Law against reality? Contextualizing the Ethiopian-Eritrean border problem

Abbink, G.J.; Grutty, A. de; Post, H.; Venturini, G.

LAW AGAINST REALITY? CONTEXTUALIZING THE ETHIOPIAN-ERITREAN BORDER PROBLEM

Jon Abbink

1. Introduction

If the central objectives of international law are to prevent or regulate conflicts between sovereign political entities and to create conditions conducive for maintaining or making peace, then one might say that its success is rather mixed. The largely normative body of reasoned law and legal injunctions are largely premised on the state system, on powerful state machineries controlling their armies as well as populations, and on the need for international monitoring and sanctioning regimes that should effectively operate in case of flagrant transgressions. The 60 plus years of UN conventions and relevant international law treaties developed since World War II, mainly in Western, democratic countries, has shown that the realities of dispute, conflicts of interest, or armed contestation about state legitimacy and power have led more than once to blatant disregard for the core principles of peaceful or lawful conduct among states and among insurgent movements. This may be explained by two general factors: firstly, the weak power to enforce international norms of conduct and of legal decisions or precepts, and secondly the deep-rootedness of the conflicts of interest. The latter is tied up with notions not only of regime survival but also in some cases of state or people's survival, i.e., 'realities' that make international law – which almost by nature disregards local and historical subtleties and power relations – an option to either implement or to ignore or delay. Recent developments in international law, following the dis-

A. de Guttry, H.H.G. Post and G. Venturini (eds.), The 1998-2000 War between Eritrea and Ethiopia

course of political and economic globalization, increasingly show the elaboration of international humanitarian law, addressing problems of human security[1] beyond the confines and 'needs' of the existing states in the world system, and of third-generation rights, e.g., those relating to self-determination. Needless to say, the chartered rights and laws are easily proclaimed, but difficult to observe. Darfur, since 2003 the scene of genocidal violence by Sudanese state authorities directed at the 'African' populations of this region, is only the most poignant case in point, with a death toll of more than 250,000 in five years with no solution in sight, and the UN or the major world powers incapable of acting efficaciously.

The case discussed in this book, the Ethiopian-Eritrean conflict, ostensibly a 'border' issue, is a case yet awaiting a final solution. Unless we take the problem as solved with the 'virtual demarcation' of the border based on the Decision[2] of 13 April 2002 of the Eritrea-Ethiopia Boundary Commission (EEBC) and proclaimed on 30 November 2007.[3] However, the boundary remains unmarked on the ground due to fundamental problems between the two protagonists in particular the refusal of Ethiopia to comply in full with the 2002 EEBC decision.

In this essay I claim that despite the important and painstaking work done by the five 'neutral' international law experts on the EEBC no convincing and workable decision has been reached. This despite the observation that the Decision constitutes in itself an important contribution to the development of international law *per se*, notably on the regulation of boundary disputes. From the fact that it has not brought the two parties together in a negotiating structure, has antagonized local populations, and has perpetuated the danger of armed conflict, it seems that there are flaws in its judgement. Some claim that the EEBC missed a great opportunity to bring the resolution of the conflict a decisive step forward.[4] Many international legal scholars of course argue that the decision is simply the best that could be made on the basis of the 'pertinent colonial treaties and applicable international law' – the clause used in the Algiers Agreement of December 2000[5] – and the mandate of the EEBC to which the two countries agreed. But such legal decisions, although strongly normative and legally prescriptive, are often subject to dispute, not always finding universal acclaim despite being defensible on purely legal grounds. Such acclaim tends to be reserved for international treaties and conventions on what

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[1] See M. Kaldor, *Human Security. Reflections on Globalization and Intervention* (Cambridge, Polity Press 2007).

[2] Eritrea-Ethiopia Boundary Commission, *Decision Regarding Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia* (13 April 2002). The Hague: Permanent Court of Arbitration (13 April 2002). Available online <www.pca-cpa.org/upload/files/EEBC-0.pdf>.

[3] See the press release of the Eritrea-Ethiopia Boundary Commission of 30 November 2007 (PCA 6307) on: <www.pca-cpa.org/upload/files/Press%20Release%202007-11-30.pdf>.

[4] See C. Clapham, 'Notes on the Ethio-Eritrean Boundary Demarcation'. Online on: <www.aiga-forum.com/clapham0311.htm> (accessed 3 January 2008).

[5] See for the text: <www.unmeeonline.org/index.php?option=com_content&task=view&id=15&Itemid=50>.

ought to occur in international relations, as the embodiments of the regulative ideas of international law held to govern the complex world of sovereign states.

So it is with the EEBC decision of April 2002 and with the decisions of the Eritrea-Ethiopia Claims Commission (EECC), both instituted under the Algiers Agreement concluded in December 2000 between Ethiopia and Eritrea after the devastating war that from May 1998 to July 2000 claimed at least 70,000 to 80,000 lives and wrought enormous material destruction in both countries. Some observers[6] even stated that decisions of the EECC undermined those of the EEBC.

2. History, Context and Law

This essay is prompted by the disagreement on the judgement made by the EEBC in the, apparently clear-cut case of the Ethio-Eritrean border, and later by some of the EECC decisions. If there is cause for dispute also among international legal experts, then there is room for discussion on the ultimate merits of the decision issued as well as on its impact on and relevance for the situation 'on the ground': in the states in question, for their future relationship, and, moreover, for the rights and well-being of the populations affected by the decision.[7]

Any analysis of the thorny issue of 'the boundary' is faced with the difficult task of taking a proper distance from official views (e.g., of the two governments involved) and of having an eye for the concerns and interests of the citizens of the two countries involved.[8] Here I reflect on the issue from a more *historical* perspective and make some notes on the difficult relationship between (international) law and reality. Also, I will argue why, 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.[9]

In not reflecting political and power relations on the ground, and also omitting to give an implementation structure and not heeding the historical and social rights of the local peoples, the Decision has in fact produced a result that might be acceptable in purely legal terms but defeats its own purpose. Needless to say, responsibility for the war itself and the impasse in relations since December 2000 lies mainly with the two governments, which are not known for democratic decision-making,

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[6] C. Gray, 'The Eritrea/Ethiopia Claims Commission oversteps its boundaries: A Partial Award?', 17 *EJIL* (2006) p. 721.

[7] As Massimo Toschi, Regional Minister of Cooperation, Dialogue and Conflict Management (Italy), said in his opening address to the conference in Pisa where this book has its origins: 'People should not pay for the wrong decisions of their governments.'

