss that the two nations have suffered as a result of the conflict.

As this study primarily is concerned with problems associated with boundary delineation, borderline, EECC's venture appears out of context. EEBC was manned by five reputed international lawyers and assisted by experts having wide range of experience in setting international boundary delineation. Both states had appointed arbitrators of their choice while the United Nations chose the chairperson. The Commission set its internal procedure accordance with Permanent Court of Arbitration.

⁴⁷ Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (Peace Agreement,) Ethi-Eri, Dec, 12, 2000, 40 I.L.M. 260 (2001). See also Jibril *supra* note 2.

6.2.1. Legal Authority to Arbitrate: The Governing Law

Determination of governing law, procedures to be followed, and the scope of power of arbitrators is very important in international arbitration.⁴⁸ In accordance with Art. 4(2) of the Algiers Agreement, EEBC was conferred with authority to settle the boundary dispute in accordance with *pertinent colonial treaties of 1900, 1902, 1908, and applicable international law*.⁴⁹ The Algiers Agreement expressly excluded the equitable doctrine of *ex aequo et bono*,⁵⁰ and has stamped finality and absolute binding nature of the decision.⁵¹ Before dealing with the arbitral disposition, brief assessment of laws that have been applied by EEBC is pertinent.

6.2.1.1. Colonial Treaties

As pinpointed in the foregoing chapter, three colonial treaties were concluded to legally separate Eritrea from Ethiopia. After defeated in the battle of Adwa Italy concluded peace and friendship treaty with Minilik II that followed by three successive boundary treaties. In modern sense it is hard to take the colonial “treaties” of single provision or combination of names of seasonal rivers that were linked by hyphen as treaties. The “notes” were not only elusive and hard to implement, but also repeatedly ignored by the dominant party- Italy. The Ethiopian people doubt and often question EPRDF’s commitment to resolve boundary dispute in accordance with the defunct colonial treaties. Thus, it is imperative to assess the validity and consequences of colonial treaties of 1900, 1902, and 1902.

⁴⁸ In accordance with Art. 4(11) of the Algiers Agreement, EEBC adopted its own procedures under the auspices of 1992 Permanent Court of Arbitration Option Rules for Arbitrating Disputes Between Two States. Accordingly, the Parties were required to submit their case simultaneously and all decisions made by majority vote.

⁴⁹ Ross Hebert, *The End of the Eritrean Exception? SOUTH AFRICA INSTITUTE OF INTERNATIONAL AFFAIRS COUNTRY REPORT* No. 8 2(2002). In the 1902 Treaty, Great Britain was also involved as former colony, Sudan, which bordered Eritrea and Ethiopia.

⁵⁰ The reason why Ethiopia consented to exclude the equitable doctrine of *ex aequo et bono* is not clear. The most important reason that Ethiopia tries to justify for reconsideration of the award was demarcation on the basis of delimitation would create harsh consequences by dividing family and ethnic groups. The equitable doctrine would have empowered the EEBC to regard geographic and geo-ethnic considerations.

6.2.1.1.1. **Legal Status of Colonial Treaties: Were the colonial treaties valid and enforceable?**

It is true that most colonial African treaties were shame and never coincided with facts on the ground, but the Ethiopian case was very different. First, the treaties were presented for signature after Ethiopia reversed Italian aggression by humiliating the colonial power. The war was a result of a deceptive treaty that attempted to make Ethiopia under Italian protectorate.⁵² There no doubt that the Ethiopian signatories were fully aware of the fact that Italian colonial agents could not be trusted and an offer for treaty often backed by some kind of subtle motive. The other peculiar characteristic of colonial treaties with respect to Ethiopia was the fact that Italy invaded Ethiopia disregarding the shame treaties and redrew a new boundary line.⁵³ In 1935 Italy invaded Ethiopia and mingled Ethiopian territories with Italian East African Empire. After five years of resistance movement, at the end of WWII, all the territories that were occupied by Italy were liberated. Moreover, in 1947 by the Paris Peace Treaty, Italy expressly renounced any right, claim or influence it had created in Ethiopia.⁵⁴

This has effectively nullified the colonial treaties and vitiated the supposed boundary lines. After ten years of British trusteeship, Eritrea was reunited with Ethiopia by the U.N. mandated federation. In October 4, 1950 Haile Selassie I formally annulled the supposed boundary line

⁵¹ Algiers Agreement Art. 5 (17).

⁵² The Italian version of Art. 17 of the Wuchale Treaty did not match with the Amharic version of the same treaty. While the Amharic version afforded option to Ethiopia to have Italian assistance whenever needed, the Italian version stated that Ethiopia could only make foreign relationship through Italy. This practically makes Ethiopia under Italian protectorate. As result, Italy informed European powers that they could not directly contact with Ethiopia. For details see W.B. Stern, *The Treaty Background of the Italo-Ethiopian Dispute*, 30 AM. J. INT'L L. 191, 189 – 203 (1936).

⁵³ Regarding history of Ethio-Eritrean boundary, see Negussay Ayele, *On Ethiopia's Legitimate Claim to its Natural Seashores*, ETHIOMEDIA.COM, (Sep. 26, 2000) Available at http://www.ethiopians.com/Views/Negussay_NaturalSeaShores.htm (accessed 03/23/16).

between Ethiopia and Eritrea declaring, “Mereb river no more separate brothers,” thereby formally declared colonial the treaties and the boundary line the treaties supposed to create null and void. Later in 1962 the Eritrean federation was abolished and Eritrea become one of the provinces of Ethiopia. The Eritrean Assembly by following a legally correct procedure, voted for abolition of the federation. Abolition of the federation was in line with initial goals of the Unionist Party that had the agenda of mingling Eritrea with Ethiopian. After downfall of the monarchial regime, the Communist military government redrew Eritrean boundary by splitting Eritrea into two: Special Autonomous Region of Eritrea and Assab Administrative region.

After all these changes in the Eritrean boundary setting why Ethiopian authorities consented to abide by the defunct colonial treaties to redefine the Ethio-Eritrean boundary? Nowhere in the EEBC’s delimitation decision Ethiopia challenged the validity and enforceability of illusive colonial treaties that were trashed away by the colonial power itself.⁵⁵ The treaties may support Eritrea’s claim at the Ethiopian cost. The Ethiopian silence on invalidity of colonial treaties and consent to respect long abandoned and illusive colonial boundary line is puzzling.

As pointed out in the foregoing chapters, EPLF requested TPLF for delineation of boundaries on the basis of colonial treaties, but TPLF postponed it. After 1998 United States and Rwanda suggested boundary dispute between Ethiopia and Eritrea to be resolved in accordance with the colonial treaties and principles of international law. OAU’s Framework Agreement also makes the same reference. As pointed out in the foregoing chapters, accepting colonial boundaries

⁵⁴ Section VII (Articles 33 – 38) of the Paris Peace Treaty of February 1947 that was concluded between Italy and Allied powers and associates like Ethiopia spells out rights of Ethiopia vis-à-vis colonial Italy. Accordingly, Italy renounced “all claims to special interests or influence in Ethiopia.” (Art. 34).

⁵⁵ It is submitted that this study does not challenge Eritrea’s independence, as it is the choice of people of Eritrea. The author does not agree with any coercive act triggering to vitiate the choice of Eritrean people. As a result of erroneous political decision the people of Ethiopia and Eritrea had paid unnecessary cost that has been inflicting pain. The current generation has to work to mitigate the effect of old wrongs and pave a way for future fraternity of the people. It is equally submitted that Ethiopia’s interest has to be protected. Any attempt to gain at the expense of the other cannot create a lasting peace.

as it was on the actual date of independence was one of the core principles of OAU that was specifically affirmed by the Cairo Resolution of 1964. The United States/Rwanda proposal for maintaining *status quo ante bellum* was important condition for peace negotiation, which aligned with the Ethiopia's quest, but Ethiopia unconditionally accepted the Peace Plan, and OAU's Framework Agreement that mirrored United States/Rwanda Peace Plan without challenging the reference to the colonial treaties. Further Modalities for implementation of the Framework Agreement and Technical Arrangement also state colonial treaties as authorities for setting Ethio-Eritrean boundary.⁵⁶

The clarification question on Technical Arrangement posed by Ethiopia reflects Ethiopia's interest to abide by the colonial treaties as binding law governing Ethiopian Eritrean boundary line. The question specifically queries the reason for omission of expression "pertinent colonial treaties and international law."⁵⁷ Eritrea, on the other hand, appeared to be not sure of Ethiopia's acceptance of the colonial treaties. This can be inferred from the Eritrea's question forwarded to OAU. The fifth question that was submitted to OAU states:

5. Regarding colonial treaties

- Has the OAU ascertained that both sides recognize and respect the colonial boundary between the two countries as defined by the established colonial treaties?
- If this is the case, can this be affirmed through an agreement between the two Parties?
- What is the meaning of the clause "international law applicable to the colonial treaties?" What is the precise interpretation of the OAU and UN Charters concerning colonial treaties?⁵⁸

⁵⁶ Art. 11 of OAU's Technical Arrangement states, "*The delimitation and demarcation process will be done on the basis of pertinent colonial treaties and applicable international law.*" (Emphasis mine). Paragraph V of the Preamble of the Technical arrangement refers to the 1964 Cairo Declaration regarding determination of African colonial boundaries. Article 4 of the Algiers Agreement specifically states the three colonial treaties and pertinent international law to resolve the boundary conflict.

⁵⁷ QUESTIONS SUBMITTED BY ETHIOPIA TO THE OAU FOR CLARRIFICATION OF THE TECHNICAL ARRANGEMENTS FOR IMPLEMENTATION OF THE OAU FRAMWORK AGREEMENT & ITS MODALITES, APPENDIX 15, Negash and Tronvoll, *supra* note 1 at151.

⁵⁸ Points of Clarification Raised by Eritrea on the OAU Framework Agreement that was handed over to the Secretary General of OAU during the meeting with the President of Eritrea in Asmara on 12 December 1998 as a follow –up to the Ouagadougou Meeting, 6- 7 November 1998) Negash and Tronvoll, *supra* note 1 Appendix 8 at 125.

Reference to the colonial boundary and elusive colonial treaties undoubtedly affords undue advantage to Eritrea. Italy had expansionist motive as its guiding policy was taking more land and additional territories, if not possible to occupy the whole Ethiopia. Italy induced the Ethiopian king by offering arms, or gifts of money to sign elusive treaties to get more territories though the treaties and the boundary lines that the treaties meant to create were unknown to the local people, as the boundary line was not set on the ground. Thus, though elusive the treaties did not set the actual boundary line on the ground colonial treaties believed to afford more territories to Eritrea.⁵⁹ In this scenario President Isias Afeworki's move to ascertain the intention of Ethiopia was well calculated.

Despite Ethiopia's unchallenged acceptance of colonial treaties, ascertainment of legality and enforceability of the treaties appears and the legal status of colonial boundaries is vital for future peace negotiation and settlement of boundary line. In the preceding section we will briefly assess the validity and binding nature of the colonial treaties in line with accepted practices of international law.

6.2.1.2. Assessing Validity of Colonial Treaties in Light of Vienna Convention on the Law of Treaties

In contemporary world, Vienna Convention on Law of Treaties of 1969 (hereinafter VCLT) sets forth rules governing validity and enforceability of treaties. As a rule all written treaties are presumably valid and enforceable.⁶⁰ Contracting States, however, are free to attach any condition or additional formality for validity and enforceability of treaties. Ratification,

⁵⁹ Eritrea had been arguing that Ethio-Eritrea boundary was clearly define by the colonial treaties. In reality, however, colonial treaties were not only elusive substantial portion of the boundary was not fully delimited and totally not demarcated. (Malcolm N Shaw, *Title control, and Closure? The experience of the Eritrean- Ethiopia Boundary Commission*, 56 ICLQ 756, 755 – 796 (2007)

⁶⁰ Art. 2(1)(a) Vienna Convention on Law of Treaty requires only writing as a formality requirement. Thus, oral agreements between states cannot be termed as treaty.

registration and depository are important procedural requirements of treaty that may affect the validity & enforceability of treaties. For instance, in accordance with Art. 102 of VCLT, all contemporary treaties shall be registered in the U.N. registry, but unregistered treaty is not invalid. However, a non-registered treaty cannot be enforced in international courts.

VCLT, of 1969 sets out rules regarding vices that can vitiate the validity and enforceability treaties.⁶¹ The vices that can taint enforceability of treaties are almost similar to vice that can render ordinary contracts defective and voidable. In almost all legal systems, error, duress, fraud, or illegality make contracts void or voidable depending upon the nature of vice.⁶² Thus, rules governing validity and enforceability of contracts, *mutatis mutandis*, are applicable to treaties. Some authors label this comparable effect of vices on treaties as contractualization of treaty.⁶³ Thus, as do defective contracts, a defective treaty may be void or voidable depending up on the nature of vice. Art. 48 of VCLT declare a treaty tainted by error may be invalidated at the request of party who consented erroneously. Art. 49 of VCLT sets forth the effect of fraud on treaties. The effect of fraud on treaties and contracts is identical – the treaty or the contract may be invalidated at the option of the victim of fraud. Unlike contracts, a treaty may be invalidated on account of corruption. Corruption may induce a representative to enter into unfair treaty or may induce conclusion of a treaty otherwise the representative may not consent. Corruption, of course may fall under category of fraud. Thus, a treaty tainted by corruption may be invalidated at the request of the victim of corrupt practices.⁶⁴

⁶¹ See Articles 48 – 53 of VIENNA CONVENTION ON LAW OF TREATY, available at

<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>

⁶² See Lantera Nadew Anebo, *Void Agreements and Voidable Contracts: The Need to Elucidate Ambiguities of their Effect*, 2:1 MIZAN L. REV. 91 -109 (2008).

⁶³ U.N. *Conference on the Law of Treaties*, Vienna, Austria, DOC A/CONF: 39/C.1/SR.40 March (26 - May 24, 1968) Available, http://legal.un.org/diplomaticconferences/lawoftreaties-1969/vol/english/1st_sess.pdf

⁶⁴ U.N. Vienna Convention on Law of Treaties Art. 50 May 23, 1969, 1155 U.N. T.S. 331

Art. 51 declare the effect of duress on treaties. In treaties coercion may take two forms. One a representative of nation may be personally coerced to enter into treaty or a nation may be coerced to conclude a treaty under threat of war. Unlike ordinary contracts, a treaty stained by coercion cannot produce any legal effect (*void ab initio*). In a way similar to illegality of contracts, a treaty that is contrary to *jus cogens* may be void (Art. 53 of VCLT).

Akin to vices, the effect of breach on contracts *mutatis mutandis* applicable to treaties. Breach entitles the other party to cancel a treaty. In ordinary contract, if the contract canceled, parties should be restituted to the position they were, as if the contract never been concluded. In some case restitution may not be possible or cancellation may affect the interest of third parties in good faith. In such a case, the act should remain valid.

Italo - Ethiopian treaty of early 19th century appears stained with variety of vices. First, the treaties were vitiated by deceit. After being defeated in battle of Aduwa, Italy approached Minilik II to conclude a boundary treaty with a view to create a lasting peace. But in fact this was not the true intent of Italy. Italy never intended to live as a good neighbor with Ethiopia. Concealing its expansionist motives Italy repeatedly cheated Emperor Minilik II by offering arms and money.⁶⁵ Take, for instance, the 1902 Treaty that was conclude between Italy, British and Ethiopia. Before conclusion of the treaty on May 15, 1902, in November 2014, Great Britain and Italy concluded a secret arrangement to take Kunama territories of Ethiopia. Hiding the true intent, the great powers conspired to cheat Minilik II under the guise of negotiation.⁶⁶ This proves how colonial treaties were tainted by fraud. The Wuchale Treaty was also another fraudulent act that ultimately took

⁶⁵ In 1887 even when Minilik II was not coroneted as king of kings, Italy promised it would not take any Ethiopian territory (Art. 3 of the October 20, 1870 Treaty of Friendship and Alliance) and the boundary between Ethiopia and Italian colony of Eritrea lied south of Asmara which was in very north to the present boundary. See Stern, *supra* note 52 at 190

⁶⁶ See EEBC para 5.32. On November 22, 1901 Great Britain and Italian agents deliberated to “work together to obtain from Emperor Menelik in return for extension of the Abyssinian boundary, a zone of territory to the east of the Toduluc- Maiteb line, which will give to Erythrea the whole of the Kunama tribe up to the Mareb.” (*Id*).

lives of several Italians. As pointed out elsewhere, though Minilik II reversed invasion by winning Italy in the battle of Aduwa, there was no guarantee that Italy might not come back. Had Minilik II refused to accept the offer for boundary treaty, Italy would have used force and taken more territory or would have occupied the whole territory. Therefore, in fear of implied and possible war, Minilik II had to sign on the boundary treaty. Thus, there was element of coercion. However, there was no apparent ground to prove it with a view to invoke violation of *erga omens*.

A close look at the pertinent treaties reveals the most important factor that has vitiated colonial treaties was breach by the dominant party- Italy. Italy utterly ignored the treaty by invading Ethiopia thereby occupying the whole Ethiopian territory. In 1935 Italy mingled Ethiopia with its East Africa colonies - Eritrea and Italian Somaliland. In 1941 Ethiopia regained its independence after Ethiopian patriots in support of Great Britain defeated Italy. Thus, as a result of fundamental breach colonial treaties were rendered dead. In 1950 Haile Selassie I formally declared the treaty and the boundary null and void by stating “*Mereb no more separate brothers.*”⁶⁷ (Emphasis added). As Conforti and Labella, succinctly put, “if a state formally denounces a treaty, it brings out certainly and definitely the fact that in its view the treaty is not applicable or no longer applicable as a result of its being invalid or terminated.”⁶⁸ Therefore, it is fair to label the colonial treaties were dead by the Italian invasion and Ethiopia’s declaration of invalidity.⁶⁹

However, during negotiation effort in 1998 OAU, United States and Rwanda pointed to the colonial treaties as guiding authorities in defining the Ethio-Eritrean boundary. For a reason not explicit, the Ethiopian government did not challenge the move to revive the already dead colonial

⁶⁷ Within a month of issuing an order declaring nullity of colonial treaties, Emperor Haile Selassie declared the statement while crossing Mereb to visit Eritrea on October 4, 1952.

⁶⁸ Benedetto Conforti and Angelo Labella, *Invalidity and Termination of treaties: The Role of National Courts*, 1 EUR.J. INT’L LAW 505, 44-66 (1990).

treaties.⁷⁰ In some cases Ethiopia expressly demanded colonial treaties to be mentioned as governing laws. As pointed out above, Eritrea was not sure that Ethiopia would agree to be bound by the colonial treaties and expressly requested OAU regarding Ethiopian view of the treaties. Ultimately after winning the war, and losing tens thousands of Ethiopians, Ethiopia agreed to be bound by the colonial treaties of early 19th century that obviously favored expansionist Italy. Now, therefore, it is hard, if not impossible, to challenge the binding effect of old treaties, as the dead treaties have revived by Algiers Agreement.

6.2.1.3. Effects of Nullity of Colonial Treaties on the Boundary Line.

Nullity of the colonial treaties is not doubtful; but the question is whether the treaties were executed or the actual borderline was created as a result of the treaties. As it is succinctly stated in the earlier chapters of this Dissertation, boundary making involves two major stages: Delimitation and demarcation. Accomplishment of these two vital steps of boundary crystalizes the boundary line and signals execution of treaty. After creation of the boundary line, the treaties assumed accomplished their purpose, and may only be resorted to ascertain boundary line in case of confusion or conflict. Therefore, if we take the Ethio-Eritrean boundary was actually drawn by the colonial treaties, subsequent nullity of the treaties will have no effect. In *Eritrea/Yemen Case*, it was declared that boundary treaties confer title to the territory and “ [...] establish an objective territorial regime valid *erga omnes*.”⁷¹ As pointed out in *Libya/Chad Case*, boundary treaties

⁶⁹ Order No. 6, 1952, see EEBC para 2.10 which states, “On 11 September 1952, Ethiopia declared null and void the Treaties of 1900, 1902 and 1908.”