[8] This will be tried in this chapter. As Richard Reid says in his interesting paper 'The Trans-Mereb Experience: Perceptions of the Historical Relationship between Eritrea and Ethiopia, 1 *JEAS* (2007) p. 253: '… research on the region should wean itself off the need to score political points, which is how so much scholarship has been constructed...'. I will try to follow Reid's example.

[9] These pages are only a brief reflection on an issue demanding a major, book-length study to do justice to the complexities of history and political machinations that led to the impasse and the deep enmity now produced.

respect for human rights, or to seek consensus on normalisation. It is exactly this autocratic and ideologically rigid nature of the political regimes in these two countries, the incapability of dialogue and give-and-take in negotiations on such an extremely sensitive and psychologically anchored conflict, that should have been more properly reckoned with in the decision. The Decision seems to want to please both parties and does not convey the impression that one is more in the right than the other. It gives no incentives for bilateral negotiation and normalization, upon which a realistic implementation of any decision is dependent, a fact illustrated by the complete impasse between the two regimes in subsequent years. Ultimately, the process of normalization is an issue that the two governments, so closely related in outlook, common history, and military struggle against the pre-1991 regime in Ethiopia, will have to face and should be prepared for. They both agreed to do so in the mandate of the EEBC and the EECC in December 2000 following the Algiers Agreement.[10] Talks on normalization would be and have been necessary in case of the immediate and full compliance of both countries with the arbitration as laid down in the 2002 Decision. In reality, we have seen it otherwise: a relentless propaganda struggle has unfolded on the level of the two political elites that have emerged from the two long-dominant political parties since May 1991.[11] They are locked in a prestige psychological battle that now seems to amount to an effort to overthrow the 'enemy regime' as well as to vindicate their *domestic* position as sole political power.

Historical perspectives on the Ethiopian-Eritrean border issue emphasize the inordinate complexity of the matter as well as the duplicity of all the parties involved. Notably the Italians, who carved out their Eritrean colony from the Ethiopian political domain and were engaged in a 40-year effort of encroachment in the border area with Ethiopia were two-faced. But so were the British Mandate authorities (1941-1952), the Ethiopian imperial regime (controversially abrogating the UN-instigated federation with Eritrea in 1962), and especially the two post-1991 governments. Excellent studies by G. Ciampi[12] and by F. Guazzini[13] provide ample evidence of this. In her essay in this volume, historian Federica Guazzini adds a

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[10] Which was too hastily and optimistically assessed by outsider observers. See F. Jouannet, 'Le règlement de paix entre l'Éthiopie et l'Érythrée: un succès majeur pour l'ensemble de l'Afrique?', 105 *RGDIP* (2001) pp. 849-896.

[11] In Ethiopia the 'Ethiopian Peoples Revolutionary Democratic Front' or EPRDF (dominated by the 'Tigray Peoples Liberation Front', or TPLF) that assumed power in May 1991, and in Eritrea the former 'Eritrean Peoples Liberation Front' (EPLF), renamed in 1994 as the 'Popular Front for Democracy and Justice' (PFDJ). They are vanguard parties, similar in étatist political outlook and autocratic methods of governance via central planning and programmes, party cadre dominance in the civil service and the national administration, overwhelming control of the mass media, a party economy, and full control of the military.

[12] G. Ciampi, 'Componenti cartografiche della controversia di confine eritreo-etiopico', 12 *Bolletino della Società Geografica Italiana* (1998) pp. 529-50 and 'Cartographic Problems of the Eritreo-Ethiopian Border', 56 *Africa* (Roma) (2001) pp. 155-189.

[13] F. Guazzini, 'La geografia variabile del confine eritreo-etiopico tra passato e presente', 54 *Africa* (Roma) (1999) pp. 309-348 and *Le Ragioni di un Confine Coloniale. Eritrea 1898-1908* (Torino, L'Harmattan 1999).

major contribution to our understanding of the political and historical complexities of the border arguments as well as to the controversial status of the so-called 'pertinent colonial treaties' that were taken as a basis for the EEBC Decision. Her work and that of Ciampi show that a proper assessment of the colonial legacy of the border issue is crucial. The political duplicity and deliberate ambiguity – I fear especially on the part of the Italian colonizers of Eritrea (see below, and Guazzini's essay) – have created a divisive legacy which is not easily to be disregarded. The fact that colonial treaties are the result of contested if not illegal action by a foreign conquering power in Northeast Africa should already in itself be a cause for deep reservation in accepting them at all. The so-called border problem is indeed an issue of national identities and prestige or power politics between, firstly, Ethiopia with a European colonizer angry and vengeful about its defeat at the hands of an African country (at Adwa in 1896), and subsequently between a problematic successor state to the Italian colony of Eritrea and a restored imperial Ethiopia after World War II. The struggle for recognition and for re-drawing of state boundaries went on undiminished after the 1991 take-over of power in Ethiopia by two insurgent movements (see below). This was a long way from the amicable start of relations between the two regimes in that year.[14]

Another relevant aspect to consider is that of diverging conceptions of governance and law in the region (Northeast Africa). They are founded on customary law, imperial absolutist power, gaining (or enforcing) loyalty of local people to elites and forceful self-made leaders rather than on an unequivocal delineation of territory or on consensus and state sovereignty based on texts and treaties (cf., Clapham's analysis, *infra* pp. 159-170), even less on rule-of-law ideas emanating from the (Western) legal tradition.

In this respect it is imperative to recognize the close *interaction* of the 'human border' and the physical-political border as they were perceived, developed and manifested on the ground.[15] It is relevant to understand this interaction not only for the recent, post-April 2002 period, but for the entire historical trajectory of the region in question since the inception of the *Colonia Eritrea* in 1890. The various regimes have tried to carve out or claim borders usually without much concern for the people living in the area. We might say this still holds today.

The historical and socio-cultural links between Eritrea and Ethiopia are well-known and may not require extensive comment. While areas across the Märäb (Mareb) river now known as Eritrea maintained significant autonomy from the

[14] Notably, in an interview in 1996, Eritrean president Isayas Afeworki had said: 'As the relations are further strengthened and developed, our common borders shall have no meaning and our common interests shall have an upper hand on our individual interests'. He also said: 'To claim that Eritrea existed as a political and geographical entity before 100 years and there existed an Eritrean national feeling would be an utter fallacy' (ibid.) See: 'Interview with Isaias Afeworki. Translated from Tigrigna by Amanios Mekonnen', *Assir* (Magazine, Addis Ababa 1996) No. 1(3). Accessed on: <www.eritrea.org/enic>, 8 June 1998, but removed since (the interview is referred to in *Press Digest* (Addis Ababa), No. 26, 27 June 1996).

[15] Cf. Ciampi 2001, loc. cit. n. 12, p. 155; see also J. Abbink, 'Creating Borders: The Impact of the Ethio-Eritrean War on the Local Population', 56 *Africa* (Roma) (2002) pp. 447-458.

Ethiopian imperial state since the demise of the Aksumite empire in the ninth century CE, the region was usually within the orbit of the highland state until 1890, when Italy declared Eritrea a colony. This gave rise to a new, though always contested territorial-national consciousness. Local identities were strong however, and unity in the sense of state or national identity as we anachronistically tend to define it had not developed.[16] Several ethno-linguistic groups, such as the Tigrinya and the Afar and later the Kunama and the Irob straddled the border, while common religious faiths, kinship and economic relations linked the two regions, liked they did in Italian colonial times. Local social relations and disputes were regulated largely by customary law which kept its force next to the expanding role of codified law in both Eritrea and Ethiopia.[17]

Since the recent war however, the commonalities are no longer emphasised, notably from the Eritrean side. The independent status of Eritrea has been pointed out in strong political rhetoric by state/party authorities and even solidified in historical and archaeological research as having existed 'since ancient times'. In the aftermath of the conflict that concerns us here, the 1998-2000 border war, links of kinship, historical and cultural affinity and trade are broken. Memories of the actual conflict – the purposeful destruction of houses and churches, of fields and irrigation systems, the abuse, killing and abduction of civilians, the hate displayed towards citizens of the 'enemy country' and the mutual expulsions have created a deep psychological rift. On the level of the political (party) elites in power in both countries who share a common core ideology and are both increasingly unpopular, this will be a passing phenomenon. Among the wider population the rift will take a long time to heal. The EEBC Decision does not provide a solution for normalization because the effect has been to sow the seeds of enduring instability with its particular choice of border line, perhaps to the long-term detriment of both countries.[18] The core issue is that it did not appeal to 'applicable international law' and almost exclusively made its case on the basis of 'pertinent colonial treaties'.[19] From the purely legal point of view this is also a puzzling feature.

3. The Nature of the 2002 EEBC Decision in Socio-historical Context

3.1 The mandate

It was a unique fact that an arbitration commission was installed after Ethiopia won the war started by Eritrea.[20] Though the country was the victim of armed attack

[16] Cf. Reid, loc. cit. n. 8.

[17] Cf. Aberra Jembere, *An Introduction to the Legal History of Ethiopia, 1434-1974* (Münster, Hamburg, Lit Verlag 2000).

[18] See C. Clapham, 'Notes on the Ethio-Eritrean Boundary Demarcation', loc. cit. n. 4.

[19] As per the mandate mentioned in the Algiers Agreement, Art. 4(2).

[20] That Eritrea had started the war was at least what the Eritrea-Ethiopia Claims Commission (also installed under the Algiers Agreement) has stated in its Dispositif of 19th December 2005. See: Eritrea-Ethiopia Claims Commission, Partial Award, *Jus Ad Bellum* – Ethiopia's Claims 1-8 (19 De-

on 12th May 1998, after an ill-managed skirmish between Eritrean and Ethiopian militia on 6th May 1998 in the Badme (Badimme) area, leading to a devastating and costly war, Ethiopia's government was willing to submit to a 'final and binding' arbitration on the border by an outside force, an arbitration commission hosted by the Permanent Court of Arbitration.[21] Accepting a restoration of the *status quo ante* as before May 1998 and renegotiating bilateral relations would also have been an option. This solution was seen as a major mistake, from which virtually all subsequent problems were seen to emanate by many observers, and certainly by the Ethiopian public at large. The Algiers Agreement in which this arbitration clause was contained had also come like a bolt of lighting on the Ethiopian political scene after five months of silence. It was prepared behind the scenes and its nature and conditions were of course never democratically discussed in public in the Ethiopian parliament, the press, or other forums. It can partly be explained with reference to the deep-seated ideological kinship between the leaders of the TPLF and EPLF rebel fronts. They had been fighting against the previous Ethiopian central government and its unitary conception of the state. Also the seniority of the EPLF over the TPLF, locked in an alliance that despite its moments of crisis had been quite resilient, played a role.[22]

Looking specifically at the EEBC decision, a few observations could be made that put its 'solution' into perspective and assesses its contribution to international law and as a resolution of the actually existing conflict.

3.2 The use of evidence

A first general point emerging very clearly is that none of the so-called treaties and maps used in British-Ethiopian or Italian-Ethiopian negotiations since October 1896 (date of the Addis Ababa Treaty after the Adwa defeat) is really helpful in determining the borders. Hardly any agreement was reached on the details. For example, as Guazzini says of the 1900 'treaty': 'No geographical coordinates of the points between which the boundary was to run were given in the treaty' (see *supra* pp. 109-139). Basically, *not one* successful, mutually agreed upon treaty or map was produced. This kind of situation holds for all treaties and proposals subsequent

cember 2005). Online at: <www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf>. However, it rejected Ethiopia's claim that Eritrea '… was responsible for the whole war'.

[21] Important to note: *not* the International Court of Justice, whose decision would have more authority in international law.

[22] See ex-TPLF member Asegued Gäbre-Sellassie's book *Gahdi* (Addis Ababa 2007, in Tigrinya), an insider account of the subject, and the amazing statements by a TPLF veteran and important Ethiopian ruling party member, Sebhat Nega, in a *Dimtsi Woyane* (TPLF radio station) interview of 28th May 2007, saying that: 'On our part, we believe the people of Eritrea know very well – except a few members of the Shaebia leadership – that the EPRDF-led government of Ethiopia is the one and only force that would defend the independence of Eritrea. In short, the Eritrean people are very well aware of the fact that no force matches the power of the EPRDF-led government to defend and support the independence of Eritrea.' He concluded: 'Suppose let's say Eritrea comes under invasion by an outside force. I've no doubt the EPRDF government would, along with the Eritrean people, fight against the enemy of Eritrea' (online on: <www.abbaymedia.com/TPLF_WakeUp_Call_to_Ethiopians.htm>).

to the 1900 text. No final decisions of any kind were made or *recognized* by both contenders.