⁷⁰ The treaties were invalid as a result of unilateral action of Italy. By ignoring the “Treaties” Italy invaded Ethiopia in 1935 and occupied for 5 years mingling both Ethiopia and Eritrea. Then at the end of the WWII, UN recognized Ethiopia’s right to sea by federating Eritrea to Ethiopia. Thus, the colonial treaties were modified by the later UN Resolution. See Nigussay Ayele *supra* note 53. Professor Ayele asserts obsolescence of colonial treaties as a result of Italian invasion of 1935 and subsequent merger of the two countries. See also Kehsay *Supra* note 3.

⁷¹ Shaw *supra* note 59 at 761.

create a borderline that “[...] will continue even if the treaty in question itself ceases to apply.”⁷² This postulation accords with the principle of stability of boundary line.⁷³ Therefore, once a boundary is created, it should remain in tact and should be clearly marked on the ground to avoid confusion and conflict. In case of boundary conflict, boundary treaties are the most important evidences justifying an exact location of boundary.⁷⁴ The principle of stability of boundary is applicable only when an actual boundary line is created. It is doubtful whether the colonial treaties had actual created Ethio-Ethiopian boundary line. The supposed boundary line substantially not delimited and totally not demarcated.

6.2.1. 4. Conflicting Views in Setting Boundary Line in Each Sector: The EEBC Dilemma

This Section presents a brief overview of problems associated with EEBC’s delimitation and demarcation decision. EEBC endeavored to fill treaty lacunae by constructing treaty wordings and resorting to external sources like colonial reports, notes, private memorandums, and non-treaty maps, which further complicated boundary-making process. Even though confronted with numerous conflicting situations, EEBC never attempted to ascertain facts on the ground. As a result, the supposed boundary remained elusive and unacceptable. Moreover, the delimitation decision left certain areas and facts to be considered during actual physical demarcation stage, but never fulfilled due to non-cooperation of the Parties. Consequently, by ignoring its promises for actual boundary making during physical demarcation, EEBC declared virtual demarcation with a view to end its mandate. The purpose of this Section is not to define a correct boundary line, but to show problems associated with colonial treaties and EEB’s decision with a view to stress the need for dialogue to draw an acceptable boundary line.

⁷² *Id.* See also CASE CONCERNING THE TERRITORIAL DISPUTE, LIBYA ARAB JAMAHIRYA/CHAD, (FEB.3, 1994), <http://www.icj-cij.org/docket/files/83/6897.pdf>

⁷³ Shaw *supra* note 59.

6.2.1.4.1. *The Western Sector*

The western sector of Ethio-Eritrean boundary was delineated twice. First, the 1900 Treaty initially set the Western boundary line to commence from Tomat at the juncture of Setit river and Anglo Egyptians Sudan boarder moving upwards to Todluc at the very north, then to Mai Ambessa and Mereb river. Had this treaty were not modified, there would be no issue on “Badme” – the flash point of 1998 destructive war. But Great Britain and Italy made a secret arrangement in Rome to take more Ethiopian territory.⁷⁵ This secret plan had resulted in alteration of the 1900 Treaty in the Western Sector. The 1902 was a tripartite treaty which defined boundaries of Sudan, Ethiopia and Eritrea. The modified treaty states the Western Terminus to commence from Um Hager (some times “Hajer”), later maps and other documents state the starting point *Khor Royan*, a river that joins Setit at the Sudan border.⁷⁶ The boundary then runs eastward following river course of Setit. After short distance of 20 Km, there was a river called “Maiteb” that exactly matches the treaty river that appears commencing from Setit river flowing northwards deep into the Eritrean territory. If this appears the a treaty river called “Maiteb”, as Ethiopia claims, then the next point of connection will be *Mai Ambessa* that can be connected by a straight line.⁷⁷ This position is so clear and undoubtedly places “Badme” sometimes referred as “Yirga Triangle” and its environs within Ethiopian territory. Two Italian maps and 1923 Ethiopian map substantiate this claim.

⁷⁴ *Id.*

⁷⁵ On November 22, 1901 Great Britain and Italy concluded a confidential arrangement to “work together in concert to obtain from Emperor Minilik in return for this extension of the Abyssinian boundary, a zone of territory to the east of the Todluc Maiteb line, which will give to Erythrea the whole of the Kunama tribe up to the Mareb.” See, EEBC *Decision Regarding Delimitation of the Border between Eritrea and Ethiopia*, 2002 iLM 1057 UN Documents S/2002/423, (Apr. 15, 2002) para. 5.32

⁷⁶ *Id.* (point 1) at para 5.07. Adjustment of boundary line from Um Hager to Royan was made by the agreement of February 18, 1903. *Id.* at para 5.9. “This agreement was confirmed by a further Sudan – Eritrea agreement of February 1, 1916. *Id.* at Para 5.10. Ethiopia accepted this agreement in 1972 by exchange of note of July 18, 1972. ; *Id.* at para 5.11 at 59.

⁷⁷ In absence of contrary stipulation, connecting boundary points by a straight line is an accepted international experience. As there is no treaty declaration how to connect the Ethiopia Eritrean boundary points, it is legal to draw a straight line between boundary points.

This line of interpretation, though literally based on 1902 Treaty wordings, was not acceptable to Eritrea, as it relied on Italian manipulative and expansionist conducts that were manifested in several colonial documents including numerous maps that were unilaterally drawn by Italian cartographers and Italian agencies.⁷⁸ In addition to the colonial maps, Eritrea presented several colonial reports, comments, notes, and telegrams that were unknown to Ethiopia.⁷⁹ On Ethiopian side, due to poor archival preservation and destruction of monarchial institutions by Italy during the five years of occupation no document that could assist treaty interpretation was found.

To determine the sovereignty over location *Badme*, resolution of conflicting views arising from 1902 is imperative. The important conflict arising from 1902 Treaty was diverging locations and varied expressions of River “Maiteb.” The Amharic version of 1902 Treaty captions River “Maiteb,” as “Maiten.”⁸⁰ Eritrea seizes this confusion, and argues that the treaty river that links the boundary line to Mai Ambessa was not actually “Maiteb,” but “*Mai Tenne*” which is located at the very easterly south near Tomsa. As pointed out in the preceding chapter, the 1902 Treaty is the

⁷⁸ *de Chaurand map* of 1894, *Mai Daro map* (the map that was referred by the report of the Italian negotiator, Major Ciccodicola May 16 and June 28, 1902), a sketch Map between Great Britain and Ethiopia defining Anglo Egyptian Sudan and Ethiopian border which of courses applied the an identical caption to the River “Maiteb” (*Id.* para 5.18), the map of Anglo Egyptian Sudan of 1901 the so called Talbot-Colli map, the 1904 Italian Carta Dimostrativa (sometimes called Prinetti map) which doubts the Ethiopian assertion of “Maiteb” at point 3, “Ombrega” sheet of the Carta Dimostrativa produced by te Istituto Geografico Militare in 1903, Gubernatorial Decree 1903, Comando del Corpe di Stato Maggiore map of 1904, Checchi map 1904 (para 5.57), Miani map of 1905 (para 5.58), Martini reports of 1906, the only map that was drawn by an Italian institute but supported Ethiopian position. See *Id.* Para 5.58), Martinin report of 1907, Italian map of 1907 (para 5.63, Concessions map of 1909, Pizzolato report of 1929, Zolit report of 1929 (*Id.* para 5. 68, Denti di pirjano report of 1932 (*Id.* para 5.75).

⁷⁹ Major Ciccodicola’s report of May 16, 1902 that referred to the Mai Daro sketch was accepted by EEBC and later one referred just like treaty map. EEBC termed this sketch as a map convincing that the Ethiopian line of “Maiteb” at point 3 argument was wrong. Eritrea produced several reports that Major Ciccodicola to colonial governor of Eritrea and several reports and suggestions that the Eritrean governor, Martini, telegrammed to Italy were produced as evidences as proof for treaty location of the river “Maiteb” or misunderstanding regarding the name or location of river “Maiteb”.

⁸⁰ No one exactly knows the source of confusion. The only possible justification can be unfamiliarity of the geography of the area either by the Ethiopian government and colonial powers. It is hard to prove an exact name and location. Different names of rivers used at different locations. Take, for instance, the case of Setit river. At the Sudanese border river is captioned as Setit where at the center it is known as Sitona where the very South is Tekeze.

most confusing treaty as it uses the name of a river called “Maiteb” which, inexplicably, attributed to numerous tributaries in varied nomenclature.

The first treaty river that was captioned as “Maiteb” is located at the very west at the juncture of Setit river. Through the river course of Setit, “the new frontier follows [Setit] river its junction with Maiteb.”⁸¹ A river known as “Mai Tenne” is located 87 km further east than the western “Maiteb”. The *Mai Daro* sketch that Ciccodicola attached to this report states “Maiteb” as “Meeteb” adding another confusion. EEBC remarks, “ The fact that *Mai Daro* map spelled the river as “Meeteb” does not appear to the Commission to affect the situation, for Ciccodicola appears to have equated “Maiteb” with “Meeteb.”⁸² While Ethiopia claims that the very western “Maiteb” was the river mentioned in the 1902 Treaty, Eritrea initially argued that it was “*Mai Tenne*” from which the boundary line connected by a straight line to *Mai Ambessa* and then follows Mereb River courses to the easterly direction.

But later Eritrea changed this stance and asserted that the boundary line runs from Setit Tomsa (at point 6) to Mai Ambessa. Eritrea also “ [...] suggested that the original Treaty reference to the “Maiteb” was actually to the Sittona (Point 4).” Several other earlier or later maps have also used different nomenclature. De Chaurand Map of 1894, an Italian geographer, applies the name Maitebbe–Meeteb while the later map of *Mai Daro* states “Meeteb” but all at different locations.

EEBC gave unnecessary authentication to the unilateral sketch that was referred by reports of the Italian negotiator, Major Ciccodicola, to Martine, the governor of Eritrea and latter’s report to the Italian legislator. Moreover, EEBC attested that *Mai Daro* sketch was known to Minilik II during negotiation. This assertion raises questions on Ethiopian side. First, it is simply a unilateral

⁸¹ Art. I(II) of 1902 Treaty. The Amharic version of the 1902 Treaty states “Maiten” while the English version of the treaty calls it “Maiteb”.

⁸² See *Id.* paras 5.22 and 5.23 EEBC p. 63. The Commission took Ciccodicola’s remarks as authority that revealed the intention of negotiators. (*Id.* para 5.23)

report that was known to Ethiopia. Second, if Minilik II had accepted it, why not the sketch was not attached to the treaty? Finally, how EEBC accepts unilateral statements of Italian authorities as proof for common intention of Parties? It appears contrary to the general principles of law of evidence to accept a document written by a party unilaterally as evidence in favor of the writer.⁸³ As this fact cannot be disproved by Ethiopia, it appears unfair. This makes EEBC's decision unrealistic which will remain as a stabling block for future peaceful coexistence and good neighborhood of the two brotherly nations of Ethiopia and Eritrea. EEBC's biased stand regarding Ethiopian claim can be read from the expression it mentioned in *para 5.65*. In this case Ethiopia presented a map of 1923, which depicted *Setit – Mareb* link as running from western *Maiteb* to *Mai Ambessa* exactly as Ethiopia claims. EEBC stated this map as “the so called Haile Selassie map” of 1923. Why “the so called” expression which never been so even in the case of private, reports, or comments?

Professor Abbink surmises that the takings of both Ethiopia and Eritrea are wrong. To Professor Abbink a real *Maiteb* would be the one that reflects local facts. In the words of Abbink:

Eritrea pretentiously claimed that the ‘Maiten’ stream, due east, was the “Maitieb” of the 1902 Treaty (see EEBC 2002:14). Ethiopia, equally pretentiously, claimed that the ‘real’ Maiteb was located far in the west, about 20 Kms. east of the town of Umm Hager. The names were indeed on the old maps (there are at least three ‘Maitbs’ or Meetebbs), but both claims were wrong. Looking at the available maps and the confusion on geographical names, the question of deciding on where the ‘real’ Maiteb is located is up to a certain extent arbitrary. There was no compelling logic in the extant documents for the Commission to follow. This fact made it all the more important look at actualities, feelings of belong of the local population, affectivities, etc. that evolved in the last 50 years especially since the end of Italian occupation in 1941.⁸⁴

⁸³ As Eritrea now stands at the shoes of Italy invoking all the privileges Italy had at the moment, citation of documents unilaterally written and archived by Italy should not be accepted in a way favoring Eritrea.

⁸⁴ Jon Abbink, *Badme and The Ethiopian-Eritrean Conflict: Back To Square One?*, ETHIOMEDIA.COM, FEB 2003. Professor Abbink surmises that EEBC could have made an acceptable decision if it considered ethno geographic facts on the ground. The decision even created a worse scenario by spoiling the already established boundary. EEBC could have gone beyond the confusing treaty following the “applicable international law ” to ascertain the true meaning. For a reason not clear enough the Commission opted to follow the Italian assertion. In the words of Abbink, “ Remarkably, the Commission incomprehensibly took over the *Tomsa* point from the Italians, who had unilaterally claimed it in the 1930s.” *Id.*

To Ethiopia, the Eritrean line of argument is absolutely wrong. The beginning from the Sudanese border is not hard to comprehend and there is no disparity, at least, until the beginning of the “*Maieteb*” that Ethiopia argues for. By ignoring the “*Maieteb*” that could be seen after 20 Kms from the Sudanese border, Eritrea simply followed lines of *Setit* river to the *Tomsa* point to the south wards. Eritrea stood at Italian expansionist position of 1930s – an expansionist position that Italy attempted to justify its expansionist stance before moving to occupy the whole Ethiopian territory.⁸⁵ EEBC was influenced by the bulk of colonial archives that Italy unilaterally produced and opted to follow the Eritrean line of argument rather than making neutral investigation to know the real treaty junction that contractants referred to *Maieteb*. Conflicting spots that may be viewed as treaty junction could have been cured with though investigation of facts on the ground. Study of historical facts and changes that took place since conclusion of the treaty would fairly indicate a possible boundary point.

The other problem related to 1902 Treaty was allocation of Kunama tribe to Eritrea. As has been mentioned elsewhere in this work, Kunama are indigenous people that were repeatedly vacated from their land after arrival of Semitic people from South Arabia. Kunama had been repeatedly moving to the uninhabitable territories that powerful people would not claim. Denti di Pirjano report of 1932 proves this assertion. The report describes *Mai Ten* in some detail and indicates finding of “ [...] the ruins of a destroyed [K]unama village at a point which would appear to lie east of the Eritrean claim line. While clearly evidencing the absence there of [K]unama at that time, it does suggest that [K]unama had lived there earlier.”⁸⁶ The 1902 treaty had objective of

⁸⁵ *Id.* As Gbenga Oduntan rightly remarks, “ Italian colonial policy and maneuvers was one of the duplicity and gradual encroachment.” See GBENGA ODUNTAN, INTERNATIONAL LAW AND BOUNDARY DISPUTES IN AFRICA 187(2015).

⁸⁶ *Id.* at para 5.76

allocating Kunama that had an elusive and unsettled borderline, to Eritrea.⁸⁷ As a result, delimitation of Kunama land was postponed but never done.⁸⁸ This has impact on the reasoning of the EEBC that appears to be Eritrean legal team brief in which EEBC justified to move the treaty “Maiteb” to the Sittona under the guise of nomenclature of “Meeteb”.

EEBC came across three Italian maps that coincided with the Ethiopian map of 1923, which affirmed the Ethiopian claim i.e. correctness of the western Maiteb, it did not give any weight.⁸⁹ Moreover, EEBC repeatedly expressed that Ethiopia did not object colonial actions, suggestions, and unilateral maps of Italy.⁹⁰ Fairly thinking Ethiopia had no possibility to know unilateral actions (reports, memos, maps, suggestions, comments of Eritrean governors) and intentions of Italy or its agencies operating from Eritrea. Moreover, EEBC did not consider Ethiopia’s situation at the time. Was Ethiopia’s silence for unpublished thoughts deemed as acceptance?

In 1920s, when Ethiopian governors increasingly become conscious about Italian manipulations, Ethiopia asserted and fought any military or private intrusion into the territories in Yirga Triangle or territories that EEBC ceded to Eritrea as a result treaty interpretation.⁹¹ As pointed out in paragraph 5.74 of EEBC’s delimitation decision, Ethiopian Minister of Foreign Affairs formally requested Eritrean authorities to stop illegal intrusion to Adiabo that killed

⁸⁷ This is implicit in Garasellassie’s letter that was addressed to Maritin, Eritrean governor in which he expressed his view regarding Kunama land. According to Garasellassie, “Cunama is a name that we generally apply to all of the Baria villages.”⁸⁷ Baria is a tribe to the very north in Eritrea. May be Garasellassie took Kunama land was far way from the actual Kunama land.

⁸⁸ As clearly expressed in para. 5.34 EEBC reference to Kunama tribe involves two prong action. One determination of boundaries of Kunama which is not easy then determining boundaries of Ethiopia and Eritrea. If the first step skipped or cannot be done, the next stage also fails.

⁸⁹ EEBC remarked, “It has noted that three early Italian maps how the Ethiopian claim line, as does not Ethiopian map of 1923.” (*EEBC supra* note 69, Para 5.88)

⁹⁰ *Id.* at para 5.88 in which EEBC remarked “ There is no record of any timely Ethiopian objection to these maps.”

⁹¹ As EEBC pointed out, Ethiopia did not fully administer or claimed its authority over the whole territory until western Maiteb. (See *Id.* at para 5.93 – 5.95 EEBC also pointed out that Ethiopia exercised its authority only 1/5 of the claimed territory. Given economic development, communication and technological backwardness, it was not

Ethiopian citizens at Mai Tani.⁹² In 1931 – 1932 there was incident in area of Mochiti, which is in Yirga Traiangle that EEBC views within Eritrea’s claim line.⁹³ At the time, Ethiopia sought Eritrean authorities to withdraw from Mochiti and Gongoma.⁹⁴ Also sporadic friction happened at Acqua Morchiti.⁹⁵ In 1920’s Ethiopians repeatedly requested for demarcation of the border that fell into deaf ears.⁹⁶ These clashes, and requests to cease and decess “illegal intrusion” proves Ethiopia’s rejection of Italy’s move.

Most importantly, EEBC has failed to say a word on effect of 1935 Italian invasion and nullity of earlier treaties and redrawing internal administrative boundary line. Italy after occupying Ethiopia, it mingled its East African colonies. In this situation should it be fair to refer to the failed colonial treaties and elusive boundary lines it sought to draw?

6.2.1.4.2. *The Central Sector*

The 1900 Treaty covers the Central Sector starting from the last end of Western Sector at Mai Ambessa. It is noticeable that the 1902 Treaty has modified the first part of the 1900 Treaty. In this Section we will briefly deal with the supposed boundary line in between Mai Ambessa, Mareb, Belesa and Muna until it is linked by the 1908 Treaty of Eastern Sector. Central Sector, like the Western Sector of the borderline, is a contentious boundary regime.

As pointed out in the foregoing Chapters, the 1900 Treaty was a note of one page in which only a single provision meant to define Central Sector of Ethio-Eritrean boundary. The single provision merely mentions supposed boundary rivers. Thus the Central boundary line was

easy to reach all its territories. Italy was advanced at the time and had all possibilities to patrol and control all territories including Ethiopia. (*Id.* at para 5.93).

⁹² *Id.* at Para 5.74.

⁹³ *Id.* at Para 5.76.

⁹⁴ *Id.*

⁹⁵ *Id.* at para 5.94.