It is relevant instead to take those 'colonial maps' and their history as *political artefacts*, embedded in a competitive political game between the regimes in place and to recognize their artificial, iconic and indicative role in the changing power configurations between regimes, as opposed to between peoples or citizens of the states in question.[23] It is already remarkable that in 2000 the two regimes, both led by a former insurgent movement that catered to a specific constituency, acquiesced in submitting to international arbitration on the basis of partly fictitious and outdated treaties lacking clarity and status. These were all abrogated by the Italo-Ethiopian Peace treaty of 1947. It was no doubt an exercise of political legitimacy, construction and state consolidation, especially on the Eritrean side.[24] On the side of the Ethiopian government no doubt a major mistake was made, the results of which continue to haunt the EPRDF regime, especially as it seems that it did not properly do its homework, leaving out essential evidence and ceding too much beforehand to the Eritrean position.[25] A barrage of critique has landed upon them, from the general public, from researchers and analysts, and from (former) associates who disagreed with them.[26] Despite its rhetorical acceptance of the decision in full in November 2004 (via the 'Five Point Peace Plan'), the current Ethiopian government cannot and will probably never accept the EEBC Decision as it stands: if Badme and a large part of the Irob area, undisputedly under *de facto* Ethiopian administration *since Italian times*,[27] are to be formally Eritrean, domestic unrest will grow and the regime will have 'lost the war' and the battle for prestige, so important in this part of the world.[28] As to the Irob area this is more than ironic because the Irob never figured as one of the nine officially recognized 'nationali-

[23] Cf. Ciampi, loc. cit. n. 12; Guazzini, loc. cit. n. 13.

[24] Cf. J. Abbink, 'The Eritrean-Ethiopian border dispute', 97 *African Affairs* (1998) pp. 551-565.

[25] See the critical comments made on this by the EEBC in its 2002 Decision, *supra* n. 2, at pp. 21 and 50.

[26] E.g., from lawyer Tecola Hagos, Ph.D., a former TPLF member, in his strongly expressed comments on the EEBC on <www.tecolahagos.com/editorial_sebhat_nega.htm> (accessed 2 February 2008).

[27] See also A. Vascon, 'Eritrea – Bademmè e la questione dei confini con l'Etiopia' (2003) p. 10. Online on: <www.ilcornodafrica.it/gt-bad1.htm> (accessed 8 November 2007).

[28] The Irob case, underexposed in the debates about the EEBC Decision, is perhaps even more painful that the Badme issue, because this people is to be divided into two parts, and many locals will have to live under a regime that killed many and destroyed their houses, churches, fields and irrigation systems in the course of the 1998-2000 war (see A. Waters-Beyer, 'Participation in suffering', 1998. Online report on: <www.geocities.com/~dagmawi/News/News_Aug6_Tigrai.html>; Irob Community of North America, 'Ethio-Eritrean boundary delimitation: the Irob case'. Online on: <www.geocities.com/malula86/irob.html> (accessed 8 February 2004). In the Irob case the principle of self-determination was clearly flouted, apart from the questionable decision by the EEBC against applying the *effectivités* of Ethiopian authority mainly on the basis of Italian documents and information. Italian Eritrea-governor Corrado Zolli, writing about the controversial status of Irob country *and* of Italy's claims on it (C. Zolli, 'Un territorio contestato tra Eritrea ed Etiopia. Escursioni nel paese degli Iròb', 8 *Bollettino della R. Società Geografica Italiana* (serie VI, No. 10, 1931) pp. 715-746, would have been very happy with the EEBC decision.

ties' (ethnic groups) of Eritrea. In addition, an important Italian map of 1931[29] of the Irob area shows the *entire* Irob country including Endeli as part of Ethiopia, with the remark 'confine di fatto attuale', a situation which has not changed since 1931.[30]

There are also other factual errors in the EEBC's judgement. I mention a few only to indicate the unresolved problems of interpretation and the wide scope for alternative readings of map evidence which was very uneven and indecisive. It is for this reason that more reliance on 'applicable international law' would have been preferable. In referring to this matter, the following statement in the Decision is unconvincing:

> 'As it turned out, the Court [the International Court of Justice] found in that case that there was insufficient prescriptive conduct to affect its interpretation of the treaty. But what matters for present purposes is that the Court read the applicable law clause before it as including recourse to such rules of customary international law. – i.e., considering customary international law rules.'[31]

In the Decision and in a letter of 7th October 2003 from the EEBC chairman,[32] it is suggested that the maps offered, including the unilaterally marked-up Italian map of 1935 claiming Eritrean territory up to the Mai Tomsa (point 6), was agreed upon by Ethiopia and Italy.[33] But, as Guazzini argues, this was not the case. Hence, one cannot say on the basis of a map drawn up by Italy that '… the title of Eritrea […] had crystallized as of 1935'.[34] How such a misconception can then become the basis of a boundary decision is rather puzzling.

A very telling Italian map of 1929 (see appendix to this book[35]), not properly considered by the EEBC, shows the extent of the claims by Italy after more than 20 years of encroachment efforts on Ethiopian territory. Even there, the Badme area (or rather the 'Badumma' plain, at that time there were no villages) is not claimed. The Italian claim line ends at the Meeteb stream (one of three) *west* of the Tomsa stream. What is more important, the limits of effective Italian occupation at the

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29 Cited in Ciampi 2001, loc. cit. n.12, fig. 12. It was made for their own purposes.

30 Ibid., pp. 176-177.

31 EEBC Decision, *supra* n. 2, para. 3.14, p. 25. In this 1999 *Kasikili/Sedudu* case the parties by agreement prescribed that the decision should be made 'on the basis of the ... Treaty ... and the relevant principles of international law'. The Court decided that the words 'and the relevant principles of international law' were not limited in their effect to the international law applicable to the interpretation of treaties; they also required the Court to take into consideration any rules of customary international law that might have a bearing on the case (ibid., p. 24).

32 Sir E. Lauterpacht, 'Letter of the Eritrea-Ethiopia Boundary Commission to His Excellency Kofi A. Annan, Secretary-General of the United Nations', 7th October 2003.

33 Section 8 of the letter says: 'The Commission was convinced that these [maps] showed the Parties' agreement upon an interpretation of the relevant Treaty which placed the boundary prescribed by that Treaty in the location determined by the Commission.'