⁹⁶ See *Id.* at paras 5.66, Para 5.72

assumed to follow “Mareb”, “Belessa”, and end at the juncture of “Muna”.⁹⁷ While “Mareb” starts at the conjunction of Mai Ambessa, the end of supposed river course of Muna is a perplexing task – there was river called Muna in the vicinity. In Irob regions, for example, the boundary line marked by River Muna has been strongly condemned, as the local people do not know a river called “Muna.” It is either non-existent or captioned by another name. The traditional administrative boundary between territories currently making Eritrea and Tigray was River Mereb. Territories beyond River Mereb captioned as Medri Bahir (a name used by Abyssinians before Italian colonization). The original version of 1900 Treaty appears to reflect the traditional territories of Medire Bahir. As a result, during setting boundaries of Eritrea, Emperor Minilik II sought the boundary line to be deep north in Eritrea’s territory, but Italy offered a gift of 5,000,000 that silenced the Emperor to accept the boundary line at Mareb, Belessa and Muna water courses.⁹⁸

Central boundary line is marked by river course of Mai Ambessa, Mareb, and Belesa. “The identity and courses of Mareb, the location of its confluence with the Mai Ambessa, and the location of its confluence with the Belesa, are all agreed by the Parties.”⁹⁹ This is a *de facto* (traditional administrative) boundary between *Agame* district of Tigray and *Acchale Guzai* district of the former *Medire Bahir* (renamed as Eritrea by Italy). As a result of long recognition of Mareb, Belesa as Boundary Rivers, there is no apparent dispute in this part of the Central Sector.

As pinpointed above, the most important problem of Central Section of Ethio-Eritrean boundary is “nomenclature for various stretches of relevant waterways, in particular the Belesa and the Muna.”¹⁰⁰ The changing nomenclature coupled with scanty maps that were based on limited geographic information and documentary references compounded the problem. The 1900 Treaty

⁹⁷ This coincides with provisional boundary agreement that was entered for building peace after the battle of Adwa. Article IV of the Peace Agreement of October 1896 states “[...] provisional frontier, determined by the courses of the Mareb, Belesa, and Mouna Rivers.” (*Id.* at para 4.6.).

⁹⁸ *Id.* at Para 4.7.

defines boundary line to follow watercourses of Belesa-Muna but identification of an intended watercourse that may be considered as boundary lines is an uphill task. Settlement of the intended watercourse that may be taken as Belesa will definitely help resolve the dispute. Resolution of the issue involving an actual watercourse of Belesa and identifying a river captioned as Muna are crucial to delimit boundaries of central sector. It will not only resolves sovereignty over Badme but also would resolves *Irob* issue.

The Treaty Map shows Belesa flowing to easterly direction.¹⁰¹ It also shows the two unnamed small rivers that flow to the direction of the river Belesa; one flowing from south toward Belsa while the other one from east. Despite the map that shows no tributary flowing from north to Belesa, in fact there are several tributaries flowing from northeast to Belesa.¹⁰² The other complexity is modern maps depict two rivers that may be viewed as Belesa.¹⁰³ Each party chose a river that supports its claim. EEBC captioned these rivers as: Belesa A, Belesa B and Belesa C. Modern maps also show several unnamed small rivers flowing northwards to Belesa from south.

Eritrea claims Belesa B as a tributary to actual Belesa (Belesa A as designated by EEBC). Ethiopia, however, strongly argues that Belesa A is the tributary of actual Belesa (i.e. Belesa B). EEBC has accepted Ethiopia's assertion.(Para 4.22). Thus, Belesa A is southern tributary of the actual Belesa (Designated by EEBC as Belesa B) (para 4.18) As described in paragraph 4.23 the treaty map shows a small tributary to Belesa B, which was not named in the treaty map or de chaurands' map. Ethiopia "identifies" this tributary as Sur. (Para 4.23) EEBC designates as Belesa C. Later EEBC took this tributary as "[...] continuation of the boundary line [...]" (Para 4.23). Though the treaty map is silent, modern maps depict several tributaries to Belesa C. The treaty

⁹⁹ *Id.* at Para 4.11.

¹⁰⁰ *Id.* at Para 4.14.

¹⁰¹ *Id.* at Para 4.16.

¹⁰² de Chaurand map expresses these tributaries as T. Tserona. Between points 11 and 12. (*Id.* at Para. 4.17)

map instead goes overland to River Muna. However, EEBC decided, “[...] Treaty Boundary follows the line of the most southerly of the small tributaries of the Belesa C. On modern mapping, the tributary has its source close to the modern town of Zalambessa.”¹⁰⁴

The next issue relates to location and identity of River Muna. Both contending Parties agree the fact that the treaty reference to “[...] the boundary line in this sector [...] cannot be literally correct.” (Para 4.25). The most perplexing problem with regard to River Muna is disagreement by the Parties regarding identity of the very river – *Muna* (Para 4.26). While the treaty map refers to *Mai Muna* and de Chaurand map captions it as *Maj Mena* which flow East South arising from south of *Barachit* until it reaches *Endeli* and *Ragali* (Para 4.27).

As the Treaty Map either omits or “contains inconsistent indications,”¹⁰⁵ Ethiopia views a river designated as *Mai Muna* as *Endeli* and the river depicted in the Treaty Map as *Mai Muna* as *Berbero Gedo* (Para 4.28). As a result of the dilemma, EEBC has used both of the names of the river suggested by Ethiopia and Eritrea simultaneously. Ethiopia proves persistent confusion over river “Muna” in 1900 Treaty as follows:

- (i) Ciccodicola, the principal Italian negotiator, recorded in 1903 that “the Endeli, a tributary of the Muna, [had ben] designated to him[i.e., Emperor Menelik] as waters of the Muna, “ and that it was on that basis that the Emperor had signed the 1900 Treaty;
- (ii) In January 1904 the Italian Governor of Eritrea noted in his diary that “[o]ur mistake is to have confused it [the Muna] with the Endeli, “a confusion which Ethiopia suggests shows that the Parties intended the boundary to follow the northernmost branch of the Endeli system, thereby leaving the Irob district to Ethiopia.
- (iii) The Italian Boundary Commission of 1904 [...] was unable to find a river clearly identified as the “Muna.” [...] expressed considerable uncertainty in its attempt to identify the Berbero Gado as the river corresponding to the “Muna”¹⁰⁶

Consequently, Ethiopia strongly argues that Irob woreda as part of Agame, but Eritrea denies.¹⁰⁷

¹⁰³ *Id.* at Para 4.16

¹⁰⁴ EEBC *supra* note 69. Para 4.24.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Ethiopia's assertion is based on facts on the ground. At a location designated as Muna actually we have Endelli. The river course marked on the map is actually Berbero Gedo. Eritrea, however, stick to the wording of colonial treaty or unilateral maps. To Eritrea a river identified on the map as "*T mai Muna*" with its head water south of *Barachit*, constituted the boundary and that there was a river with the name in the place so that this river was the boundary."¹⁰⁸ EEBC preferred to the Eritrean line of argument, which disregards facts on the ground and adjudged taking literal wordings of treaty. It concluded, "Parties had agreed to a treaty which referred to the *Muna* and that the treaty map showed a boundary line following a river designated as *Muna*, following from south of *Barachit* running generally east toward to Salt Lake."¹⁰⁹

The last issue that EEBC decided on regarding Central Sector was is the eastern terminal point. As usual there was disagreement on this point. Eritrea argues, "*Muna* ends at the confluence with the *Endeli* (located at the village of Massolae, at point 27 (para 4.45). Eritrea further asserts that Endeli turns northeast and becomes Ragali in which the river continues southeast to Djibouti. (para 4.45). Surprisingly, the 1900 Treaty or the accompanying map, nor the 1908 treaties does not clearly reveal the terminal point at Massolae. In fact, Massole is located within 60 kms distance as stated in 1908 Treaty but both River Muna and the boundary line extends beyond Massolae. (para. 4.47). Thus, Massolae's apparent location within 60 Km scope cannot be a ground to conclude Central Sectors ends at Massolae. Ethiopia, however, argues that the river that may be termed as 'Muna' continues to the town of Ragali and then the terminal point lies. Therefore, EEBC did not accept Eritrea's line of argument regarding the end of 1900 Treaty and the beginning of 1908 Treaty, as the Treaty map depicts that the river captioned as Muna continued toward eastward and terminated at Salt Lake. (4.49). Taking note of contemporary situation and based on 1900 Treaty

¹⁰⁷ *Id.* para 4.29.

¹⁰⁸ Shaw *supra* note at 769.

and accompanying map EEBC decides that boundary line “follows Ragali at point 29 until reaches its terminus at the Salt Lake.”¹¹⁰

6.2.1.4.3. *The Eastern Sector*

The 1908 Treaty sets the Eastern Sector of Ethio-Eritrean boundary. The Eastern Sector runs, “ From the most easterly point of the frontier established [...] by the Treaty of the 10th July, 1900, the boundary continues south-east, parallel to and at a distance of 60 kilometers from the coast [...]”¹¹¹ The Treaty of 1908 has deprived Ethiopia’s historical access to sea. It may be surprising to know that Emperor Minilik II had suggested the 60 Km from coast “formula” to serve as “*modus vivendi*” to set the eastern sector of Ethio-Eritrean boundary.¹¹² It is plausibly wrong to suggest that Minilik II deliberately acted in a way affecting Ethiopia’s interest. It is true Ethiopia needs sea access and there is no reason to give away its land without any consideration. On Ethiopian side there is still unsettled issue: why Minilik II had negotiated to give Ethiopia’s right of sea access way? The 1908 treaty does not supply any rationale for setting the boundary line at the stated spot and all other justifications may be speculations. Among the various intelligent guesses, Italian subtle influence will take forefront. As a result of this treaty Ethiopia has been paying unnecessary cost.¹¹³

The 1908 Treaty has some special features that were not stipulated in prior boundary treaties. First, unlike the prior treaties, the 1908 Treaty applies geometric boundary delineation method. As we have observed above, both 1900 and 1902 Treaties apply natural boundary making

¹⁰⁹ *Id.*

¹¹⁰ *Id.* para 4.54.

¹¹¹ 1908 Treaty, Art. I.

¹¹² EEBC *supra* note 69 para 6.9.

¹¹³ The Treaty of 1908, especially created generational cost to Ethiopia as Ethiopia deprived of sea access. It is, however, not possible to sum that Minilik II deliberately acted in a way affecting Ethiopia’s interest. Due to Italy’s expansionist move the very motive of Minilik II was to restrain them by setting a clear boundary line that

methods by using rivers, mountains or lakes, but 1908 treaty declares mathematical rule for delineating easterly boundary. Second, unlike prior boundary treaties, the 1908 Treaty is not a treaty of single provision – it has six provisions. Thirdly, the 1908 Treaty makes consideration of geographic facts on the ground and attempts to keep socio-economic relationship among the borderland residents from both sides. Thus, the 1908 Treaty not only makes boundary line, but also declares rules that meant to regulate continuity of historical relationships among the borderland people that were split by the artificial borderline. It also stipulates mechanisms of dispute resolution.

The Eastern Sector of Ethio-Eritrean boundary commences from the end of the Central Sector – that is Salt Lake and ends at the northwestern end of the Djibouti border. Eritrea argues that the 1908 treaty has clearly set boundary and demanded only demarcation in accordance with the *modus vivendi*. However, EEBC did not accept this assertion stating that there were several issues that need to be settled before the actual demarcation. First, as the boundary measurement has to start from coast, a spot that may be taken as coast has to be settled. Second, an exact point at which the boundary line terminates has to be agreed or decided. Finally, the supposed boundary line was not demarcated for long time and the delimitation is not complete in accordance to the wordings of the treaty that require consideration of facts on the ground.

The term “Coast” may be asserted to include islands in which case the boundary line may be set at the Red Sea but Ethiopia “[...] abandoned its conception of the coast as including islands and submitted in its concluding argument [...]”¹¹⁴ Thus, the term “Coast” has to be understood “the continent itself.”¹¹⁵ This aligns with the Eritrea’s position. EEBC has decided to implement the

should not be crossed. Given limited international transaction and foreign interaction, it may be possible to imagine that the priority was setting a clear boundary instead of seeking sea access.

¹¹⁴ EEBC *supra* note 69 para 6.19.

¹¹⁵ *Id.*

Eastern Sector by taking satellite image of the coastline of Eritrea and then computing up to 60 Km inland.¹¹⁶

With Regard to the Eastern Sector EEBC did not accept Parties contention of subsequent acts that could potentially modify the treaty boundary. Almost all of the Eritrea's contentions fell within the scope of geometric boundary delineation. The calculation of the mathematical boundary begins from the coast to point 31 and it proceeds in the same way until reaches to the western edge of Ethio-Djibouti boundary at point 41.

In conclusion, EEBC has heavily relied on the unilateral Italian maps, colonial reports, comments and memos to ascertain elusive treaty wordings, confusing and unavailable or changing river designations. Ethiopia persistently argued against undue reliance on colonial reports, memos or unilateral maps that did not coincide with treaty wordings, especially in the Western Sector. While the 1902 Treaty expresses the boundary follows river "Maiteb" at the juncture of Setit, EEBC considered unilateral Italian maps and other personal notes, like Ciccordicola's report, and memorandums of Martine, the then governor of Eritrea, regarding Western Sector and to find out intention of parties. The maps, reports or memos or comments may reflect Italy's intention but not necessarily common thoughts of the Parties. Similarly in the Central Sector various tributaries were not considered in the treaty and EEBC troubled to find out a river that may taken as *Belessa*. Though EEBC took a mid way approach to decide the treaty river *Belesa* B which flows to unavailable or a wrong river called *Muna*.

These confusions led to the delimitation of unacceptable boundary line that has staled demarcation or led EEBC to get out of the case at the back door by declaring the most confusing and unintended demarcation – virtual demarcation. There are several issues that were pending to be decided during actual physical demarcation. For instance EEBC remarked, " the Commission

¹¹⁶ *Id.* para 6.21.

holds that the determination of the boundary within rivers must be deferred until the demarcation stage.”¹¹⁷ With regard to the specification of coordinates at the Eastern Sector EEBC again concludes, “All coordinates will be recalculated and made more precise during the demarcation as the Commission acquires the additional necessary information.”¹¹⁸ A commentator familiar with Ethio-Eritrean situation remarks, “[...] in view of highly relevant social and historical aspects of the boundary issue, the EEBC decision is not the best that could have been made, and may in fact have perpetuated the conflict between the two countries.”¹¹⁹ EEBC’s decision has not met the goal of Algiers Agreement. It has not normalized relationship; we have still antagonism, fear, and threat of armed confrontation. Jon Abbink concludes, “[...] it seems that there are flaws in [EEBC’s] judgment.”¹²⁰ He further notes, “Some claim that the EEBC missed a great opportunity to bring the resolution of the conflict a decisive step forward.”¹²¹ Others, however, view that given the mandate envisaged in Algiers Agreement, EEBC did “[...] best that could be made on the basis of the pertinent colonial treaties and applicable international law.”¹²² Whatever the justification be, in reality, the Ethio-Eritrea issue is not solved yet; the key to unlock the deadlock at the hand of the both nations.

6.2.1.1.2 Applicable International Law

In addition to the three colonial treaties, EEBC was authorized by the Parties to consider the “applicable international law”. The Algiers Agreement has no provision defining the meaning and scope of “Applicable International Law,” but Ethiopia later, in the midst of hearing unsuccessfully attempted to limit the scope of “Applicable International Law” to the interpretation

¹¹⁷ EEBC *supra* note 69, Para 7.2.

¹¹⁸ *Id.* at 101.

¹¹⁹ Abbink, *supra* note 7 at 142.

¹²⁰ *Id.*

¹²¹ EEBC purely relied on elusive colonial treaties by ignoring “applicable international law. Jon Abbink remarks, “From the purely legal point of view this is also a puzzling feature.” views this ignorance “*Id.* at 146.

of treaties. EEBC, however, did not accept this contention. EEBC afforded an expanded connotation to the notion as defined in *Botswana/Namibia Case*.¹²³ In this Case, Contesting Parties requested ICJ to determine the dispute in accordance with Anglo – German Treaty of July 1890 and the rules of and principles of international law. The Court, however, declared that the meaning of principles of international law was not merely confined to interpretation of treaty wordings. Similarly, EEBC concluded that the expression, “Applicable International Law” meant rules of international law applicable to resolve border dispute “[...] in particular, the rules relating to the effect of conduct of the parties.”¹²⁴ It includes, all doctrines, practices, conventions, customary laws and international law precedents.

Though EEBC was expressly barred from application of *ex aequo et bono* (what it thinks merely “just and fair”) or cannot simply be guided by its conscience, the belief and understanding of a member had huge impact in resolving dispute. Confronted with dilemma, in several instance the arbitrators resorted to their belief, stating “the Commission believes....” The exclusion of the doctrine of “*ex aequo et bono*” actually was not helpful, as it justified EEBC to turn blind eyes whatever injustice happens due the supposed boundary line. EEBC’s boundary line would divide family, ethnic groups that have been living together from the time immemorial. Take, for instance, the case of *Irob* people who have decided to fight EEBC’s delimitation decision that would divide them.

Generally, under the authority of “applicable international law” EEBC was not confined to the rules of interpretation of treaty provisions, but was empowered to apply both substantive and procedural law doctrines of international law, including but not limited to, the accepted international principles of international law like, principles of estoppel, the notion of critical date,

¹²² *Id.*

¹²³ Kasilik Sedudu Island (Botswana/Namibia) ICJ REP. 1045, 1058, (1999] cited in Shaw *supra* note 59 at 758.

principles of determining boundaries following rivers,¹²⁵ the doctrine of *uti possidetis*, international precedents, the rule of *effectivity*, the doctrine of contemporaneity, and subsequent conduct of parties and so forth.

As both Parties do not contest regarding the coverage the three colonial treaties cover the whole boundary between Ethiopia and Eritrea, EEBC rightly gave priority to the colonial treaties before resorting to international law. An applicable international law may come into play only when the treaties fail to draw a clear boundary line. Put simply, resort international law may be made only to fill treaty lacunae, or facts on the ground or the borderline was changed by the subsequent act of parties. Thus, “[...] relevant treaties had to be examined first, and only then would recourse be made to the rules of general international in order to see if provisions of the treaties needed to be modified.”¹²⁶ When words or phrases in the treaties appear vague or hold varied meaning, EEBC had authority to ascertain the meaning of treaty wordings by assessing the intention of parties in accordance with the principles of international law.

In accordance with ordinary rules of interpretation, if literal interpretation of words, phrases or statements is not helpful to ascertain meaning, the tribunal may assess common intention of parties at the time of conclusion of treaty. The tribunal will not simply search for intention of one of the parties to a treaty, as it may lead into a wrong conclusion, as the intention or assertion of one party may not necessarily be acceptable to the other party. It may be easy to find out of the motives of one of the parties, but it cannot prove common intent. Needless to say, assessment of intention of one the Parties to the treaty is contrary to the accepted rules of interpretation of laws and would lead into a wrong conclusion.

¹²⁴ EEBC *supra* note 69 para 3.15. cited in Shaw *supra* note 69 at 755.

¹²⁵ Argentina/Chile Frontier Case, 9 December 1966, available at http://legal.un.org/riaa/cases/vol_XVI/109-182.pdf (accessed 02/21/16 11:16).

¹²⁶ Shaw *supra* note 69 at 759.

In accordance with the international law doctrine of contemporaneity, treaties should be interpreted “ [...] by reference to the circumstances prevailing when the treaty was concluded.”¹²⁷ Socio-economic facts, names, meaning of words, outlooks and so forth prevailing at the time of conclusion of treaty should be taken into account. For example, most Ethiopians, at present question why Emperor Minlik II consented to the biased colonial treaties, or concluded treaties with Italy to separate Ethiopian territories? A response to these questions if based on current facts would lead into condemnation. To respond correctly, we have to put ourselves into early 19th century Ethiopia and assess the overwhelming pressure from European side on largely unexposed African tribal chiefs. Similarly, “ The determination of the meaning and effect of a geographical names used in a treaty, whether of a palace or of a rive, depends upon the contemporary understating of the location to which that name related at the time of the treaty.”¹²⁸

A treaty may be modified by express words or by subsequent conduct of parties or one of the parties with implied or express approval of the other party. Assessment of subsequent conduct of parities is vital as it may amend the treaty provisions by conduct ascertainable to both parties. Silence of a party, where an overt act that is contrary to the treaty took place, may be taken as implied approval. As EEBC has quoted from Permanent Court of International Justice, in assessing subsequent conduct the most important consideration is, “ [...] whether the Parties by their conduct have altered or impaired their rights.”¹²⁹ In Ethiopia and Eritrea case, numerous subsequent conduct that had huge impact on the colonial treaties may be cited. The Italian invasion of 1935 was the most notorious one that has trashed all of the treaties. Moreover, the treaties were not known to the local people and previously unoccupied regions like *Badme* were settled by the local people who never assumed the territory belonged to some one else. After Eritrea’s federation to

¹²⁷ *Id* at 762.

¹²⁸ EEBC *supra* note 69 para 5.17.

Ethiopia, the treaties were formally rendered null and void, which was not opposed by the Eritrean parliament.¹³⁰

Subsequent contrary conduct by one of the party's can be taken as variation of the terms of treaty if the other party takes no action. Even the case of *Badme* is disputable, assuming it was on the Eritrean side, in 1950 Ras Mengesha of Tigray developed *Badme* plains for commercial agriculture and agricultural workers and laborers settled therein without any objections from, Eritreans parties or any organ acting on behalf of Eritrea. This may be taken as an instance of modification of treaty provision by one of the parties. As summed by ICJ in *Temple Case* if subsequent conduct of a party "[...] which it was reasonable to expect that the other would expressly have rejected if it had disagreed with it, the Court concluded that the later was estopped or precluded from challenging the validity and effect of the conduct of the first."¹³¹ The arbitration agreement between Egypt and Israel often referred, as *Taba Case*¹³² is another situation illustrating variation of treaty by subsequent conduct. In this case pillars were erected at a spot contrary from treaty wordings but for a long period there was no objection. This was taken as tacit acceptance and parties later estopped from challenging the variation.

EEBC has also considered *effectivite's*, actual display of sovereignty, as a ground that may alter treaty provisions. For determination of actual display of sovereignty determination of critical date is vital. In the case of Ethiopian and Eritrean boundary, the question is the *critical date* in which Italy took sovereignty over the territories delineated by the colonial treaties. If signature on boundary treaty creates boundary line irrespective of demarcation, it may be taken colonial treaties

¹²⁹ Serbian Loans, PCIJ Series A. Nos. 20/21, 5, 38 (1929) cited in EEBC *supra* note 69 para 3.6.

¹³⁰ When it comes to the Ethiopian situation, subsequent conduct not merely modified the treaties, but killed them. EEBC rightly remarked in paragraph 3.8 that "[...] the effect of subsequent conduct may be so clear in relation to matters that appear to be the subject of a given treaty that the application of an otherwise pertinent treaty provision may be varied, or may even cease to control the situation, regardless of its original meaning." (*Id.* Para at 3.8).

¹³¹ Temple of Peah Vihear (Cambodia v. Thailand) ICJ REP. 6(1962) quoted by EEBC *supra* note 69 para 3.9.

had already created in Addis Ababa. This assertion may not necessarily be true in all circumstances. Sometimes, enforcement of treaties may be attached with some conditions of important procedural requirement. Take, for instance, the need for ratification or registration of treaties for its finality. In these cases, a treaty cannot automatically create boundary line until the stated condition is met or procedural requirement's satisfied.

Colonial treaties that supposed to define Ethio-Eritrean boundary, were not only vague but were also incomplete. In numerous instances the treaties deferred boundary making to later date for consideration of local facts, which was never done until EEBC's decision in April, 2002.¹³³ For instance, EEBC summed that "[...] each of these boundaries was, to varying degrees, not fully delimited."¹³⁴ The boundary was not only fully and clearly delimited, but also totally not

¹³² Arbitral Award in the Dispute Concerning Certain Boundary Pillars between the Arab Republic of Egypt and the State of Israel 80 ILR 226 (1988), 27, ILM 1421 (1988) herein after "Taba" as quoted by EEBC (*Id.* para 3.10)

¹³³ Take the case of 1902 Treaty, which deferred determination of Kunama territory. As EEBC affirms, "The line from the junction of the Setit and Maieteb to the junction of the Mareb and Mai Ambessa shall be delimited by Italian and Ethiopian delegates, so that the Canama tribe belong to Eritrea." (1902 Treaty Art. iii) The scope of Kunama territory had been changing frequently and a settled territory that might be viewed actually as Kunama never been determined in accordance with wordings of the treaty. This can be inferred from Garasellassie's letter of August 8, 1902 which stated Ethiopian impression of the boundaries of kunama. Grasellassie, the then governor of Tigray states, "Cunama is a name that we generally apply to all of the Baria villages." Currently Baria region is located deep inside Eritrea. Similarly an Italian report of 1932 that was written by a Regional Commissioner of the Western Lowland, denti di Pirjano, reveals absence of Kunama in states area. EEBC remarks, "While clearly evidencing the absence thereof Cunama at that time, it does suggest that Cunama had lived there earlier." (see EEBC *supra* note 69 para 5.75) It appears possible to appreciate elusiveness of colonial treaties and disparity between the treaty and actual reality on the ground. (*Id.* para 5.47). The 1908 Ethio-Eritrean treaty referred actual boundary that would take local geography of Afar community to be determined, but never done. Art II of 1908 Treaty States, "The two Governments undertake to fix the above mentioned frontier –line on the ground by common accord and as soon as possible, adapting it to the nature and variation of the terrain." But no action has been taken so far. With regard to river boundaries, both Ethiopia and Eritrea not only rejected determination of river boundary by reference to coordinates. The Parties also declared deferment of river line determination to demarcation stage (*Id.* para 7.2. – 7.3) which is not done so far. Regarding determination of actual boundary line in the vicinity of Tserona EEBC summed that a precise boundary line "[...] to be determined more precisely during the demarcation," which still not done. (See *Id.* para 8.1 iv) Similarly, EEBC concludes, "The current outer edge of Zalambessa will be determined more precisely during the demarcation" (*Id.* para 8.1 vi). However, it was never determined. Finally, the Commission concluded, "All coordinates will be recalculated and made more precise during the demarcation as the Commission acquires the additional necessary information." (*Id.* para 8. 3) But never done

¹³⁴ EEBC in Para 2.7. For instance, the English translation of Amharic version of Art. iii of 1902 Treaty is a clear instance. It states:

The boundary between the junction of the Mai Ten and Setit to the junction of Mereb and Mai Ambessa will be decided after representative of the Italian government and the Ethiopian government look into the question and reach agreement.

demarcated. It was with this understanding that EEBC was conferred with the authority to delimit and demarcate the boundary. However, any argument that claims total absence of borderline between Ethiopia and Eritrea cannot hold water. As each region in Ethiopia has its known boundary line, there is a clear line of separation that has been accepted to borderland residents. This is a clear and undisputable boundary line but colonial treaties have distorted it.¹³⁵

As repeatedly pinpointed, the Ethio-Eritrean colonial treaties were concluded in Addis Ababa, but nothing was done on the actual border until the eve of WWII in 1935 in which Italy occupied the whole Ethiopian territories including territories stated in the colonial treaties. EEBC concluded that colonial treaties were crystalized in 1935 when Italy invaded the whole Ethiopia and actually took control of the whole Ethiopian territories.

Determination of the critical date is very important in international boundary making. In the case African States that liberated from colonial yoke, a critical date for determination of boundary is the date of independence.¹³⁶ OAU's Framework Agreement, and the Algiers Agreement pointed to the Cairo Resolution of 1964 for determination of boundary. In Eritrean case, the situation is very complicated. After Eritrea was liberated from Italian occupation it was held under British trusteeship for ten years until 1952 and later Eritrea federated to Ethiopia and Haile Selassie declared that Mereb no more separate brothers and the traditional boundary (Mereb) was changed into internal boundary. After Eritrea's reunion with Ethiopia in 1962 boundary issue was totally dead and all Ethiopian territories were mingled. Internal administrative boundaries were redrawn during the military regime. After 30 years of war Eritrea got *def acto* independence in 1991 and *de jure* independence in 1993. Until May 1991 Eritrea was never been independent.

And also para 5.42 states, “ The details of the line between the Sittona, the river they actually had in mind, and the Mareb wee, however, left for later delimitation. *No formal delimitation was ever carried out.* ” (Emphasis added.) (*Id.* at para. 5.42.).

The Framework Agreements and Algiers Agreement point to the date of independence, but did not mention the actual date of independence, apart from reference to the OAU's Resolution of 1964. Stating all events that happened since 1935 and concluding that all these events did not change the boundary line, stating, "[...] the Commission can perceive nothing in that chain of developments that has had the effect of altering the boundary between the parties. The boundary of 1935 remains the boundary of today."¹³⁷

Until 1950 *Badme* plains were vacant. As there was more land than the number of people that may be interested to use it, no one needed it. But in 1950 the development of commercial agriculture necessitated use of vacant lands. Accordingly the then governor of Tigray operated commercial agriculture in *Badme* plains thereby initiating the settlement of Ethiopians. This may be taken as an actual display of authority that was never challenged.

Even if the treaty or its interpretation on account of unsettled nomenclature of rivers put the town of *Badme* on Eritrean side, the rule of *effectivites* or subsequent conduct should have been prevailed. *Effectivities* reveal the true intention of the parties. As EEBC remarks:

“There is no set standard of duration and intensity of such activity. Its effect depends on the nature of the terrain and the extent of its population, the period during which it has been carried on the extent of any contradictory conduct (including protest) of the opposing State. The conduct of one Party must be measured against that of the other. Eventually, but not necessarily so, the legal result may be to vary a boundary established by a treaty.”¹³⁸

With regard to *Badme* Ethiopia presented tremendous evidence proving *effectivites*' but never been considered as important evidence. Rather EEBC hunted unilateral comments, reports, maps and memos that were authored by colonial Italy, which led into a wrong decision that cannot be accepted unless modified through constructive dialogue.

¹³⁵ The borderland resident of both states for sure cognizant of the true borderline. If this line of making an acceptable borderline a stable boundary line may be drawn.

¹³⁶ Shaw *supra* note 59 at 759.

¹³⁷ EEBC *supra* note 69, paras 5.90 – 5.91.

¹³⁸ *Id.* Para 3. 29.

6.3. The Arbitration Award and Consequences

After declaration of the delimitation decision on April 13, 2002, there was confusion and misunderstanding, as the award did not clearly specify the actual location of *Badme*. As a result, both Parties declared success and happily accepted the award.¹³⁹ Later Ethiopia learnt that *Badme* was awarded to Eritrea. After realizing the contours of the award, Ethiopia formally requested for reconsideration of the delimitation decision with a view to avoid catastrophic effects on the borderland residents that have been residing on the borderland for centuries. Ethiopia contends that EEBC awarded some of the territories that were never been under Ethiopian administration to Ethiopia, and wrongly allocated Ethiopian territories to Eritrea thereby dividing families, ethnic groups, villages and towns.¹⁴⁰ Consequently, Ethiopia has concluded that demarcation on the basis of literal terms of the delimitation would trigger greater evil that may generate a catastrophic effect. The Boundary Commission, however, has rejected Ethiopia's request for reconsideration stating it was beyond mandate, unless Eritrea so consents. Eritrea expressly denied any form of revision or reconsideration and started campaigning to pressurize Ethiopia respect terms of the Algiers Agreement or face sanction.

The two states have virtually declined cooperation with the Boundary Commission though cooperation was one of the terms of the Algiers Agreement.¹⁴¹ Ethiopia almost stopped working with the Commission since its request for reconsideration was expressly rejected. Eritrea in its turn, not only failed to respond to the Boundary Commission's repeated request, but also restricted

¹³⁹ There was celebration in Addis Ababa as it was declared on the mass media that Ethiopia won the case taking *Badme*. Later it was understood that the AU representative who took part during the declaration of the decision sent a message to AU headquarter that *Badme* was on the Ethiopian Side. As *Badme* was not expressed on the delimitation map, it was really confusing. According to Healy & Plauti, "[...] the 125 page Delimitation Decision with accompanying maps, was dense and difficult for a layperson to absorb." See Healy & Plauti *supra* note 8.

¹⁴⁰ Take, for instance, the case of *Tsorena* and *Fort Cadona* that never been under Ethiopia but later allocated to Eritrea as Ethiopia formally admitted these cities never been under Ethiopian administration and not Ethiopian territories.

¹⁴¹ *Id.*

movement of UNMEE that has been monitoring the buffer zone thereby breaching the Algiers Agreement on Cessation Hostilities.¹⁴²

Despite lack of cooperation from the parties, EEBC attempted to demarcate the Eastern boundary.¹⁴³ Ethiopia declined to comment on the proposed boundary map on the Eastern sector. EEBC took Ethiopia's silence as acceptance and concluded the boundary point determination was final. Ethiopia accepted the boundary points and "[...] approved the Commission's method of demarcation."¹⁴⁴ In accordance with the Algiers Agreement EEBC had to carry out an actual demarcation sector by sector and pillar building in Eastern Sector has to be completed. But Eritrea refused to allow the actual demarcation stating, "[...] no demarcation should take place in any part unless it was absolutely clear that demarcation would take place in all parts in accordance with the Commission's delimitation decision."¹⁴⁵ As a result, the actual physical demarcation on the planned Eastern region was stalled. In Central and Western sectors Ethiopia refused to allow demarcation demanding negotiated settlement with a view to draw a borderline that takes interest of borderland people.¹⁴⁶

After the effort to demarcate the border was failed, EEBC issued directive on November 27, 2006 that the Commission cannot remain in existence indefinitely¹⁴⁷ and proposed Parties reach into agreement for actual demarcation threatening, otherwise, to consider the boundary as “

¹⁴² *Id. para. 15.*

¹⁴³ See VICTOR PRESCOTT AND GILLIAN D. TRIGGS, INTERNATIONAL FRONTIERS AND BOUNDARIES, LAW, POLITICS, AND GEOGRAPHY, I, 141(2008).

¹⁴⁴ STATEMENT OF EEBC, *supra* note 139 Para. 15.

¹⁴⁵ *Id.*

¹⁴⁶ As reported by the Chief surveyor Ethiopia declined to allow demarcation in the Badme and Irob vicinities while supporting demarcation in other areas. ERITREA-ETHIOPIA BOUNDARY COMMISSION, ELEVENTH REPORT Annex I to STATEMENT OF EEBC November 27, 2006, Available at http://www.pca-cpa.org/showpage.asp?pag_id=1150

¹⁴⁷ The Commission based its decision on the Court of Arbitration in the *Beagles Channel Case* in which one of the parties to the case refused to cooperate. In *Beagles Channel Case* it was concluded that, “It is not admissible that, because of the total non-cooperation of one of the Parties, contrary to its obligation under a valid Award, the Court should be compelled to remain indefinitely in existence in a state of suspended animation.” 52 International Law

[...] automatically stand as demarcated by the boundary points [...]”¹⁴⁸ The Parties could not agree for the actual demarcation as required by the Commission within the one year time frame and the Commission declared that, “[...] *boundary will automatically stand as demarcated* by the boundary points listed ... and that the mandate of the Commission can then be regarded as fulfilled.”¹⁴⁹ (Emphasis added). Eritrea has accepted the virtual demarcation while Ethiopia rejected it, stating a mere legal fiction.¹⁵⁰ Eritrea views that the boundary issue has been resolved by the virtual demarcation and asserts that Ethiopia illegally occupies sovereign territories of Eritrea and demands immediate and unconditional surrender. Ethiopia, on the other hand, argues that the boundary issue is not yet settled as the boundary is not yet marked on the ground in accordance with the Algiers Agreement and has been pleading for dialogue to settle to issue.

Later, due to the overwhelming international pressure, Ethiopia accepted the arbitration award “in principle”. To Ethiopia this does not mean attachment of condition, but it has a positive element, which aims to cure apparent defects within EEBC’s award that may hinder future relationship and peaceful coexistence. It is a plea for negotiated settlement to address some of the crucial blockades that would absolutely thwart peaceful settlement of dispute. Ethiopia, therefore, strongly believes that ambiguous terms of the colonial treaties have caused the unfair delimitation decision that is hard or impossible to implement on the ground. Unless the obvious anomalies that would generate irreparable damage are fixed in advance through constructive dialogue, peace cannot prevail in the region. Plainly speaking, Ethiopia expresses its acceptance of the delimitation decision but insists for making a true boundary line that is acceptable to borderland residents of

Reports 284 noted by ERITREA – ETHIOPIA BOUNDARY COMMISSION STATEMENT BY THE COMMISSION Nov. 27, 2006, Available at http://www.pca-cpa.org/showpage.asp?pag_id=1150 .

¹⁴⁸ ERITREA-ETHIOPIA BOUNDARY COMMISSION, TWENTY – SIXTH REPORT, Annex II Report of the Secretary –General on Ethiopia and Eritrea, UN Doc s/2008/40, Available at http://www.pca-cpa.org/showpage.asp?pag_id=1150 .

¹⁴⁹ ERITREA – ETHIOPIA BOUNDARY COMMISSION STATEMENT of 27 November 2006; *Id.* Para 22.

¹⁵⁰ EEBC *supra* note 147 para. 3.

both nations with a view to reduce harsh consequences by considering “[...] the human and physical geography through the study of facts on the ground,”¹⁵¹ and thereby build peaceful coexistence and normalize relationship. But Eritrea has rejected any form of dialogue and demands Ethiopia to comply with the “final and binding” decision as it is.

Nowadays, it has not been uncommon to notice Eritrean authorities, Eritrean diaspora,¹⁵² and even some dignitaries demanding Ethiopia’s ‘immediate’ withdrawal from border areas that were awarded to Eritrea.¹⁵³ President Isaias Afewerki has echoed Hank Cohen’s proposal, which demands Ethiopia to “accept *symbolic initial takeover* by Eritrea of border territories awarded by EEBC followed by the same day opening of dialogue....”¹⁵⁴ It is not clear what the former United States assistant secretary of state for Africa meant by a “*symbolic initial takeover*”. Similarly, Ambassador David Shinn, though fully aware of the ‘drama’ behind the boundary question tends to suggest, Ethiopia to “give up control over *Badme*.”¹⁵⁵

¹⁵¹ See STATEMENT OF EEBC November 27, 2006 Para 7. Available at http://www.pca-cpa.org/showpage.asp?page_id=1150

¹⁵² Rahel Weldeab, *Peace Requires Ethiopia’s Withdrawal from Sovereign Eritrean Territory*, TESFANEWS, <http://www.tesfanews.net/end-occupation-peace-requires-ethiopia-withdrawal-from-sovereign-eritrean-territory/> (Last visited Apr. 22, 2015).

¹⁵³ See Hank Cohen, *Time to bring Eritrea in from the Cold*, AFRICAN ARGUMENT, Dec. 16, 2013, <http://africanarguments.org/2013/12/16/time-to-bring-eritrea-in-from-the-cold-by-hank-cohen/> Last visited Feb. 11, 2015). See Dire tube, *Eritrea’s request for border demarcation rejected by AU members states*, Feb. 7, 2015, http://www.diretube.com/articles/read-au-member-states-eritrea’s-request-for-border-demarcation-rejected-by-au-member-states_8226.html#.VN5W5RY8Eb0 (Last visited Feb. 14, 2015).

¹⁵⁴ *Id.*

¹⁵⁵ David Shinn, *Time to Bring Eritrea in from the Cold (But it’s Harder than it Sounds*, AFRICAN ARGUMENT, (Jan. 13, 2014), <http://africanarguments.org/2014/01/13/time-to-bring-eritrea-in-from-the-cold-but-its-harder-than-it-sounds-by-david-shinn/> (Last visited Feb. 11, 2015). Ambassador Shinn, pinpoints some of the possible causes that have triggered the war as follows: Ethiopia’s refusal to allow Eritrea to freely transact with Ethiopia by using local currency, but Ethiopia issued a new paper note, which rendered the old birr notes that were in Eritrea useless, Ethiopia’s refusal to buy more share of oil from Assab refinery, and thereby making the refinery uneconomical and subsequent closure which in turn demanded Eritrea to buy oil through its own hard currency, superiority complexity among Eritreans purporting more educated and industrialized and so forth. For detailed analysis of socio-economic and political reasons behind the Ethio-Eritrean border conflict. See also Hamilton *supra* note 1 at 114.