34 EEBC Decision, *supra* n. 2, para. 5.95, p. 84. Compare also p. 93, paras. 5.90-95.1: a fictitious claim.

35 In: Bahru Zewde, 'The Ethio-Eritrean Border/Boundary: a Seesaw Puzzle', 3-4, 3 *Medrek – FSS Bulletin* (Addis Ababa 2006) facing p. 5.

time are indicated again to the west of that, along a line from the Sittona river to Mai Anbässa (the uncontested point of confluence with the Märäb), and not the Tomsa. In 1929-1935 Ethiopia did not reach agreement with Italy on any other maps produced.

The location of Fort Cadorna as per the EEBC Decision (and the line between points 14 and 18 on the Western sector map) is most likely wrong being 20 km. too much to the south. In a letter by the EEBC chairman of 21st March 2003 (Section 23),[36] this is admitted more or less, on the basis of the EEBC having received 'insufficient information'. But it is glossed over with reference to Articles 28 and 29 of the Commission's Rules of Procedure. For the Commission the boundary line in the region (Acran) would not be affected by it due to the remarkable Ethiopian submission to the EEBC that Fort Cadorna was part of 'mostly … undisputed Eritrean places'.[37] But this is contestable to say the least.

For the central area, the EEBC Decision rightfully hints at the inordinate complexity and confusion existing in maps and reports on river names and courses,[38] especially the triad 'Märäb-Bäläsa-Muna' or the 'Muna/Berbere Gado'. For example, the 1900 Treaty map, the only map ever attached to the three 'pertinent' colonial treaties and therefore given (too) much value by the EEBC,[39] mentioned a stream with the name 'T. Mai Muna'. In reality its name and course could not be identified with any certainty on the basis of subsequent maps and reports. A focus on the Muna to determine the boundary is not helpful.[40] Closer study of all the evidence reveals that the problem of river courses and boundaries notably in the Irob area has not been solved by the EEBC – and *could not* without a solid field study.[41] Here the weakness of the Ethiopian submission to the EEBC may also have contributed, as it apparently did not present tax records, court case evidence, etc. showing the historical orientation of the Irob towards Tigrayan (Ethiopian) authorities in the Agame region and not to Italian-colonial authorities.[42]

As to Badme: this issue has been discussed *ad nauseam* and will not be gone into here except to note that Eritrea was not able to bring any real evidence of its administrative presence in the area. The village was founded in 1951 under the Ethiopian administration in *Ras* Seyoum Mängäsha's time (administrator of Tigray region). Before the 1998 war Eritrea did not bring up the case of Badme as being Eritrean. It was not a Kunama village,[43] but settled by Tigrayans. There were two

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[36] See Eritrea-Ethiopia Boundary Commission, *Observations of 21 March 2003* (Addendum to the Progress Report of the UN Secretary-General, UN doc. S/2003/257 of 6 March 2003), online at: <http://untreaty.un.org/cod/riaa/cases/vol_XXV/216-224.pdf>.

[37] EEBC Decision , *supra* n. 2, p. 50.

[38] Ibid., pp. 33, 35, and 39.

[39] Reproduced as Map 5, EEBC Decision, *supra* n. 2, p. 31.

[40] Cf. also Bahru Zewde, loc. cit. n. 35, at p. 5.

[41] See also the EEBC's admission in its letter of 23rd March 2003, section 25 (cited in the source *supra* n. 35).

[42] Cf. Bahru Zewde, loc. cit. n. 35 at p. 7.

[43] As mistakenly assumed by A.M. McHugh, 'Resolving International Boundary Disputes in Africa: A Case for the International Court of Justice', 49 *Howard Law Journal* (2005) p. 215.

Ethiopian customs posts *northwest* of Badme before 1998.[44] In the Yemen-Eritrea arbitration case on the Hanish Islands, the PCA, in a major piece of jurisprudence, elaborated on the need for 'intentional display of power and authority' over *effectivités* in the area.[45] No such Eritrean display was evident in the case of the Badme area.[46] Therefore the EEBC reverted to the old colonial maps, at the detriment of Ethiopian evidence for its display of authority. Ethiopia, however, had held elections in Badme since the 1960s. The place participated in the Ethiopian censuses of 1984 and 1994. In the 1960s the World Bank funded an agricultural project in the area to the tune of USD 20 mln, administered by Ethiopia.[47] Ignoring this evidence and reverting to the (unilateral Italian) maps as authoritative has a weak basis: can this really be accepted as part of the development of 'applicable international law'?

The implication of the fact that apparent errors were made in this judgement, whatever the quality of the legal reasoning and the marshalling of accepted tenets of international law, is potentially far-reaching. Can these errors stand as still valid, and can a border be demarcated on the basis of them? Not only the conclusion that we have *res judicata* here is questionable. More important, it is likely that realities on the ground will continue to further generate conflict.

In a general sense, the very fact of the shaky status of the maps makes doubtful any contemporary decision as to which treaty or map is pertinent, and what international law should be applicable. Any decision is very much dependent not only on detailed negotiations in good faith between two governments (preferably with a democratic, i.e., widely supported mandate), but even more so on the views of political loyalty, governance, interests and identity of the people living in the frontier areas. They know the human geography, the trade routes, the social systems, the customary rights and duties. We all know that the EEBC has not considered these, either because of the mandate given to it, or due to a lack of sufficient fact-finding. It did not carry out any solid ground survey, interviews or local document and data-gathering, but relied on border area satellite / aerial photo information. Whatever the legal reasons for this, a satisfactory decision would at least have come up with more than an analysis of the archival material, secondary documents and strict reasoning on the basis of international law devoid of contextual referents.

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[44] Notably, in the Bure area in the Eastern sector, there was in 1994 one Eritrean checkpoint or customs facility in contested territory with Ethiopian permission. This was seen as sufficient evidence of Eritrean *effectivité* in the area because Ethiopian and Eritrean governments of the day appeared to see it as their border. Purely to see it as such on the basis of this evidence is doubtful. But the chunk of territory was assigned to Eritrea. See EEBC, *supra* n. 2, para. 6.32.

[45] See PCA, *Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), between the Government of the State of Eritrea and the Government of the Republic of Yemen, 1996*, The Hague 1996, p. 18 (para. 68) p. 78 (para. 269) p. 94 (para. 341) p. 97 (para. 361) and p. 142 (para. 507) (online at: <http://www.pca-cpa.org/upload/files/EY%20 Phase%20I.PDF>).

[46] Although the two insurgent movements EPLF and TPLF made some informal deals on the division of the area in the 1980s.

[47] Mentioned by former governor of Tigray *ras* Mängäsha Seyoum in a Memo of December 2004 (in Amharic), online at: <www.ethiopiafirst.com/news2004/Jan/Letter_By_Ras_Mengesha.pdf>. Extant documents on this were not submitted by Ethiopia.

I give one example of why this latter aspect is important. In 1909, Emperor Menelik II of Ethiopia (r. 1889-1913) gave grazing rights to local (probably Kunama) people from Italian-held Eritrea in the Ethiopian-administered localities of Shilalo and Shäshäbit, i.e., across the (unmarked) border. This of course did not imply a transfer of sovereignty: the Emperor granted these rights without any legal implications and out of magnanimity. In later years, well after his death in 1913, the Ethiopians had trouble in getting this land back under their sovereignty. The Tigrayan ruler *ras* Mängäsha Seyoum appealed to Emperor Haile Sellassie to ask that the Eritrean authorities give it back,[48] to no avail of course. This fact of 'Eritrean presence' in Tigray (Ethiopia) was used and was even, from a Western point of view, legal, an *effectivité* that could be used to bolster a claim to sovereignty over the area.[49] But it was *not* from a local customary-law point of view.

The fault of not fully exploring the contextual meaning and the ground data or the ideas and practicalities of the border as 'lived' by local communities is as much that of the two countries (notably Ethiopia). The mandate given is too limited or constraining, obviously without considerations of *ex aequo et bono*, 'according to what is equitable and just.'[50] But then, nothing would have prevented the Commission from making a few bold moves – on the basis of 'applicable international law' providing judicial *discretion* – to gather more material itself (maps, colonial reports, government archival evidence, testimonies from local people, expert informants and political decision makers from imperial times) and not being dependent on what the two countries gave them. They could also have come up with a more innovative and defensible solution thus reflecting realities on the ground and making a contribution toward conflict resolution in a wider sense – which, despite the intrinsic challenges for further developing the discipline of international law, was the ostensible aim of the exercise.

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[48] This case was also mentioned by the former administrator of Tigray, Mängäsha Seyoum, see previous note.

[49] As was done in the EEBC decision: Shilalo and Shäshäbit are seen as part of 'undisputed Eritrean territory'.

[50] As the EEBC rightly says in its Eighth report of 6th March 2003 (online at: <www.pca-cpa.org/upload/files/Mar.%20SG%20report%20-%20final%20version.pdf>) : '… the December 2000 Agreement expressly precluded the Commission from deciding matters *ex aequo et bono*: it did not confer on the Commission, as it could have done and as has been done in the demarcation arrangements for many other boundaries, the power to vary the boundary in the process of demarcation for the purpose of meeting local human needs. Absent such authority, the hands of the Commission are in large measure tied. The Commission regrets that the boundary lines found by it to follow from the Treaty provisions and international law which it is bound to apply may at certain points result in physical divisions within communities that may adversely affect the interests of the local inhabitants. The Commission has not been insensitive to certain likely problems; it expressly contemplated the possibility of variations to the line, but only at the request of and with the agreement of both Parties. *While the Parties have not reached such agreement, nothing would preclude their doing so in the course of the demarcation, even on a location-by-location basis.'* [Emphasis added]

3.3 The reference to 'applicable international law'

As per its mandate, the EEBC had the possibility of referring to applicable international law. To do so would have been particularly apposite in this historically complex case, where notions of state law, international law, local customary law, and political competition intermingled. It made a straightforward interpretation of 'pertinent colonial maps' – all of dubious status – very difficult. In the Decision, however, little due relevance was given to *uti possidetis* and *effectivités* in the context of state relations over the past century.[51] But realities on the ground – settlement, economic activities, customs posts activity, court proceedings, etc. were going on in the area for decades. The border between Italian Eritrea and Ethiopia up to 1941, as well as in later periods up to 1962 when the federation was abrogated was never delineated or demarcated.

These realities should have been considered for the period from the late 19th century up to 12th May 1998, the start of the armed conflict, and the consideration of *uti possidetis* in combination with historic sovereignty rights would find acceptance in a judgement. The *uti possidetis* principle emerged in Latin America to regulate borders between newly independent states after the Spanish colonization ended and, indeed, worked rather well. In Africa one of the most cited cases was the decision by the International Court of Justice in the case of the Burkina-Faso/Mali boundary (1986), on the basis of which *uti possidetis* was declared to be a general principle of international law, not only a special rule.[52]

It is important to note that although the principle of *uti possidetis* is now recognized as 'a rule of international law applicable generally with regard to the phenomenon of decolonization, it remains to be determined whether it is a principle applicable to all situations of independence, irrespective of the factual situation'.[53] This holds for Ethiopia and Eritrea. The latter did not exist before 1890 when Italy detached it from Ethiopia - despite the strong autonomy of the region - and the idea to 'keep what you have' at the time of independence is difficult to determine: was this at 'independence' in 1941, when the Italian colony reverted to the UN and became a British mandate? Or was it the situation in 1962, when Eritrea's existence as an independent member of the federation with Ethiopia was ended, or was its independence in May 1991 (formally declared on 24th May 1993) after the armed victory over the Mengistu regime? The issue is problematic because at the time (1964) that the OAU Charter affirmed *uti possidetis* for ex-colonies Eritrea was a part of Ethiopia and not a colony in the legal sense. Especially with regard to the question of Ethiopia's access to the sea (its former port of Assäb, built and used by Ethiopia mainly in the period after the genesis of the 'pertinent colonial treaties') these questions are important although they did not get adequate treatment in the

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[51] And even less to finding whether and how *uti possidetis juris* and *uti possidetis de facto* might be congruent or clash in this particular case of Ethiopia (as the pre-existing country from which Eritrea was carved out in 1890).

[52] Cited in M. Shaw, 'People, Territorialism and Boundaries', 8 *EJIL* (1997) pp. 478-507.

[53] Shaw, loc. cit. Online version: <www.ejil.org/journal/Vol8/No3/art6.pdf>, p. 15.

EEBC Decision.[54] The Assäb issue would have brought in law relating to the exercise of historical sovereignty.

Other relevant applicable law already mentioned, and related to the *uti possidetis* issue, would be that relating to the *exercise of self-determination* of peoples in the border area (see next section). *Uti possidetis* when strictly applied would have the territorial consideration prevail over issues of human rights of minorities that face new problems as a result of new divisive borders.