This appears awkward for various reasons. Apart from a mere “demarcation” on the map, an exact territorial limit of both nations is not yet actually set on the ground.¹⁵⁶ No monument or pillar has been emplaced on the boundary line that supposed to separate the contested territories so far. On account of both Parties failure to cooperate with EEBC for actual physical demarcation, EEBC has declared a virtual demarcation. A virtual demarcation, which is a mere supposition of demarcation, simply assumes geographic coordinate¹⁵⁷ on the map as pillars or monuments on the ground. In reality nothing has been done on the actual borderline. As Ethiopia claims it, a virtual demarcation is simply a fictional demarcation and a legal nonsense.¹⁵⁸ Ethiopia, as a result, has been strongly insisting for an actual demarcation in order the demarcation to be legally binding.¹⁵⁹ As a matter of fact, a virtual demarcation serves no different purpose other than the very map. The geographic coordinates (boundary points) on the map can guide an actual point on which a boundary pillar to be emplaced, but assuming the points as monument or pillar makes no sense, as nothing is noticeable on the ground to avoid confusion and conflict. Kathleen Claussen rightly captioned a boundary line delineated by virtual demarcation as an “*invisible border*.”¹⁶⁰ Needless to say, an invisible border is an uncertain border that cannot meet the objectives of a defined border.

To Ethiopia the virtual demarcation is a simple assumption of demarcation, which has never changed facts on the borderland – still the borderland residents do not know the line of

¹⁵⁶ As Jon Abbink rightly remarks, “[...] despite the important and painstaking work done by the five ‘neutral’ international law expert on the EEBC no workable decision has been reached.” Abbink *supra* 7 note at 141.

¹⁵⁷ These are boundary points on the map which normally indicate locations in accordance with boundary markers supposed to be emplaced. But these points (coordinates) “[...] are not necessarily final and the Commission may be have to adjust or vary them in the course of demarcation. Only final demarcation map will be definitive.” EEBC *supra* note 69 para 2.16.

¹⁵⁸ Gro Nytuén and Kjetil Tronvoll, *The Eritrean- Ethiopian Peace Agreement: Exploring the Limits of Law*, NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETTER 19, 16-37 (2008).

¹⁵⁹ *Id.*

¹⁶⁰ Kathleen Claussen, *Invisible Borders: Mapping out Virtual Law*, 37 DENV. J. INT’L L. & POL’Y 257 -278 (2008 - 2009).

separation in accordance with the EEBC's delimitation award. Thus, until the boundary line is clearly set on the ground, definitely, the confusion and tension will continue. On the contrary, Eritrea has been campaigning in all international forums demanding Ethiopia to surrender the territories awarded by the EEBC invoking the virtual demarcation. It alleges that Ethiopia occupies "Sovereign territories of Eritrea," and pleads for unconditional surrender. Now a new issue has emerged: whether Ethiopia occupies Eritrea's "sovereign territories," and should surrender them before sitting for negotiation.

In absence of a visible sign or mark on the borderline, how far should Ethiopia pullback its forces and surrender a territory to Eritrea, if at all a territory has to be surrendered? On the same token, in a situation where the Boundary Commission has phased out, who will convert the geographic coordinates on the map into the actual border on the ground to surrender a portion of territory? Eritrea? Ethiopia? Or a third party named by Eritrea and Ethiopia? In this dubious boundary setting is it not fallacious to argue or demand Ethiopia to surrender an 'Eritrean sovereign territory'?

Ethiopia has been holding the contested territories from the time immemorial, apart from temporary moments that it lost possession of the territories during brief Eritrean invasion, but regained them in June 2000. It is hard to conclude that Ethiopia occupies Eritrea's "sovereign territory" and surrender them. Ethiopia has been holding the territories since the time immemorial notwithstanding the illusive colonial treaties and expansionist tendencies of colonial power.

6.4. Possible Remedies to Unlock the Deadlock

6.4.1. *The Need to Resolve Latent causes that Instigated the Border Dispute*

It is rightly said that understating an actual problem is half of the solution.¹⁶¹ The journey of identifying of an actual problem, however, may not simple. Given long rooted relationship and conflicting situation, it may be a perplexing task, but in fact it is a significant step in an effort to build a lasting peace that will normalize relationship.¹⁶² An actual problem may be colored by numerous apparent problems that may complicate resolution. Contending parties may hide a real issue that instigates side issues that may be legally claimed until the other party consents to deal with the latent cause. The side issues may be easily resolved but that will not end conflict. Side issues are simply bargaining leverages that may veil an actual problem and make resolution hard or impossible to achieve.

Turning to the Ethio-Eritrean border conflict of 1998 one may invoke several related issues that may have initiated the border conflict. Why the two nations that have suffered from the longest civil war, and battling to get out of poverty again plunged into a destructive war while the previous wound has not yet properly cured? Why the two previous allies who fought their common enemy turned guns against each other? Specifically, why Eritrea deployed its combat battalion armed with tanks and missiles to the disputed regions before exhausting all possible avenues of

¹⁶¹ Albert Einstein is often quoted for his notorious formula of solving problem. It may appear unbelievable but he spent lion's share of his time in studying the true nature and causes of a problem (if he had an hour to resolve a problem, he would spend 55 minutes in defining the problem and applies only five minutes in finding solution) and spent little in devising a solution. (See Lifemind.com regarding Einstein's Secret to Amazing Problem Solving (and 10 Specific Ways You can use it), available at <https://lifemind.com/problem-definition/>)

¹⁶² A mere attempt to resolve a border dispute may be a temporary solution, just like prescription of a pain killer that cannot remedy the very source of pain that require a curing medicine.

peaceful dispute resolution? Why the already constituted Joint Border Commission denied fair chance to resolve border dispute?¹⁶³

As President of Eritrea, Isias Afeworki remarks, “It is very difficult to easily find an answer,” to all these questions.¹⁶⁴ Similarly, Ted Dagne when reporting to the United States Congress rightly remarks, “The real reason behind the out break of fighting is murky at best.”¹⁶⁵ Close look at the flash point of border war and number of lives perished therein and economic loss the nations have endured makes the war non-sense, unless it was backed by a bigger undisclosed agenda. *Badme* is an insignificant barren land having no oil or endowed with other significant economic resources.¹⁶⁶ If blessed with rain, *Badme* plain can only be used for agriculture from which few quintals of sorghum may be harvested. Otherwise, *Badme* is not a tourist attraction center, nor historical conservation site.¹⁶⁷ It is really puzzling to lose huge number of lives and spend massive resources in fighting for a barren land. Why Eritrea opted for armed confrontation disregarding possibilities of peaceful resolution for any issues it had harbored? This is a question often asked than answered.

Prime Minister Meles Zenawi explained Ethiopia’s justification for plunging into the war. In the words of Melese, “For us *Badme* is nothing but the principles behind invading *Badme* is

¹⁶³ The Joint Border Commission that comprised highest officials of both States who were conversant with all socio-economic and political facts but did little to resolve the apparent border conflict after two years of deliberation. Jean-Louis Pennou points complexity of Ethio-Eritrea dispute stating, “[...] it is unclear whether this committee even succeeded in establishing a complete list of the ‘disputed areas.’” Jean-Louis Peninou, *The Ethiopian – Eritrean Border Conflict*, IBR Boundary & Security Bulletin 46(1998).

¹⁶⁴ President Isias Afeworki remarked this during an interview with Washington Post, on June 17, 1998, quoted in Plaut *supra* note 5.

¹⁶⁵ Ted Dagne, *The Ethio-Eritrean Conflict*, CRS REPORT FOR CONGRESS, order code RL 30598 July 2000. See also LEENCO LATA, (ed.), *THE SEARCH FOR PEACE: THE CONFLICT BETWEEN ETHIOPIA AND ERITREA, PROCEEDINGS OF SCHOLARLY CONFERENCE ON ETHIOPIA-ERITREA CONFLICT 8* (2006).

¹⁶⁶ Khalidiagala *supra* note 6 at 41.

¹⁶⁷ A journalist who visited *Badme* after reoccupation by Eritrea labeled it as, “[...] a broken stone table-land with few wells, but in lucky retainer years can be persuaded after torn-bush and prickly –pear have been cleared by bulldozer [...] It is a dusty one-street place sited on a slight eminence, and consisting of crude huts [...]” For detailed description of *Badme*, see Margart Fielding, “*Bad time in Badme: bitter warfare continues along the Eritrean –Ethiopian border*,” IBRU Boundary and Security Bulletin, Spring 1999, quoted in Plaut *supra* note 5.

everything. For what is at stake in *Badme* is not a piece of real estate but a cardinal principle of international law.”¹⁶⁸ Prime Minister justifies Ethiopia’s involvement in the war for the purpose of averting the invasion. Thus, he justifies Ethiopia’s involvement in the war as self-defense. It has the duty to defend its people and its territory against foreign aggression. Otherwise Ethiopia’s existence as a State would be meaningless. As pointed out else where Eritrea-Ethiopia Claims Commission (EECC) Eritrea invaded Ethiopia and occupied territories that were under Ethiopian administration.¹⁶⁹

To find out an acceptable solution and normalize relationship assessment of possible causes that may have prompted the border war appears imperative.¹⁷⁰ As Khadiagala pinpoints, African border wars “*spring from antagonisms that often have no relationship to the common border.*”¹⁷¹ (Emphasis added). In Ethio-Eritrean case, there were “[...] myriad unresolved problems [...] rupture-ranging from the nature of political institutions, economic development, currencies and trade to Ethiopia’s lack of direct sea access [...]”¹⁷² Thus, unless causes of antagonism are properly addressed and cured, any attempt to resolve border conflict (the symptom) would be waste. Touval’s remarks in this regard need to be quoted. To Touval:

The primary conflict between governments may have had a variety of causes: personal antagonism between leaders, competition in the African arena, one government’s support of opposition groups against another government and a chain of mutual suspicion and subversion. When such relations lead to border disputes, these disputes are inadvertent by products, or systems, of another conflict. At the same time, boundary claims that arise in this manner may serve as a lever for the *exertion of pressure intended to extract concessions in matters unrelated to the boundary.*¹⁷³ (Emphasis added).

¹⁶⁸ “Report of the meeting between Prime Minister Meles Zenawi and the OAU Committee of Ambassadors on the Peaceful Resolution of the Conflict between Ethiopia and Eritrea, 20 July 1998, Chronology of the Ethiop-Eritrea Conflict and Basic document, WALTA INFORMATION CENTER 2001, quoted in Plaut *supra* note 5.

¹⁶⁹ ERITREA – ETHIOPIA PARTIAL AWARD, IUS AD BELLUM, ETHIOPIA’S CLAIMS 1 – 8, (Dec. 19, 2005), available at <http://www.pca-cpa.org.2006.iLM.430>

¹⁷⁰ Needless to say, the best curing medicine can be prescribed if and only if the nature and cause of disease is known.

¹⁷¹ Khadiagala, *supra* note 6 at 41.

¹⁷² *Id.* at 52

¹⁷³ SAADIA TOUVAL, THE BOUNDARY POLITICS OF INDEPENDENT AFRICA, 40 (1972), quoted in Khadiagala *supra* note 6 at 52.

Pre-war actions that were perpetrated by both nations, the sudden outbreak of the war without any form of warning and lack of attempt to resolve issues peacefully, and subsequent decisions taken by Ethiopia and Eritrea, may offer clues to find out latent causes of the conflict that will enable to devise a “curing” resolution and turn life back to into normal state.¹⁷⁴ As pointed out elsewhere, the border conflict quickly flared up and alarmed not only international community but also the people of Eritrea and Ethiopia.¹⁷⁵ Brief overview of some of the actions and decisions taken by Ethiopia and Eritrea will suggest possible causes that may have triggered the apparent border conflict. Numerous research works and political actors conclude the actual cause of Ethio-Eritrea conflict was not really border issue.¹⁷⁶ Thus, the border conflict was simply a bargaining leverage that cannot be resolved and normalize relationship unless concealed issues have been solved.

¹⁷⁴ The collaboration between the governing parties of both nations during fight against Communist Regime, intimacy of leaders of two nations, historical ties and strong socio economic dependence makes “border” cause of the destructive war unacceptable. Consequently it was usual to observe speculation of multifaceted rationale for the outbreak of war in May 1998. For more detailed political, ideological and economic rationale for the May 1998 Ethio-Eritrean war see Michael WoldeMariam, *Why Ethiopia Won't Back down on Eritrean Border*, AFRICAN ARGUMENTS, May 23, 2013, <http://africanarguments.org/2012/05/23/the-bad-news-over-badme-why-ethiopia-won't-back-down-on-eritrean-border-by-michael-woldemariam/> (accessed 02/25/16 10:31 AM)

¹⁷⁵ It is true that border question was not a new issue. In heydays of armed struggle ELF claimed territories upto shirero, which TLF did not agree with ELF but allowed ELF to administer the claimed area with intent to benefit from necessities of sustenance from ELF. In 1983 EPLF formally claimed border demarcation in joint meeting of EPLF and TPLF in Khartoum. At the time TPLF convincingly justified that it lacked legitimacy and supporting documents to deal with border demarcation and the issue was postponed until the downfall of Dergue. Surprising, after downfall of Dergue border issue was disregarded. EPLF did not claim border demarcation during *de facto* independence from 1991 – 1993 and even after *de jure* independence until unresolved economic issues were activated after issue of Eritrean currency. The most important consideration after *de jure* independence was economic cooperation. In September 1993 Eritrea and Ethiopia concluded economic cooperation agreement including regulation of exchange rate, inflation control, economic transactions investment by citizens of both nations. The economic cooperation and friendship agreement was not fruitful on account of lack of strong institution for monitoring and enforcement of the economic and friendship agreement. Then when the desired economic objectives failed, the issue of border activated. See Gedamu, *Ethiopia and Eritrea: The Quest for Peace and Normalizations*, (M. Phil Thesis, Faculty of Social Sciences, University of Tromso, Norway 40(2008) (Unpublished)

¹⁷⁶ Martin Paut in his online article states, “[...] the war remains something of mystery to military analysts and historians.” See Martin Plaut, *supra* note 5.

6.4.1.1. *Economic Reasons behind the Border Conflict*

There is no disagreement about the pre-war strong socio-economic relationship between Ethiopia and Eritrea. Successive economic integration agreements were concluded between Ethiopia and Eritrea.¹⁷⁷ As Khadiagala attests, “ [...] Ethiopia remained the principal supplier to Eritrea of food, revenues related transshipments through the ports and jobs to nearly 300,000 Eritreans.”¹⁷⁸ Until 1998, there was little restriction on goods imported from and exported to Eritrea.¹⁷⁹ The only limitation, though not respected by Eritrea, was re-exporting Ethiopian products to third country. Eritrea, however, did not respect this minimum restriction by exporting Ethiopian coffee to third countries that has jeopardized Ethiopia’s interest for hard currency.¹⁸⁰ All pre-war economic agreements “had largely benefited” Eritrea and Eritreans “at the expense of Ethiopia.”¹⁸¹ Consequently, before eruption of the border dispute, Ethiopians had publicly blamed the Ethiopian Government for affording undue protection to Eritrea and Eritreans.¹⁸² But the Ethiopian Government did not take any serious action.

In addition to the aggressive nature of leadership and government, Eritrea had the ambition of making the Red Sea State as an *African Singapore*.¹⁸³ Eritrea aspired to model its economic policy on Singaporean mode of export based economic system.¹⁸⁴ Ethiopia was market for 60-

¹⁷⁷ On September 27, 1993 Ethiopia and Eritrea entered into 25 protocols most stipulated with economic cooperation. Harmonizing exchange rate policies, and interest rate, money stock and control of inflation were some of the core points of the economic cooperation protocol. See Negash & Tronvoll, *supra* note 1 at 31.

¹⁷⁸ Khadiagala *supra* note 6 at , 43.

¹⁷⁹ Richard Cornwell, *Ethiopia and Eritrea: Fratricidal Conflict in the Horn of Africa*, SEC. REV. (1998).

¹⁸⁰ See Seyoum Yohannes, *supra* note 2 at 174.

¹⁸¹ Khadiagala *supra* note 6 at , 43.

¹⁸² Trace C. Lasley, *We Saw Not Clearly Nor Understood: The Economic Background of the Ethiopian –Eritrean War*, 5 KALEIDSCOPE 71, 66-75 (2015). Though the 1991 – 1993 economic treaties concluded with Eritrea states about reciprocity, actually economic transactions and political actions favored Ethiopia and Eritreans. While the Eritrean Government expelled about 150,000 Ethiopians from 1991 – 1992, confiscating everything they had produced, the Ethiopian Government did not defend them. (*Id.*)

¹⁸³ LEENCO LATA, (ed.), THE SEARCH FOR PEACE: THE CONFLICT BETWEEN ETHIOPIA AND ERITREA, PROCEEDINGS OF SCHOLARLY CONFERENCE ON ETHIOPIA-ERITREA CONFLICT 10 (2006).

¹⁸⁴ Eritrea had been exporting Ethiopian coffee by purchasing from Ethiopian local market with local in local currency thereby earning hard currency. See Seyoum Yohannes, *supra* note 2 at 174. In generally, Eritreans had

70% of Eritrean factory products.¹⁸⁵ Though the Ethiopian law and economic policy state otherwise, Eritrean business freely traded in Ethiopia alike to Ethiopian businesses. In turn, Eritrean businessmen and consumers freely transacted Ethiopian agricultural products including coffee and *teff*. To further smooth the way to Eritrean businessmen, Eritrea formally sought Ethiopia to open its doors to Eritrean businessmen residing in to trade or invest in Ethiopia alike to Ethiopians.¹⁸⁶

Contrary to the expectation of Eritrean Government, Ethiopia instead of relying on Eritrea's old and light industry products, has been working to develop its own industry.¹⁸⁷ Numerous factories and light industries were built in Tigray and Addis Ababa. Pharmaceutical, cement, textile, car assembly and so forth were started to mushroom, especially in Tigray Ethiopia. Ethiopia's attention toward industrialization appears another reason that has irritated Eritrea. Industrialization of Tigray region of Ethiopia supposed to obstruct Eritrea's plan to control Ethiopia's market. This would dwindle the demand for Eritrean products and curb movement of Tigrean cheap labor. Ethiopia's fast economic growth, and special privileges that were reserved a to Ethiopian investors was another economic measure that thought to hinder Eritrean economic goals. This was a huge disappointment to Eritrea and it could not reap the benefit of growing Ethiopian economy and wide market to boost its economic ambitions. As Negash and Tronvoll succinctly put, "Eritrea felt that it was effectively shut out of Ethiopian Economy."¹⁸⁸

been enjoying undue economic advantage from Ethiopia. Ethiopian people at the time widely felt that the current Ethiopian government had been helping Eritrea to enrich itself at the expense of Ethiopia.

¹⁸⁵ Negash and Tronvoll *supra* note 1 at 41. See also Gedamu *supra* note 73.

¹⁸⁶ The Ethiopian investment law declares certain fields of investments were only reserved to Ethiopians. To make use of the privileges afforded to Ethiopian businessmen and investors, Eritrea formally asked Ethiopia for non-differential treatment of Ethiopians and residents Eritreans, but this was not acceptable to Ethiopia. The minutes of meetings of Joint Technical Committee that was held in 1996 disclose Eritreans formal request Ethiopia to open trade and investment without restriction to resident Eritreans. See Negash & Tronvoll, *supra* note 1 at 32.