3.4 The interpretation of evidence

On what counts as evidence the EEBC has made many steps in its reasoning that do not accord with historical facts, or gives a very specific, often contestable, interpretation of them. As we saw above, with regard to the most contested part of the boundary around Badme, the EEBC in a remarkable move, chose to draw a straight line between the Mai Anbässa-Märäb confluence (point 9) and the Tomsa (point 6). The straight line in actual practice was never a real boundary that was observed: it was an area *to be demarcated*. The Italian authorities in Eritrea always prevented this from happening: this was to be expected on the basis of their colonialist aims. The line was supposed to be sorted out by consultations and consideration of facts on the ground and subsequently marked between the two points hypothetically connected. It is puzzling that the EEBC saw fit to just to copy the line and plot it on the map as 'the boundary'. Italy never administered the area to the west of the line,[55] let alone east of it. Ethiopian activities, however, were increasingly evident on the western side since the early 1900s.

Of course, a legally defensible decision on the border dispute can be made without an appeal to *ex aequo et bono* principles – which are only very reluctantly used in international law disputes[56] – and without taking note of the human border or the situation on the ground. But the result is instability and a heightened chance for the renewal of violent conflict, which a comprehensive arbitration decision was meant to prevent.

This is most evident in the case of the Irob people (see note 28) and above. The proposed boundary line cuts across their land, flouts their right to self-determination and pre-empts their overwhelming preference to remain an undivided people and citizens of one state, based on historical affinity and communal identity. One could refer to the Yugoslav Arbitration Commission (Badinter Commission),

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[54] Perhaps because the Ethiopian leaders did not raise them; cf. the IRIN news message (11th February 1998) on a statement of the Ethiopian Ministry of Foreign Affairs: 'Ethiopia dismisses calls for sea outlet'.

[55] Although, as we saw above, Emperor Menelik II had given grazing rights to Eritrean-administered people in Ethiopian-held territory.

[56] Perhaps justifiably so, as they lead quickly into politics and allegedly introduce non-legal elements. Cf. also McHugh, loc. cit. n. 43, at p. 222. But the scope of application of *ex aequo et bono* could be extended: see L. Trakman, '*Ex Aequo et Bono*: de-mystifying an ancient concept'. University of New South Wales Faculty of Law Research Series, Working Paper No. 39 (online:< http://law.bepress.com/unswwps/flrps/art39>. In: 9 *Chicago Journal of International Law*, 2008) p. 621.

which opined in 1991 that the rights of minorities are part of *jus cogens* and thus comprise a right to recognition of their identity under international law or the right to choose their nationality.[57] While this is controversial, it shows at least that there was and is leeway for creative interpretation, for doing justice to realities on the ground. However, the Irob problem will now remain another aspect of instability in the border region and must be solved in another, probably political, common-sense manner.

Excluding *ex aequo et bono* reasoning does not prevent an arbitration commission from gathering relevant facts on the ground. While the EEBC has used recent satellite images and other field material on the disputed areas, it never has carried out proper fact-finding missions in the three sectors that would have permitted it to develop its legal arguments with reference to 'applicable international law'.

There was, therefore, the need for an assessment not only of the international legal aspects of this century-old conflict (engendered by Italian colonial conquest), but also of the *political* consequences of this history and of the opportunistic and authoritarian actions taken by the various regimes that have been, or still are, in place and that are not marked by serious democratic decision-making or sufficient respect for people's rights. The rule-of-law fares best in democratic states. Furthermore, if the development of an important piece of international law, as in the case of a boundary decision, is constrained too much by a basically political and problematic mandate given to the arbitrators by certain governments, its scope and impact will be seriously limited. This happened with the EEBC.[58] In the case of its twin commission, the Eritrea-Ethiopia Claims Commission, a more bold and independent step was taken.

3.5 A possible contradiction with the findings of the Eritrea-Ethiopia Claims Commission?

In its award of 19th December 2005, the EEBC said that:

> '… [Eritrea] violated Article 2, paragraph 4, 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, as well as other territory in the Claimant's Tahtay Adiabo and Laelay Adiabo Weredas.'[59]

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[57] This was Opinion no. 2 (1991); cf. Shaw, loc. cit. n. 52, at p. 506 in his note 130.

[58] Interestingly, K.H. Kaikobad concludes: '… the fact that the Parties were unable to accept the delimitation carried out by the Commission shows that this dispute settlement procedure ought not to have been embarked upon in the first place. Attempts at political solutions and settlements are better in this sort of hostile environment wherever possible' (*infra* pp. 171-223).

[59] EECC, Partial Award, *Jus Ad Bellum* – Ethiopia's Claims 1-8, as cited *supra* n. 20. It also said: '… The Claimant's [Ethiopia] contention that subsequent attacks by the Respondent along other parts of their common border were pre-planned and coordinated unlawful uses of force fails for lack of proof.'

This judgement has been contested. In the present book, we find two views on the EECC decision regarding Ethiopia's *jus ad bellum*. E. Greppi, *supra* pp. 55-77) argues similarly to Gray, who perhaps exaggerates the point[60] that this commission is 'disappointing' and 'quite unsatisfactory'. It allegedly did not relate to the earlier EEBC Decision and according to him contributed to the Ethiopian Government's refusal of the latter. Apart from this being questionable in view of the strong and continuous focus of Ethiopia on Badme, it is also the question of whether the reasoning of the EEBC is faulty and whether it has no relevance for the issue of claims awards. Greppi's analysis does not discuss the facts of the May 1998 incidents (or the views on them).

In this book, J.R. Weeramantry, in contrast, and equally plausible from a legal point of view, argues the opposite, saying that the EECC's Partial Award '… finding is sound in law and contains a good deal of common sense', and '…appears consonant with international law', confirming the role of Article 2(4) of the UN Charter (see *infra*).

What are the decision criteria here to make the Award an acceptable or unacceptable piece of law? The facts appear to support Weeramantry: escalation was provided on 12th May 1998 by a massive Eritrean campaign with several brigades and occupation of territory in response to an armed incident. Is this 'contradiction' between carefully drawn up judgements insurmountable and would it invalidate any of the two dispositifs? What is more important is whether these EEBC and the EECC decisions bear any significant relationship. Would the admission that Eritrea is responsible for the initial phase of war, giving Ethiopia a right to self-defence, have any direct bearing on the question to whom, for instance, Badme belongs? No, as the decision on this in the final instance must be based on evidence of effective rule, credible and mutually accepted maps, historical claims, and local people's adherence to political and civic identity. The answer to the question is only important (*contra* Greppi) for determining the responsibility for compensation payments regarding the Western sector.