¹⁸⁷ Due to Italian colonialism Eritrea had relatively better light industries. Ethiopia was a nearly 100% destination for nearly all Eritrean export products." (Adem, *supra* note 10.

¹⁸⁸ Negah & Tronvoll *supra* note 1 at 33.

The economic rationale behind the border conflict cannot be complete without reference to currency issue. The immediate cause that quickly spoiled Ethio-Eritrean relationship and triggered border war of 1998 was issuance of the new Eritrean currency (known as Nakfa) in November 1997. Until that time Eritrea had been using Ethiopian currency (known as Birr) as legal tender.¹⁸⁹ With a view to regulate its own macro economic system and as expression of sovereignty Eritrea issued its own currency, and put it into circulation in equal value to the Ethiopian currency (the Birr) without knowledge of Ethiopia. However, “Eritrea wanted Nakfa without losing all the benefits and advantages it used to enjoy when it was using the Birr.”¹⁹⁰ Immediately after Eritrea issued its own currency, Ethiopia, changed its old Birr note with a view to protect its economy from overflow of currency notes from Eritrea.¹⁹¹ Eritrea had intention to use both currencies side by side in both countries in parity.¹⁹² But this was not acceptable to Ethiopia, as it could not manage its macro economic policy in divergent monetary and exchange policy, which would put Ethiopian economy in danger.¹⁹³ After introduction of Nakfa, Ethiopia moved to avoid common use of both currencies by issuing its own which rendered old birr notes in Eritrea worthless.¹⁹⁴

¹⁸⁹ This was done in accordance with agreement reached between EPLF and EPRDF/TPLF. The two war time allies agreed to use the Ethiopian currency (Birr) in both countries, Ethiopia to use Eritrean ports for free and run Assab oil refinery. (See *Id.* at 35. At the time of liberation of Eritrea the former Ethiopian banks in Eritrea were empty and EPRDF gave 150,000,000 Birr. (See Adem *supra* note 10. This money was neither loan nor gift. At that time, though *de facto* independent, in legal sense part of Ethiopia until formally declared its independence in 1993. Then Eritrea borrowed three billion Birr from Ethiopian banks. Eritrean business had been borrowing from Ethiopian banks like any other Ethiopian. (*Id.*) See also Negah & Tronvoll *supra* note 1 at 34,

¹⁹⁰ Adem *supra* note 10.

¹⁹¹ See Negah & Tronvoll *supra* note 1 at 36. According to the research report submitted to Congress, issuance of Nakfa and subsequent actions Ethiopia took were immediate causes of may 1998 war. See Ted Dagne, *The Ethio-Eritrean Conflict*, CRS REPORT FOR CONGRESS, order code RL 30598 July 2000.

¹⁹² Adem *supra* note 10.

¹⁹³ Due to non-application of the September 1993 protocol, a common exchange rate, economic and investment policy was not devised. The exchange rate of birr for dollar in Eritrea and Ethiopia was different. This drained Ethiopian dollar supply to Eritrea. This put Eritrea and Eritrean businessmen at advantageous position

¹⁹⁴ Eritrea required Ethiopia to exchange old birr note that were in Ethiopia in hard currency. Ethiopia suggested action to be taken in accordance with advice of IMF taking experience of other similar international situation and this suggestion was accepted by Eritrea. See Adem, *supra* note 10.

Moreover, Ethiopia took additional economic measure that required Eritrean traders to make all imports of exceeding 2000 Birr in hard currency through letter of credit.¹⁹⁵ Furthermore, Ethiopia stopped purchasing petroleum from Assab refinery, as it was expensive because Eritrea used to add cost of investment on the refinery to the price of oil. Ethiopia also started using alternative ports for its import and export. According to Plauti these series of economic measures “[...] have rekindled old animosities between the ruling groups of both countries, eroding their willingness to compromise or negotiate over disagreement.”¹⁹⁶

Thus, after issue of Nakifa, the Ethiopian government took series of economic policy changes vis-à-vis Eritrea that upset Isias Afeworki’s government and promoted the border issue as a bargaining leverage. Trace Lasley observes effects of issuance and circulation Nakfa and subsequent effects as follows:

The Nakfa was circulated without any clear agreement as to how the currency would trade. Ethiopia had little time to prepare for the sudden introduction of the Nakfa and as a result erected significant hurdles for exchange. The new barriers that were created in response to the Nakfa proved too much for Eritrea to bear. The Nakfa was issued while Eritrea was at the height of its dependence on Ethiopian market. Ethiopia’s response to the Nakfa further frustrated Eritreans until they felt no recourse but to settle their harbored grievance with force.¹⁹⁷

Quick Economic measures that Ethiopia took after issues of Nakfa were absolutely contrary to the Eritrean plan and caused enormous hardship to Eritrea and Ethiopia, which in turn, stirred the border conflict.¹⁹⁸ Khadiagala observes:

[...] The currency conflict caused considerable economic hardships for both states, as the hard currency transactions raised the costs of Eritrean ports for Ethiopians and food supplied for Eritrea. The deteriorating economic relationship heightened the political temperature and ignited the border conflict.”¹⁹⁹

¹⁹⁵ See Negah & Tronvoll *supra* note 1 at 36.

¹⁹⁶ Plaut, *supra* note 5.

¹⁹⁷ Lasley, *supra* note 180.

¹⁹⁸ See Tim Ito, *Ethiopia-Eritrea: A Troubled Relationship*, WASHINGTON POST, MARCH 1999 Available at www.Washingtonpost.com (accessed 03/09/16 8:30 PM).

¹⁹⁹ Khadiagala *supra* note 6 at 43

The price of *teff* in Eritrea tripled and the price of salt that Ethiopia used to import from Eritrea went up. According to Negash and Tronvoll, “[...] the new trade policy created a barrier between the two countries that had never existed before.”²⁰⁰ At a time ports fees were increasing by the unilateral decision of Eritrea, Ethiopia had to look for alternative options. This was a huge blow to Eritrea, as it would lose free money in the form of port service fees.²⁰¹ A commentator notes, “[...] Ethiopia decried paying for most of the investment cost for the refinery as well as paying in hard currency for use of Eritrean port services.”²⁰² This prompted Ethiopia to use Djibouti port alternatively.

After long silence, President Isias Afeworki, responded how the new Ethiopian economic and trade policy was unacceptable. He argued that the Ethiopian policy draws a new wall between Eritrean and Ethiopians, which Eritrea rejects. He viewed that the new Ethiopian policies were mistake and would defeat a long common history that would “[...] have adverse effects on relation between the two people.”²⁰³ To President Isias Afeworki, Ethiopia’s economic policy against Eritrean turned to be discriminatory which aimed to prevent Eritrea from participating in Ethiopian economy and the requirement for Letter of Credit (LC) targeted at protecting mushrooming Ethiopian industry against competition with Eritrean industry products. Finally, the President remarked that the trade protocols of 1993 “[...] had reached a dead end.”²⁰⁴ Mr. Afeworki promised that Eritrea would look into alternative solutions²⁰⁵, but was not whether the alternatives he mentions was possibility of forcing Ethiopia to accept Eritrea’s options under the guise of unsettled border issue.

²⁰⁰ Negash & Tronvoll *supra* note 1 at 37.

²⁰¹ *Id.* at 43

²⁰² Khadigala, *supra* note 6 at 43.

²⁰³ Negash & Tronvoll *supra* note 1 at 37

²⁰⁴ *Id.*

²⁰⁵ *Id.*

Eritrea lost its ambition of developing its economy by leaning toward Ethiopia resources and market. This had motivated Eritrea to force Ethiopia to accept Eritrea's demand, be it currency, border, market, investment issues. Eritrea wrongly calculated and exceedingly relied on power of its military personnel and hardware to make Ethiopia kneel to its demands. Thus, border issue was a side issue that was calculated as bargaining leverage. A political analyst comments:

The border issue showed itself not to be the cause, but rather a symptom of political and economic tensions and a dramatic arena for the two parties to demonstrate their capacity to cause trouble and embarrassment for the other.²⁰⁶

Excessive attention on side issue, the drawing a borderline, while the latent issue remains unsettled appears ineffective. To achieve real peace and normalize relationship, therefore, the two contending Parties should be willing to sit down deliberate for negotiated settlement for all of the socio-political and economic hurdles. As we briefly saw, economic issue was the most important cause that has ignited the border conflict. Conflict over economy can be expressed in range of assertions. It may be restricting market access, building competing firms, charging exorbitant fees and taxes, protecting domestic investment and trade, currency issue and so forth. Economic cause of Eritrean conflict can be inferred from Eritrea's attempt to destroy pharmaceutical plant in Adigrat²⁰⁷ and the move to cut major high way route to Djibouti port.

6.4.1.2. Past Troubled Relationship between TPLF and EPLF and Superiority Complex

TPLF, the most dominant force in the coalition of Ethiopia's governing party, EPRDF, was hugely assisted by EPLF.²⁰⁸ The first twenty TPLF members trained in Eritrea. The two senior EPLF fighters later joined TPLF fighters.²⁰⁹ Initially for all logistic and training needs TPLF

²⁰⁶ Khadiagala, *supra* note 6 at 46.

²⁰⁷ Negah & Tronvoll *supra* note 1.

²⁰⁸ Khadiagala *supra* note 6 at 42.

²⁰⁹ Mehari Haile and Yemane Kidane transferred to TPLF. (Paut *supra* note 5).

totally relied on EPLF.²¹⁰ TPLF in turn fought with EPLF against their common enemy (the Ethiopian military regime) on Eritrean land at a time EPLF was badly needed military help. In 1983 after conclusion of war with Somalia, the Ethiopian government moved almost all the fighting forces and resources to Eritrea to destroy EPLF once and for all under Red Star Campaign. At this crucial time, TPLF dispatched thousands of fighters that reportedly saved EPLF.²¹¹

In another instance, EPLF deployed TPLF's trainees to fight for EPLF without authorization of TPLF Central Committee. This created some gap between the two groups. As a result, TPLF fighter withdrew from Eritrea and concentrated on fighting on Tigray land. EPLF considered TPLF as naïve in terms of fighting tactic and political ideology. Consequently, EPLF closed TPLF's radio transmission from Eritrea.²¹² In hard time during 1984 drought while aid had been pouring to save life in TPLF controlled part of Tigray, EPLF closed a corridor that TPLF had been using to transport goods from Sudan. As a result, TPLF had to face hard time and reroute all supplies by devising another route at the conjunction of Tigray and Sudan border.²¹³

As pointed out elsewhere there were ideological and tactical differences between TPLF and EPLF. EPLF opposed TPLF ideology of the right of nations and nationalities to self-determination up to secession. Both TPLF and EPLF were communist in ideology but in varying degree and different version. While TPLF followed Albanian model of communism EPLF chose Soviet version.²¹⁴ This ideological difference may reveal disparity in policy direction, but cannot be a ground that promoted the border war. It, however, shades some light regarding the troubled relationship between two factions.

²¹⁰ *Id.*

²¹¹ See Ghidey Zeratsion, *The Ideological and political Causes of the Ethio-Eritrean War: Insider's View* (A paper presented at the International Conference on Ethio-Eritrean Crises, Amsterdam, July 24, 1999).

²¹² See Ted Dagne, *The Ethio-Eritrean Conflict*, CRS REPORT FOR CONGRESS, order code RL 30598 10 (2000).

²¹³ Dagne *supra* note 188 at 10.

²¹⁴ See *Id.*

While the two factions were rebel forces, EPLF insisted TPLF for border demarcation on the basis of colonial treaties. TPLF, however, required postponement of border issue until the end of civil war to concentrate on battle with the Military Regime, and on account of lack of legitimacy and supporting documents that would prove the true borderline.²¹⁵ One may ask why EPLF worried about border demarcation at a time it controlled only Eritrean peripheries and desert regions? During civil war border was important because EPLF used to force Eritrean youth for recruitment from the Eritrean territories. To escape from forced recruitment some Eritrean youth used to get refugee at the territories held by TPLF including *Badme*. Thus, with view to recruit fighters, determination of borderline was needed. In 1988 TPLF and EPLF made tactical alliance in four days meeting in Khartoum. This had expedited Dergue's removal.

6.4.1.3. Over Confidence on Military Power to Resolve Presumed Conflict

In terms of size of territory and population, Eritrea is a small country, which may be less than one-tenth of Ethiopia, but Eritrean rebels were able to fight for 30 years resisting and later demolishing a powerful military force. At the time Ethiopia had the biggest army in Africa and was assisted by latest military hardware, but could not wipe out rebellion groups. The Ethiopian army was not only superior in training and number of fighters, but had a powerful air force that assisted the ground force. Eritrean rebels did not have fighter jets, but were able to destroy the Ethiopian military in certain key fronts and ultimately liberated the whole Eritrea. As pointed out above, TPLF forces assisted the Eritrean rebels in critical moments, and it was TPLF and other allied Ethiopian forces that led to the ultimate demise of Dergue by occupying almost all the northern Ethiopia and marched towards Addis Ababa. President Mengistu fled when TPLF forces

²¹⁵ On the same token ELF claimed border issue before its ultimate demise. At the time ELF had been working with TLF – predecessor of TPLF. At the time ELF stationed in *Badme* area and claimed it as Eritrean territory. TLF,

were near Addis Ababa. TPLF forces were more powerful, committed, and tactically, in guerilla warfare superior to EPLF forces. But this truth was not acceptable to Eritrean elites.

Eritrea, supposedly, believed that it can defeat any force and relied on its veteran fighters to resolve any potential and presumed dispute by military action. During armed struggle against military regime EPLF followed the strategy of holding military trench and defend its enemy. Prior holding of a defensive position makes easier to defend and renders an enemy to pay high cost. Eritrea has a military policy of occupy defensive position and request for negotiation. Eritrea exhibited this occupy and negotiate policy against all of its neighbors including Yemen.

As pointed out in the foregoing chapters, Eritrea suddenly invaded Hanish Island and demanded negotiation with Yemen. This makes Eritrea in superior position as any attempt to repel forces already held defensive position would make the other party to pay huge cost or accept wishes of Eritrea. Eritrea applied the same tactic against Sudan, Djibouti and later Ethiopia. On May 12, 1998 Eritrea suddenly deployed its highly armed forces at *Badme*, which had been under Ethiopian administration for several decades. After occupying *Badme* and its environs and demanded negation with Ethiopia on Eritrean terms. Eritrea also invaded Djibouti and has been occupying a swath of Djiboutian territory. Djibouti's invasion supposedly targeted at revenging Djibouti for cooperating with Ethiopia by allowing port access.

6.4.1.4. The Bada Conflict of 1997

As pointed out in the previous chapters, the Ethio-Eritrean borderline has disintegrated Afar ethnic group. The group often disregards borderline and maintains its traditional relationship with kinship in the other side of the border. When the situation restrains comingling, the group fights it. Though not implemented on the ground, the 1908 treaty between Italy and Ethiopia

however, did not agree with ELF's conclusion but allowed ELF to administer *Badme* area with a view to lose

required border delineation to be done in way it would allow Afar ethnic group to continue their traditional relationship including cattle grazing in the other side of the border.

Political actors in each side of the border have been abusing this historic right for political ends. In 1997 rebels of Afar Revolutionary Democratic United Front (ARDUF) that was camped in Afar territory of Eritrea repeatedly created havoc in northern Ethiopia, in Afar region of Ethiopia. As a result of armed rebellion, it was hard for Ethiopia to use its resources and tourist sites in the northern Ethiopia.²¹⁶ In July 1997, pursuing ARDUF rebels, Ethiopian defense forces entered *Adi Murug*, an Eritrean territory without securing permission from Eritrea. Given friendship and apparent alliance with Eritrea at the time, Ethiopian forces act was in good faith for the sole purpose of restraining disturbing rebels that stationed in Eritrea. This can be understood from Prime Minister Meles's letter written in response to President Isias Afworki's request for personal consideration of the matter.²¹⁷ President Isias Afeworki wrote two letters demanding investigation of the matter.²¹⁸ Now it appears that behind ARDUF's incursion there was a big motive, which was not known to the Ethiopian government and the international community.²¹⁹

Eritrea claims that the May 6, 1998 incidence was a consequence of July 1997 unauthorized border crossing by the Ethiopian armed forces. However, Eritrea-Ethiopia Claims

training and logistic support. (Gedamu *supra* note 173 at 39)

²¹⁶ For instance, in 2008 ARDUF fighters that have been sheltering in Eritrea crossed the border and kidnapped and killed tourists at Artale area of Afar region. The rebels took some of the tourists to Eritrean and finally released them.

²¹⁷ Appendix 3 Negash & Tronvoll, *supra* note 1, at 116.

²¹⁸ *Id.* at 115 – 116.

²¹⁹ The is was the time that economic wrangling between Ethiopia and Eritrea already started that culminated at issuing Nakfa and restrictive measures on Ethiopian use of port and some economic measures were being implemented by Ethiopia. According to Negash and Tronvoll, “ By mid August 1997 there were dead lock in most of the issues. There were no agreement on free circulation of currencies. Eritrea rejected Ethiopians proposal for cross border trades.” (Negash & Tronvoll *supra* note 1 at 36.) In As Eritrea could not legally claim some of the presumed “rights”, it had to move subtle destructive military measure that thought would convince Ethiopia to come to Eritrean terms. The two successive letters that were written by President Isias to Prime Minister Meles depict some unusual message. It was of course strange for two close relatives and comrades to follow formal letter instead of easily accessible phone call. Thus the provocative act of ARDUF appear a kind of *Badme* formula that was devised by President Afeworki but Prime Minister Meles did not see in that way.

Commission did not accept this contention. EECC summed that Eritrean act of May 12, 1998 was an act of invasion contrary to the Charter of UN.²²⁰

This incidence prompted the need for border demarcation and formation of Joint Border Commission from both States. The Joint Border Commission comprised highest government officials including Eritrean Defense Minister. The Joint Border Commission set up a technical sub committee that constituted experts to actually deal with border issue.²²¹ As there was no genuine stand on President Isias Afewroki's part to work out the border issue, the work of the Joint Border Commission was also a mere propaganda tool that could not solve the actual problem. The May 6, 1998 accident happened when the Eritrean delegation was on its way for the schedule meeting on May 8, 1998 in Addis Ababa. The Commission held its first meeting on May 8, 1998 but suddenly checked out from their hotel on May 9, 1998 abandoning the scheduled meeting on account of Eritrea's move for invading Ethiopia.

6.4.1.5. The Tigray Map that Apparently included Contested Regions

After a month of *Adi Murug's* incidence, Tigray Regional State published a regional map with assistance of GTZ. The regional maps included all contested border territories including *Adi Murug*. It is not clear why the Tigray Regional State considered unsettled territories as part of Tigray. The very motive of for issuing the map was as elementary school teaching aid. Though Federal Government did not involve in drawing the regional map, the Federal Government did not take any action against the map. Eritrea never attempted to the presumed issue on Tigray map amicably.

²²⁰ EECC *supra* note 167.

²²¹ The May 6, 1998 incidences surfaced while the Joint Border Commission schedule for meeting in Addis Ababa on May 8, 1998. The May 6, incidence occurred at Badme while the Eritrean Team was on Journey to Addis Ababa. Even after occurrence of the May incidence at Badme the Commission conducted one day meeting at Addis Ababa and the next day was schedule to be held at 10:00 AM. While Ethiopian escort time arrived at the hotel where the Ethiopian team located, the team already checked out and fled to Eritrea.

For Eritrea the map marked huge implication – the intention of Ethiopia to unilaterally take action against the contested territories before the Joint Border Commission decides the border issue. This map was presented to EEBC has Ethiopia’s intent to unilaterally draw the boundary line.

6.4.1.6. Dictatorial Nature of Leadership and Suppressive Policy

In most African States, personality of leader determines the nature of government and national policy. Eritrean and Ethiopian leaders were emerged from long period battle against the repressive military government. Their confidence is generally built in military power. A commentator portrays President Isias Afeworki as leader who is, “ Endowed with a battle-hardened military and self-confidence, [he] seem[s] ready [...] to ‘boost Eritrea’s identity at every opportunity.’”²²² The victory over the then Africa’s superior military, and the initial logistics and military superiority of EPLF over TPLF has shaped, “Self image of Eritrea’s leadership.”²²³ President Isias Afeworki’s over confidence and reliance on its military power has contributed for disturbance of regional peace.

Thus, personal character of President Isias Afeworki and his leadership policy has its share for the sudden eruption of border conflict. A Situation Report of Institute of Security Report describes personal character of President Isias Afeworki, as aggressive by nature and abhors negotiated settlement and concession.²²⁴ A quote from ISS Situation Report attests:

“[President Isias Afeworki has ...] distaste for compromise and diplomacy, both which he considers weaknesses. [He] has shown a relish for intrigues and displayed an extraordinary taste for undercover maneuvers with wide regional repercussions in relations with neighboring states. His militaristic or trigger-happy pattern of behavior in foreign relations has transpired over an extended period. [...] The misguided policy that he loves to call ‘forward policy’ has not been conducive to the building of a stable regional security in the

²²² Khadiagala, *supra* note 6 at 43.

²²³ Ulf Terlinden & Tobias Debiel, *Deceptive Hope for Peace? The Horn of Africa Between Crisis Diplomacy and Obstacles to development*, PEACE, CONFLICT AND DEV’T Issue Four April 2004, Available at www.bradford.ac.uk - social-science

²²⁴ Mesfin, *supra* note 18.

Horn of Africa. President Issayas has thus established a reputation and record for toughness and ruthlessness, trying to alter borders by force, willing to go to war for what he perceives to be Eritrea's interest, regardless of the outcome of past confrontations.”²²⁵

As noted elsewhere at the beginning of this Chapter, President Isias Afeworki's own words also reveal how his leadership policy has shaped Eritrea's invasive character. President Afeworki illustrates, “*If [...] my neighbor destroys my fence and there is nothing I can obtain by taking him to the magistrate, then I will be obliged to destroy his fence.*”²²⁶ (Emphasis mine.) As repeatedly pointed out, guided by militaristic doctrines President Isaias Afeworki, has unleashed his fighters against all neighboring States before giving any room for peaceful means of dispute resolution. As ISS proves, to President Afeworki, negotiated settlement and compromise is defeat or weakness. This in turn implies that resolution of Ethio-Eritrea dispute may not possibly be resolved while President is in power, unless he makes policy U turn, or changes his authoritarian conduct.

Failure of multitude of international mediation efforts to avert Ethio-Eritrean war demonstrates uncompromising nature of President Afework's attitude. President Isias Afeworki had ignored mediation efforts of OAU, United States, and Rwanda, which required to withdraw its troops from territories occupied after May 6, 1998 incidence. However, after Ethiopian forces ejected Eritrean troops from *Badme* and its environs, President Afeworki immediately declared acceptance of OAU Framework Agreement. He disclosed the same attitude after Ethiopia liberated all its territories and entered deep into Eritrea. This characteristic of President Afeworki suggests the weight and moment he affords to peaceful resolution. President Afeworki resorts to peaceful deposition only after all means of military solution fails to work.

²²⁵ *Id.*

²²⁶ Tronvoll *supra* note 16 at 1046.

A nation led by autocratic leader is necessarily undemocratic, this in turn, can be source of conflict.²²⁷ Undemocratic nations generally rely on coercion as a means of resolution of dispute. “Autocratic and ideologically rigid nature of the political regime”²²⁸ of both Ethiopia and Eritrea has direct effect on negotiated settlement of disputes. Though the Ethiopian government often blamed for suppression of dissent and restriction and imprisonment of journalists and diminishing political playground for opposition parties, the Eritrean case is worse. Eritrea generally neglects democratic values having repugnance to western traditions. It trashed a draft constitution and guided by personal impulses of the President. Opposition party system generally banned, there is no prospect for any kind of election. The nature of government of Eritrea, therefore, has direct effect on the Ethio-Eritrean border war. Khadiagala, aptly observes, “Given the wealth of formulas for resolving territorial tension, escalation of the Ethiopia-Eritrea conflict makes clear a fundamental failure to construct institutions strong enough to stabilize authority.”²²⁹

Eritrea’s “virulent nationalism to bolster domestic authority”²³⁰ was another reason for eruption of border war. As pinpointed elsewhere, Italian colonialism and its objective of using Eritrea as spring board to occupy Ethiopia and other regions of Africa, has shaped Eritrea in a way it to be different from Ethiopia. During the fifty years time Eritreans had served in Italian armed forces that served in Libya, Somalia and in Ethiopia. In Ethiopia, Eritrean soldiers were more important to Italy as they have common culture, religion and in some cases language. Eritreans served as pacifying forces to Italy. They were salaried personnel that had huge impact in shaping consciousness. Eritrea had modern infrastructure including asphalted roads and rail way. There were numerous Italian residents that engaged in business, trade and agriculture. In addition to

²²⁷ A symposium held by Ethiopian and Eritrean intellectuals underline undemocratic nature of Eritrean and Ethiopian regimes was the major cause that has triggered the current conflict and long standing conflict between Eritrea and Ethiopia since monarchial times. See Leeta, *supra* note 183 at 9.

²²⁸ Abbink, *supra* note 7 at 144

serving in the military, Eritrean people had ample job opportunities. At that time the people of northern Ethiopia used to go Eritrea to serve in low paid jobs like serving as domestic maids and in other low profile jobs that Eritreans were not willing to work. This presumably has created ethnic superiority complex and boosts Eritrean false appearance of superiority. Even before Eritrean federation to Ethiopia, during federation and after abolition of federation, Eritreans were the most privileged people in Ethiopia. Colonization boosted their exposure to modernization before the rest of Ethiopia. There were more educated Eritreans to serve in Ethiopian government offices, benefited from opportunities that Ethiopia could make available to citizens. This apparently made Eritreans different from people from other regions of Ethiopia.

The people of Tigray, on the contrary, were the most disadvantaged people in Ethiopian history. Tigray economy was not only undeveloped but also repeatedly jeopardized by the successive wars. Most wars including the first and second Italian invasions were fought in Tigray land. At a time Ethiopian warriors lacked sufficient logistics to feed. The entire burden was on the people of Tigray. They had to feed the warriors voluntarily or involuntarily. After finishing their own resources, the warriors had to raid cattle of their brothers in Tigray. On top of this, as the rest of Ethiopia, Tigray had no infrastructure and seriously underdeveloped. Since Italian occupation of Eritrea, laborers from Tigray had been serving Eritreans in low profile jobs. This has boosted the feeling of Eritrean superiority and chauvinism, narrow nationalism. The Eritrean government's false assumption of trans-border nationalism and the interest to boost domestic authority, as liberator of Eritrea from backward Ethiopia, was another reason that motivated for use of force.

To sum up, after long journey of political suppression, dictatorship, unending military conscription, and economic misery as a result of wrong calculation of the government of State of

²²⁹ Khadiagala supra note 6

²³⁰ *Id.*

Eritrea against Ethiopia under the guise of border issue. Now it appears that the Eritrean people could not withstand the burnt of dictatorship and unending suppression. However, little attempt has been made to change the nature of leadership and government.²³¹ In Ethiopia, the split of powerful founders and involvement of several non-TPLF allies have mitigated the dictatorial role of TPLF, the Eritrean counterpart remained in tact without any form of check and balance. In Eritrea overall power has been entrusted on the President. It appears no meaningful decision and action can be taken unless it sprang from the President.

To resolve the current border or other real issues with Ethiopia, the President has to change his aggressive and uncompromising personality, which is unlikely, or the President has to be changed and give way to progressive Eritrean elites. Political elites largely concern for power retention and narrow nationalism more than long-term benefits of their citizens. They either carry out sham election for the purpose of political consumption or conduct no election, as if they were created to lead their people. While the former may describe Ethiopian situation, there is no election for peaceful democratic transition in Eritrea. This makes the possibility of settling border dispute unlikely in short term. Ethiopia's occasional threat to remove the President further complicates the situation. All options should be left to the people of Eritrea.

6.4.2. The Need to Appreciate the Changing Nature of Borders and Mandatory Trans border Cooperation

This is an era where the world is moving toward cooperation and integration to withstand uncontrollable effects of globalization. In some cases, the tide of globalization compels

²³¹ Instead of fighting dictatorial regime to change it or change its nature, everybody, including high ranking government authorities, including ministers, military officials and ambassadors migrate out of Eritrea. Tens and thousands of Eritrean migrate despite shoot and kill policy of the government. Currently about 250 Eritreans daily march to Ethiopia. Ethiopia has granted scholarship to 1500 Eritreans who have academic qualification to join Ethiopian colleges.

unrestricted contact and integration. The advancement of digital technology has enabled cross border interaction, trans-boundary commerce, global terrorism, cybercrime and so forth, that may not be contained by the border wall or detected by border guards. Global cooperation and integration is not an option, but a necessary effect of globalization that would enable nations resist undesirable consequences (byproducts or side effects) of globalization. Though some challenges are still apparent, European Union has already changed the nature of boundaries substantial member states from barrier to bridges. One of the important *motto* of African border program is to *change African borders from barriers to bridges*. The current Ethio-Eritrean condition points innumerable possibilities that diverge with actors of globalization.²³²

In Africa Regional Economic Communities are moving toward economic and political integration by issuing one passport to its citizens with the ultimate goal of free movement of goods and service thereby changing borders from barriers to points of contact. As Khadiagala rightly remarks:

In contemporary Africa, borders are [...] continually subverted by deepening cosmopolitanism, globalization and the civilizational logic of economic integration. Such integration denudes the attractiveness of frontiers as political and economic objects and denies the salience of sovereignty. By permitting the mobility of factors of production for wealth creation, economic integration restrains border conflict, enlarging the institutional framework for problem solving.²³³

In addition to the global and African border tide touching Ethiopia and Eritrea, the colonial boundary has separated the two intertwined people that always aspire for unlimited comingling. There is interest from both sides to change barrier effect of border. Border closure does not serve interest of common people of Ethiopia and Eritrea. But the now for all effects and purposes the two nations are in deadlock. To building good neighborhood, the deadlock has to be unlocked. This assumption may appear unrealistic, but it is possible. The question may be how? At this stage

²³² There is concern '[...]' for power retention and narrow nationalisms overpowered the still underdeveloped

to talk about transforming Ethio-Eritrean border into point of contact is really impossible. Currently borderland of both nations is manned with forces that are ready to kill each other and controlled by machines that are armed with missiles, which can destroy thousands of lives again.

The impasse may be unlocked if the leader of both nations are committed build peace in the region by drawing an acceptable borderline through compromise. They should set their mind that at any point in the future the two nations will freely move across the border. The leader should be directed by the long plan of unavoidable integration. To accelerate the inevitable integration, the leaders should be willing to sit for honest constructive and dialogue rather than playing a legal game and media campaign. The borderland people, elders and neighboring states of both nations undoubtedly are aware of the true boundaries. Absolute reliance on the elusive colonial treaties and unfair decisions will not help the people of both nations.

As Ethiopia publicly declared that Tsorena and Fort Cadorna were not Ethiopian towns, Eritrea should be honest rather than attempting to benefit from elusive colonial treaties and unrealistic EEBC decisions. The two nations should make negotiated settlement that would best meet the rights and interest of both nations. After political decision and directions are designed, a joint border commission may carry out the actual border setting. A borderline that takes historical relations, to the extend possible aligns with border treaties and that takes actual interest of borderland residents would create good neighborhood. A good neighborhood in turn would perpetuate peace and boost cooperation that would ultimately make barrier nature of border walls effect less thereby changing the nature of border from barrier to bridges. Borders lands will turn into points of contact and center for cooperation thereby reunite the two brotherly people. If the people of two nations move freely like Europeans in the Schengen area, the difference between

opportunities for economic integration.” Khadiagla *supra* note 6 at 52.
²³³ *Id.* at 40

being an Ethiopian and Eritrean will be a matter of politics simply to elect and be elected in their respective nations. If the economic integration finally leads into political integration all differences will fade away by itself and Ethiopia and Eritrea will turn into a situation they were before colonial foots landed in Africa.

6.4.3. Political Commitment and Determination to Resolve Dispute Constructively

To achieve a real resolution, contending Parties' determination and commitment is paramount. This process demands high political commitment that is non-existent at the moment. If there is real interest to build peace between two States, dispute resolution will be easier. Generally there is no unresolvable dispute. The only problem, however, is willingness and interest of leaders to resolve disputes peacefully on *give and take basis*. No one disagrees with the assertion, *had there been commitment and determination to resolve dispute, the May 1998 war would never been erupted and tens and thousands of lives would have been saved*. Leaders of both States should prioritize public interest beyond their own selfish personal interest and honor. Needless to say public interest does not favor war and destruction while it is possible to resolve disputes amicably.

As attempted to prove in the foregoing Sections, the May 1998 border conflict was simply a bargaining leverage that was unexpectedly flared up but had been boiling by the unresolved socio-economic and political divergences. Dealing only with border delineation issues by ignoring pressing socio-economic issues may not produce a desired result. This appears the most important cause for the current impasse. The question would be how to deal with all of the issues at the same time. If there is political commitment and willingness, nothing is impossible. All the issue may be resolve all disputes side by side. Therefore, before dealing with issues, mediation should focus on ascertaining willingness and determination of contending Parties to resolve the dispute amicably, compromising interests.

If all issues should be dealt side by side, numerous committees may be constituted to address issues simultaneously. A Joint Border Commission may be reconstituted with a view to deal with border issues. A high level committee for reviving and implementing the September 1993 Friendship and Cooperation Agreement should be reconstituted. Currency, port, investment and trade issues should be resolved while border delineation is going on. Resolution on main issues would expedite border delimitation and demarcation.

The recommendation may be hard to accept, especially to Eritrea, but honest and peaceful resolution would best satisfy public interest, and enhance welfare of people of the two States. If the political leaders of both nations really love their people, should be willing to sit together around negotiation table and find out solution for their own problems. It will avoid animosity and hatred that will, in turn, stimulate cooperation and integration, which in turn, will expedite the effort of building peace in the Horn of Africa.

6.4.4. Set Borderline in a way Acceptable to Borderland Resident

Any decision or action that is contrary to the reality known to the borderland residents of both States cannot create peace and stability in the disputed areas. Local people are aware of the true lines that actually separate them. Reliance on reality would bring a better solution than simply wrangling with vague colonial treaties and unrealistic personal sketches. Both nations should approve a boundary line that is acceptable to the borderland residents, as there is no reason to argue to the contrary. It is true that colonial border delineation was purely Italian initiative and favored them and supported their expansionist policy. Eritrea, as a successor of the Italian rights and interest may opt for strict application of the colonial treaties, colonial maps that were drawn unilaterally by Italians. This move proved to be unacceptable to the Ethiopian borderland residents

like Irob. If border setting is a temporary solution that would be will be changed, why Eritrea stuck to the unrealistic and elusive colonial treaties? Jon Abbink makes a powerful remark as follows:

‘[...] the issue of the boundary appears to be an eminently political issue, hinging on the future relations between two countries so closely connected in social, cultural and historical terms. It suggests that – baring another big war – only a mature, democratically supported political solution, to be reached through negotiation and consultation of local populations as to self-determination, can bring about stability, and that any legal judgment or arbitration must in some way encourage that political aspect.’²³⁴

As the nature of borders soon to be changed into bridges and points of contact, there is no need to rely on vague provisions of the colonial treaties and attempt to take territories in a way not acceptable to borderland residents.

In drawing acceptable borderline, borderland residents should play an active role. They should be afforded with fair chance of deciding their own fate to join anyone of the States they choose. In a situation where not possible to clearly determine an actual borderline, both states and should be ready to compromise using traditional dispute settlement mechanism. In a cooperative environment division of ethnic groups does not matter, as it will not have long-term effect. The Joint Border Commission should be willing to recognize reasonable decisions of borderland residents. Borderland residents, including Kunama, Irob or Afar should understand that borderline is a temporary solution. It will be practically insignificant as people from both sides can freely interact. Setting an acceptable boundary line would expedite AU’s Border Program that aims at changing barrier nature of borders into bridges.

6.4.5. The Need to Resolve Disputes though Dialogue

Now Eritrea has been campaigning in all international forums demanding Ethiopia to surrender territories awarded by EEBC. As attempted to point out above, elusive treaty wordings of 1900, 1902, and 1908 colonial treaty that did not match with the facts on the ground that stained

EEBC's delimitation decision. A measure that EEBC took to cure ambiguities in the treaties and treaty map, has further complicated boundary making. In search of intention of the Parties, EEBC relied on maps unilaterally drawn by Italians or Italian agencies, which were not available to Ethiopia. Similarly, private notes, memos, reports and comments of Italian colonial authorities, which were not known or embody the Ethiopian version of intent, influenced EEBC's decision. It is puzzling to take a note of governor of Eritrea or report of Italian negotiator to ascertain intention of the parties to fill treaty lacunae.

As a result of these procedural and factual anomalies, EEBC decided in accordance with the presumed intention of Italy that favored for Eritrea. In some cases EEBC's award even widened the gap between the two countries. As discussed in detail in foregoing chapter, at the juncture of *Setit* and *Maiteb* the borderline goes northeast to the confluence of *Mareb*. Italian maps disclosed at least four rivers that may be viewed as *Maiteb*. Ethiopia contends that the first *Maiteb* as a treaty *Maiteb* that situated at the 20 Km distance from Sudanese borderline. There were other rivers that have link to *Setit* in the South East. The *Belesa* confusion and the non-existent river called *Muna* appear to render EEBC's award nonsense. With full awareness of these confusing river nomenclatures, EEBC did not attempt to ascertain actually facts on the ground. Modern satellite images are assistive but cannot "communicate" changes took place since making of the treaties, and regarding changes in river nomenclature, changes in actual geographic conditions or disclose changing nature of geographic history.

Historical facts including changes in river nomenclature, diversion or dry up of tributaries or actual or changed geographic realities supposedly best known to the borderland people of two sides of border. The borderland people were unaware of what was going on in respect of them not only in colonial time, but also in new era where they were supposed to know a decision that will

²³⁴ Jon Abbink *supra* note 7 at 156

impact their lives permanently. Though EEBC had no mandate to report its actions and findings or investigations to the borderland plan, it missed the chance to make the decision realistic and solve the actual problem instead of complicating the matter basing its disposition on theoretical hypothesis in The Hague. Borderland residents did not know the conclusion of separating treaties, but they know the actual separating line. The very objective of EEBC was to settle dispute by awarding a decision that would actually resolve dispute. With this end EEBC should have used avenues that would supply honest and unbiased facts. There were ample possibilities to cross check facts across border by filtering supposedly biased data transparently, but EEBC did not give room for empirical observation.

With little and unreliable geographic data Italian agents and, especially Emperor Minilik II who lacked the possibility and means to know actual facts on the grounds, concluded the colonial treaties at a far distance, in Addis Ababa. Emperor Minilik supposedly signed on a draft treaty presented by Italian agents. Moreover, by ignoring the supposed treaties Italy invaded Ethiopia and redraw boundary. This unilateral action has rendered the treaties dead.²³⁵ It is not clear why Ethiopia submitted itself to abide by the already dead colonial treaties.²³⁶

Enforcement of the treaties in colonial sense appears contradicting with EEBC's other position. Both Ethiopia and Eritrea suggested that the boundary dispute to be resolved in accordance with Cairo Resolution of 1964, which declared respect to colonial boundary line.

²³⁵ Negussay Ayele, *Reflections on Border Regimes and Colonial Treaties on the Horn*, ETHIOMEDIA.COM (June 17, 2000), Available at, http://www.mediaethiopia.com/Negussay_On_TheWar.htm (accessed 03/23/16). See also Ayele, *supra* note 53.