Again, by its being contested with a number of perhaps equally valid arguments from an international legal point of view, 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 – barring another big war – only a mature, democratically supported political solution, to be reached through negotiations 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.

4. Conclusion: International Law Refined, Stalemate Confirmed

If the intention of arbitration is to prevent conflict and further the maintenance of peace between states, the development and interpretation of international law

[60] Gray, loc. cit. n. 6.

on boundary issues, next to developing extant bodies of law and legal reasoning, would benefit from taking into account, if only cursorily, the historical context, the local political setting and power struggles, the local *perceptions* on territoriality and governance, and the socio-ethnic composition of the disputed regions. If a meaningful contribution to the development of international law norms is to be made, it will neither do to ignore questions of justice, to bypass customary law and to remain within the often strict conditions imposed by the parties requesting arbitration when preparing the decision, nor adhere dogmatically to a restrictive mandate given to an arbitration commission by state regimes with manifest political aims that function so to speak, to capture and co-opt international law. In a wider perspective, more explicit considerations could also be given to emerging issues of humanitarian concern and human security that affect ordinary citizens other than states or state elites.[61]

The EEBC Decision was 'final and binding' and under the mandate given to it by the two countries will not be changed unless they agree to modify the terms of the arbitration itself, to submit their case to the International Court of Justice,[62] or decide to enter into bilateral political negotiations. In the case at hand the prospects for any kind of breakthrough are slim.[63] Ethiopia prevaricates about the Decision and about literal compliance with it, facing a problem created as a result of its perhaps too liberal attitude towards the border problem and its casualness about the wider, long-term interests of the country. Its proposal of the 'Five Point Peace Plan' in November 2004, suddenly accepting the EEBC Decision in principle but insisting on adjustments in the actual demarcation phase, was the last offer made. But Eritrea wants unconditional demarcation on the ground exactly following the lines on the EEBC map, without bilateral talks with Ethiopia about normalization or minor on-the-ground adjustments. It has constantly attacked the international community for its lack of pressure on Ethiopia.

Since the end of the EEBC on 30th November 2007 (by self-imposed termination), the UNMEE mission in the border area has fared badly due to persistent hindering by the Eritrean government which is convinced of the Mission having outlived its usefulness. The way Eritrea went about progressively hindering and restricting the UNMEE forces[64] and challenging the international community shows a remarkable lack of respect for diplomatic *mores*. This has not won it any friends or convinced anybody of supporting its own position despite the fact of its, in principle, more valid stance on the border issue than Ethiopia.

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[61] See e.g., Kaldor, loc. cit. n. 1, at pp. 168-169.

[62] As argued by McHugh, loc. cit. n. 43, pp. 209-239.

[63] Cf. D. Jacquin-Berdal and M. Plaut, eds., *Unfinished Business. Ethiopia and Eritrea at War* (Lawrenceville NJ, Red Sea Press 2004).

[64] See UN Secretary-General Ban Ki-Moon's Special Report (3rd March 2008) on UNMEE and its current position (S/2008/145). He described the steps taken in December 2007 through to February 2008 in trying to persuade the Eritrean authorities to lift their blockade of fuel supplies to UNMEE and their forcing the UNMEE troops out of the border zone, necessitating it to relocate its personnel. The UNSG had noted that the restrictions imposed by Eritrea on UNMEE were unacceptable and in breach of the fundamental principles of peacekeeping.

In the conflict, the symbolic value of Badme, which the EEBC Decision, against the initial expectation of *both* sides, had placed in Eritrean territory (some 2 to 3 km from the border),[65] has now been proven so strong for both regimes in place that a negotiated, reasonable solution to the 'border crisis' is not likely to be reached in the coming years. Ethiopia, supported by a large portion of its public opinion, adheres to the view that *ex iniura jus non oritur*, with *iniura* here meaning (see the EECC Award cited above) the opening of armed hostilities at Badme by Eritrea and its pursuing of war. Ethiopia may also be of the view that *ex factis jus oritur*, reinforced by its military victory in 2000. Eritrea says, with equal justification that *pacta sunt servanda*, supported by the mandate of the Algiers Agreement and the EEBC. Care for the fate of local people is not part of that.

Be that as it may, the spectre of war is ever there where Eritrea and Ethiopia are involved fighting each other by proxy, in recent years enhanced by the Somalia conflict.[66] Any new armed conflict will obliterate the EEBC ruling and the Algiers Agreement. It is unfortunate that on account of its procedural aspects and its incomplete use of 'applicable international law' the EEBC, by order of the two parties that requested the arbitration as well as by its own volition, has sealed off the prospects for flexibility, amendment and compromise in the light of new information or interpretation. International law not taking into account clear facts and realities on the ground – both of a political and human nature, has little prospect of being implemented.[67] Instead, certainly in the case of the Ethio-Eritrean boundary decision, its painstakingly developed, normative precepts will be in danger of being overruled by those realities.

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[65] The main village of Badme (a name also used to indicate the wider area around it) is not the same as that of Yirga, despite news messages and the statements of several local people and other informants on which I based my observations in a previous article. See J. Abbink, 'Badme and the Ethio-Eritrean border: the challenges of demarcation in the post-war era', 58 *Africa* (Roma) (2003) pp. 219-231, which hereby stands rectified. The (Mai) Tomsa point (reference point 6 in the line on Map 10 (Western sector) of the EEBC Decision, p. 96) taken by the EEBC instead of the Mai Teb or the Sittona point appears to let Badme fall into Eritrea. As noted, it is an incorrect decision, unless one accords legitimacy to maps unilaterally drawn up by one interested party.

[66] See T.E. Lyons, *Avoiding Conflict in the Horn of Africa. U.S. Policy Toward Ethiopia and Eritrea* (Council on Foreign Relations, Council Special Report No. 21, Washington, DC, 2006).

[67] L. Frey, 'The Eritrea-Ethiopia dispute', 2 *International Affairs Quarterly* (2005) p. 1 (online: <http://davisiaj.com/content/view/26/86/>) has spoken of the production of a 'legal fiction'.

Appendix

The 1929 Italian map of the Ethio-Eritrean border
(Source: Bahru Zewde, 'The Ethio-Eritrean Border/Boundary: a Seesaw Puzzle', 3-4, 3 *Medrek - FSS Bulletin* (Addis Ababa 2006) facing p. 5.