²³⁶ In Ethiopia this is very politically sensitive issue and it is almost impossible to get empirical data. Where there is no clear answer varied speculations and intelligent guesses often posed. In this case first chance may be given to EPRDF's political addenda. TPLF from the onset believed that Minilik II betrayed Eritrea and its boundaries were set by the colonial Italy. This assumption was built by ELF and later followed by EPLF. TPLF supposedly molded by EPLF's propaganda, and accepted EPLF's assertion without change. This stand has blinded EPRDF elites to invoke the dead colonial treaties and the boundary line the treaties sought to draw. TPLF's stand vis-à-vis colonial treaties did not safeguard Ethiopia's national interest, but EPRDF disregarded national interest for sake of its political commitment even before the Algiers Agreement. As has been pointed out elsewhere, Prime Minister Mele Zenawi

EEBC decided that the Cairo Resolution of OAU was not applicable to the case at hand. If so on what basis EEBC has applied colonial treaties, maps, reports, comments and so on? It appears contradiction in terms. Given confusions in EEBC decision, treaty wordings, and confusing legal status of treaties, it would be fair to modify the delimitation decision in mutually acceptable way to building good neighborhood and make lasting peace and stability.

Moreover, the boundary is not yet demarcated in accordance with Algiers Agreement. Confronted with the deadlock and noncooperation of both Parties, EEBC has declared virtual demarcation. As pointed out elsewhere, in its delimitation decision EEBC time and again pledged that geographic facts would be considered during demarcation. Virtual demarcation thus fails to satisfy these promises. In general, it is possible to suggest that the boundary is not clearly defined. It is yet porous and if demarcated in accordance with literal wordings of EEBC's delimitation decision, the borderline would split families, town and villages that have been living together for centuries. Learning facts of the EEBC's award the people of Irob have petitioned to the international community and have been pressing the Ethiopian government not to honor EEBC's delimitation decision. This stressful pressure has huge impact on Ethiopia's refusal to cooperate in demarcation of Central and Western Sectors.

Due to international pressure and commitment to respect international treaty Ethiopia accepted the delimitation decision in principle and has been demanding dialogue to draw an acceptable boundary line. Even if Ethiopia accepts the virtual demarcation, an actual point that Ethiopia has to surrender is not yet marked on the ground. All these demand honest and constructive dialogue and political commitment to resolve conflict. The dialogue had to be not merely to set a dividing line, but it should gear toward resolving all presumed and potential

had been invoking reference to colonial treaties before accepting Modalities and Technical arrangement for implementation of OAU's Framework Agreement. (See Appendix 15, Negash & Tronvoll *supra* note 1 at 151.

disputes with the ultimate goals of smoothing ground for creating good neighborhood. Building a lasting peace and normalization of relationship requires resolution of all disputes through honest bilateral dialogue for the interest of the two brotherly people of Ethiopia and Eritrea.

Ethiopia has already declared its intent to resolve all disputes with Eritrea through honest bilateral dialogue. Now it is time to Eritrea to take the same initiative. The people of both nations will tremendously benefit from negotiated settlement. It will not only resolve the border issue but also will re-establish socio-economic ties. Eritrea undoubtedly will benefit from big Ethiopian market and Ethiopia will be able to use Eritrean ports, which will add income to Eritrea.²³⁷ Currently Ethiopia has been paying to Djibouti, Sudan and in the future when Ethiopia uses Mombasa port to Kenya. Both Kenyan and Sudanese ports are far away and add extra transportation cost and Djibouti port could not efficiently accommodate Ethiopian import and export. Eritrea will also benefit from Ethiopian products that it cannot get elsewhere. Like *teff*, coffee, and other special agricultural products that Eritrean people used to import from Ethiopia. Though currently Ethiopian factory products are increasing beyond local needs, Eritrean special products, can also be exported to Ethiopia.

In conclusion, in socio-ethnically intertwined people of Ethiopia and Eritrea, it is not simple enough to draw a clear dividing line. To install a lasting peace among the intermixed people all disputes should be resolved constructively through honest bilateral dialogue with the objective of normalizing relationship and reunite the two brotherly people again. But EEBC's decision has failed to attain this goal. As a political commentator rightly remarks, "[...] in view of highly relevant social and historical aspects of the boundary issue, the EEBC Decision is not the best that could have been made, and may in fact have perpetuated the conflict between the two

²³⁷ As a result of the border war Ethiopia routed all its important export traffic to Djibouti. Consequently "Eritrea lost hundreds of millions of dollars in annual revenue [...]" See Mesfin, *supra* note 18.

countries.”²³⁸. EEBC’s decision “[...] might be acceptable purely in legal terms but “*defeats its own purpose*.” [Emphasis added].²³⁹ The decision rather has complicated all possibilities of future amicable resolution. Eritrea has been invoking the decision as propaganda to pressurize Ethiopia that further complicates possibilities of future amicable resolution. Mere reliance on elusive EEBC decision and Eritrea’s dishonest media campaign cannot resolve the issue. Both Parties should be willing to resolve all disputes through bilateral negotiation.

²³⁸ Abbnik *supra* note 7 at 142.

²³⁹ *Id* at 143. The Award fails to attain the mandate of normalization of relationship as it would split families and strongly intertwined ethnic group that never viewed themselves as Eritreans and have been residing in the locality for centuries. They don’t have any intention to vacate from their land nor like to Eritreans.

CHAPTER SEVEN

Conclusions and Recommendations

7.1. Conclusionary Remarks

We are in the era of globalization where uncontrollable trans-border actors, and multinational entities have been moving to “liberate” the world from the confines of border walls thereby creating a borderless globe. As pointed out in Chapter Two of this Dissertation, in the 21st century border walls appear failing to contain invisible forces or powerful global actors, and properly discharge their traditional function of restraining “others.”¹ Needless to say, confinement within the bounds of border walls is on the verge of being obsolete. In a virtually interlinked world, an incident happening elsewhere, or an action perpetrated in one part of the globe, *for good or bad*, shakes the entire world. Consequently, global community has been cautiously watching activities and happenings elsewhere to take a countervailing measure.

For instance, United States or other global powers cannot keep quiet while Africa is being messed with acts of terrorism, as an act of terror may not stop at its origin. Similarly, global community has concern over environmental pollution, actions triggering global warming, or financial regulation that may affect economic or financial interest of everyone. Global connectivity is not simply limited to international financial sector, climate change, terrorism or cyber attacks that can bypass any border wall. The contemporary world has been witnessing the emergence of powerful multinational private companies that do not respect border walls.²

¹ The current territorial state tendency to bar mobility via huge border wall barrier and invisible intruders that can bypass the border wall or other global actors, like multinational companies that abhor border wall can be solved by designing a working solution to address the contradictory global reality *vis-à-vis* borders. For brief discussion on effects of globalization on borderlines see Section 2.4.3.

² For instance, search engine giant, Google, Social media companies, virtual markets like Amazon are in effect global companies that operate everywhere irrespective of national borders.

Moreover, nowadays, human needs extend beyond the limits of bordered territories. In 21st century walled territory policy does not best satisfy the needs and aspirations of the new generation, neither enhances the wellbeing of the public. The new generation has interest to get mingled with global citizens freely. Each nation or territory naturally endowed with unique geographic, and socio-economic resources that would make life more comfortable and enjoyable. Unrestrained movement of people, goods and services will definitely cut cost and make life more pleasant. Being cognizant of side effects of the traditional borderline, and attracted by the positive effects of unrestricted movement of its citizens, Europe has effectively changed its internal borderlines from barriers to bridges in Schengen area. Even though filtering quality of Schengen area is not well advanced to completely contain “others” like illegal flow of immigrants and potential terrorist, the benefit of changing the nature of borders from barriers to bridges outweighs its restraining effects.

With a view to smoothly regulate effects of globalization and enhance welfare of Africans by changing the traditional role of borders and avoid borderline conflicts or address ongoing conflicts, AU has devised a special program called African Union Border Program (AUBP) with a *motto* of changing the nature of African borders from barriers to bridges. It is generally believed that AUBP will eventually address Africa’s quest for peace, but currently the young Program not only suffers from financial, institutional or manpower constraints, but also has been overwhelmed with widespread border induced conflicts.

Present-day Africa is literally free but colonial footprints are still apparent in variety of sectors, including borderlands. African borderlines are colonial creations that still divide nations, nationalities, ethnic groups and in some cases families. Africa’s natural borderline development was thwarted by the infamous Berlin Conference of 1884 -1885, which partitioned Africa among

European powers in complete disregard of geographic, ethnographic, linguistic, and cultural determinants. As result, the intertwined people of Africa have been disintegrated into multiple states. Ironically, after restoration of independence, founding fathers of African umbrella organization – OAU - cherished the “sanctity” of colonial boundaries, suppressing Kwame Nkrumah’s vision of forming United States of Africa by removing divisive colonial boundaries thereby reuniting Africans.

It is understandable that founders of OAU had feared the anticipated effects of unmanageable conflict that supposed to erupt through out the continent. Prioritizing continental unity through a strong umbrella organization was a good option, but complete ignorance of revisionist objectives was a historic mistake.³ As a result, Africa has missed the best chance of rooting out the root cause of conflict. Some authors and international tribunals tend to conclude that by adopting the Cairo declaration of 1964, OAU had accepted the principle of *uti possidetis juris* that had avoided territorial or boundary conflict among the newly freed nations of Spanish Latin America, African situation was completely different.⁴ Unlike Spanish Latin America, Africa was colonized by several competing European powers that prioritized their interest in complete disregard of benefits and wishes of Africans, but African brothers should not have ignored the interest of their fellow Africans.

Complete ignorance of objectives of Kwame Nkrumah’s to redraw African boundaries in a way acceptable to Africans was not only motivated by fear of opening Pandora’s Box in which

³ Before the signature on OAU’s charter actually dry, in early 1964 a devastating border war erupted in the Horn of Africa between Ethiopia and Somalia, and in north between Morocco and Algeria. This motivated founding father’s of OAU to expressly declare acceptance of colonial boundaries “whether they are good or bad,” in First Summit of OAU, in 1964. The idea of keeping colonial boundaries or changing them with w view to reintegrate Africa had divided Pan Africans into two camps: the unionist and statist camps. The Unionist Camp propagated immediate political integration of Africa by abolishing colonial boundaries, the Statist group vigorously argued to keep colonial boundaries. (For details on this topic, see Section 4.3 of this Dissertation).

⁴ For brief discussion on application of *uti possidetis* rule in Africa and implications of ICJ decision of Burkina Faso/Mali Case see 3.4.1 and with regard to consideration of the principle of *uti possidetis* in Africa see 4.3 of this Dissertation.

supposedly mass of unmanageable conflict locked in, but geared to ward achieving power and more territory at the expense of millions of Africans. One of the founding fathers of OAU, Haile Selassie I, for example, suggested Africans to accept colonial boundaries, as they were, whether the boundaries were “good or bad”.⁵ It is plausible that Emperor Haile Selassie had interest to maintain sovereignty over the Somali region of Ethiopia that Somalia had been requesting to unit with their Somali kinsmen. Similarly, redrawing colonial boundaries was not acceptable to Kenya because Somalia had been demanding the Somali ethnic group in the northern Kenya to be ceded to Somalia. The then president of Mali and Mauritania vigorously argued against revision colonial boundary to meet their own similar private power interest.

The decision to honor colonial boundary line in fact did not suppress territorial or boundary conflict, as it was supposed. Since heydays of OAU, Africa has been experiencing brutal border conflicts. In this regard President Chadly of Algeria view, which portrays colonial boundaries as “*delayed action bombs left by colonialism,*” is not an exaggeration.⁶ Put simply, devastating boundary wars and conflicts have been not uncommon in Africa. Most political commentators agree that vague and divisive colonial boundary laws and policies take lion’s share of African interstate conflict. As pointed out elsewhere in this study, boundary issues are by nature very sensitive that can quickly flare up into armed confrontation.

Though Ethio-Eritrea border conflict was stirred up by multifaceted socio-economic causes, elusive colonial boundary line that was supposed to be drawn by the colonial treaties of 1900, 1902, and 1908 prompted the most ferocious war in 21st Africa. The war was suddenly erupted, and quickly flared up consuming lives of 70 – 100,000 people, has destroyed vast amount of property, displaced millions from their homes, and above all strained relationship of the brotherly people of Ethiopia and Eritrea.

⁵ See details in Section 4.3 of this Dissertation.

⁶ See J.R.V. PRESCOTT, POLITICAL FRONTIERS AND BOUNDARIES, 254(1987).

Terms of the colonial treaties were extremely vague to set a clear and acceptable boundary line on the ground. As pointed out in Chapter 6, the treaties were not only vague, but also named inexistent or wrong boundary rivers a boundary marks. This rendered boundary-making business almost impossible. In other cases, several rivers were captioned in the same name.⁷ The main river course and tributaries found to be indistinguishable.

Confronted with unsolvable scenario, the arbitration tribunal had resorted to unilateral colonial reports, notes, memorandums and third party maps that were not known to Ethiopia. This has further complicated boundary setting and the boundary line delimited by EEBC was completely unacceptable to Ethiopia, as it would further divide families, towns, villages, and ethnic groups that have been living together for centuries. Some of the villages that were never claimed by Ethiopia were awarded to Ethiopia, and villages that were never been under Eritrea administration were allotted to Eritrea. In refusal of both nations to cooperate with EEBC, it adopted a virtual demarcation thereby declaring Ethio-Eritrea boundary line stood demarcated on geographic coordinates (boundary points), and ended its business. But nothing has been done on the supposed borderline – no pillar, beacon or other kind of mark has been emplaced on the ground.

Now the boundary line is still elusive but Eritrea has been campaigning in all forums to pressurize Ethiopia to surrender an uncertain territory that was “fictionally” delineated by virtual demarcation. Even if Ethiopia is willing to give up the contested territories, an actual line of separation is not yet set on the ground. Thus, unless an actual boundary line is drawn on the ground through bilateral dialogue, the contested territories are practically undeliverable. As EEBC is not available to complete the delineation through actual physical demarcation, the only possible option available is to reach at negotiated settlement either by forming a joint border commission that will complete border making. With this view in mind, Ethiopia has been insisting Eritrea to resolve the issue through bilateral dialogue, but Eritrea has refused opting for strict adherence to

⁷ Take, for example, the case of River Maiteb in Setiti juncture. While the treaty names the river from which a straight line drawn to Mai Ambessa as Maiteb, there were other confusing nomenclature as Maiten, Meeteb, or Mi Tene. As a result of

the EEBC's impracticable legalistic approach demanding Ethiopia to surrender territories that were awarded by the delimitation decision. As a result, the two brotherly nations are completely locked up by the *no war no peace policy* that has rendered borderland residents to pursue uncertain future.

Honest dialogue will not only enable setting a boundary line on the ground, but also will certainly facilitate resolution of latent disputes that have triggered the border conflict.⁸ As pointed out in the foregoing chapters, the border issue was simply a bargaining leverage. Numerous political and legal analysts and commentator have observed that Eritrea had provoked the boundary war with intent for force Ethiopia to meet certain economic, monetary, and investment expectations that Ethiopia failed to honor. Unless these issues are resolved, mere attempt to settle border conflict, therefore, may not necessarily create a lasting peace and normalize relationship. Mere reliance on colonial boundary laws or policies, therefore, may not be helpful to recreate brotherhood and normalize relationship with a view to build good neighborhood.

Hence, border delineation by itself is not an ultimate goal. It is simply a means that would take the brotherly people Ethiopia and Eritrea into the situation they were before colonial boots were landed in the area. An acceptable boundary line and resolution of conflict situations will build brotherhood. Normalization of relationship, brotherhood and cooperation will make the traditional functions of border wall practically in significant, which would possibly lead into economic and political integration in line with the objectives of AUBP.

Drawing an acceptable borderline is not an easy task but its fruits are suit. An acceptable borderline will perpetuate peace, create good neighborhood, and contribute for rebuilding the sense of brotherhood by avoiding animosity and mistrust.⁹ Peaceful coexistence, coupled with the effects of globalization, therefore, would stimulate economic and political integration that would ultimately remove restraining effects border wall. This will effectuate AU's Border Program that

confusion in river nomenclature a large swathe of territory including the flash point of 1998 border conflict was awarded to Eritrea. The ward was unacceptable to the Ethiopian people, as they know for sure the truth.

⁸ LEENCO LATA, (ed.), THE SEARCH FOR PEACE: THE CONFLICT BETWEEN ETHIOPIA AND ERITREA, PROCEEDINGS OF SCHOLARLY CONFERENCE ON ETHIOPIA-ERITREA CONFLICT 8 (2006).

aims to change the nature of borders from barriers to bridges that will enable everyone to freely move all over Africa. Economic or political integration would be easy to achieve if barrier nature of African borders is changed. This will, in turn, realize Gadafi's dream of creating United States of Africa.

7.2. Recommendations

7.2.1. Ethiopia and Eritrea

As pointed out elsewhere just before the outbreak of the border conflict president Isias Afeworki remarked that common history and socio economic link between the people of Ethiopia and Eritrea make it impossible to build a border wall that would permanently separate the two intermingled people. It is true alienation would not benefit either nation. Therefore, leaders of both nations should work toward normalization of relation and rebuild brotherhood. This can only be achieved if and only if all outstanding issues are resolved. With a view to settle either border, economic, investment or socio-political issues, both States should be willing to sit together and negotiate.

At this time it appears that the highest level of political authorities are not in a position to sit together and draw a road map that would take them into a negotiated settlement. Thus, third party mediation appears vital. AUBP or a team constituted by AU can offer mediation. If mediators succeed in convincing highest political authority of both nations to resolve all issues with a view to enhance welfare of their people, political authorities can meet together and declare their determination and political commitment to resolve all issues.

⁹ The adage, "Good Fences make good neighbors" in this regard works. See Robert Frost, "Mending Wall" stated the phrase, "Good Fences make good neighbor." The poet is available at: <http://allpoetry.com/Mending-Wall>. Last accessed 01/30/15.

Depending upon category or nature of issues, couple of committee may be organized in ministerial level. Permanent Joint Border Commission may be set up to redraw borderline. Experts from both nations, AUBP or UN, may assist the Joint Border Commission. Another Committee may handle economic, monetary or investment issues. Further Committee that work for resolution of socio-political issues may also be organized. AUBP may play supervision and consultancy role in each Committee. AUBP may also play vital role in finding sources of funding, if the whole process appears to be beyond financial capacity of both nations.

7.2.2. African Union

As mapped by the 35 Algiers Conference, African Union should be guided by the long-term goals of political and economic integration of Africa. Commencement of AUBP is a wise move to resolve African border conflicts. Venturing to resolve actual conflicts is important, but may not by itself anchor Africa to the planned destiny -- economic or political integration. AUBP should rather aggressively work toward preventing border related conflicts. This requires a proactive approach, which demands AUBP to push member States of AU to catalogue all boundary lines and resolve all potential conflicts in advance and draw acceptable borderline. Each Member State, therefore, should set up a permanent Joint Border Commission that creates catalogue of national border, supervise each borderline, clear borderline or rebuild border pillars, if needed. United States and Canada International Border Commission, for instance, works permanently and reports to their respective State Department. This has built peace between the two neighboring states. If Africa follows the same mechanism, all conflict situation would be resolved before it reaches into armed confrontation. It is understandable that border management requires huge resources, but is wise idea to spend for conflict prevention than financing killer wars that

consume not only economic resources but also human life. This process would avoid colonial footprints or mitigate harsh effects or colonial border policy.

In addition to conflict prevention, and conflict managing, AUBP is expected to work towards integration of Africa. AUBP should closely work with regional economic communities that work toward economic and political integration of member states. Integration of regional economic community will ultimately lead into continual integration. The process of integrating Africa appears started with issuance of African passport that was declared today (April 6, 2016). The new African passport at the beginning will be issued to leaders of member states will follow to ordinary African citizens. The Passport will further reduce barrier effects of African borders. In accordance with the regulation issuing African Passport, any African can stay 30 days in any Member States without the need to get visa. Issuance of continental visa proves that African Union is moving toward realization of Kwame Nkrumah's vision of forming United States of Africa.

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