

CHAPTER III – THE TASK OF THE COMMISSION AND THE APPLICABLE LAW

3.1 The task of the Commission is prescribed in Article 4, paragraphs 1 and 2, of the December Agreement as follows:

1. Consistent with the provisions of the Framework Agreement and the Agreement on Cessation of Hostilities, the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.

2. The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law. The Commission shall not have the power to make decisions *ex aequo et bono*.

3.2 The Commission must therefore address three elements: (i) the specified treaties; (ii) applicable international law; and (iii) the significance of the reference to the 1964 OAU Summit Resolution.

A. TREATY INTERPRETATION

3.3 Both Parties agree that the three Treaties cover the whole of the boundary between them. The 1900 Treaty covers the central sector; the 1902 Treaty covers the western sector; and the 1908 Treaty covers the eastern sector.

3.4 The meaning of these Treaties is thus a central feature of this dispute. In interpreting them, the Commission will apply the general rule that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Each of these elements guides the interpreter in establishing what the Parties actually intended, or their “common will,” as Lord McNair put it in the *Palena* award.³

3.5 It has been argued before the Commission that in interpreting the Treaties it should apply the doctrine of “contemporaneity.” By this the Commission understands that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed

³ *Argentina/Chile Frontier Case* (1966), 38 ILR 10, at p. 89 (1969) (hereinafter “*Palena*”).

at that time. The Commission agrees with this approach and has borne it in mind in construing the Treaties.

- 3.6 The role of the subsequent practice or conduct of the Parties has also played a major part in the arguments of both sides. The function of such practice is not, it must be emphasised, relevant exclusively to the interpretation of the Treaties. It is quite possible that practice or conduct may affect the legal relations of the Parties even though it cannot be said to be practice in the application of the Treaty or to constitute an agreement between them. As the Permanent Court of International Justice said in relation to loan agreements which, for present purposes, are analogous to treaties:

If the subsequent conduct of the Parties is to be considered, it must be not to ascertain the terms of the loans, but whether the Parties by their conduct have altered or impaired their rights.⁴

- 3.7 A more recent illustration of the same point is to be found in the *Namibia* Advisory Opinion of the International Court of Justice, given in 1971. There, the South African Government contended that the resolution of the UN Security Council requesting the Court to give an Advisory Opinion was invalid because two permanent members of the Council had abstained in the vote, and that therefore the requirements of Article 27(3) of the UN Charter that a resolution should be adopted by the affirmative vote of nine members including the concurring votes of the permanent members had not been met. The Court rejected this contention, stating that

the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organisation.⁵

- 3.8 Thus, 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.

⁴ *Serbian Loans*, PCIJ Series A, Nos. 20/21, p. 5, at p. 38 (12 July 1929).

⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, at p. 22.

- 3.9 The nature and extent of the conduct effective to produce a variation of the treaty is, of course, a matter of appreciation by the tribunal in each case. The decision of the International Court of Justice in the *Temple* case⁶ is generally pertinent in this connection. There, after identifying conduct by one party which it was reasonable to expect that the other party would expressly have rejected if it had disagreed with it, the Court concluded that the latter was estopped or precluded from challenging the validity and effect of the conduct of the first. This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement. But in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule – whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first. Likewise, these concepts apply to the attitude of a party to its own conduct: it cannot subsequently act in a manner inconsistent with the legal position reflected in such conduct.⁷
- 3.10 The possibility that a clear treaty provision may be varied by the conduct of the Parties was also clearly acknowledged in a particularly relevant manner in the award in the *Taba* arbitration between Egypt and Israel.⁸ There, the relevant Agreement provided that pillars should be erected at intervisible points along the boundary. The final pillar, which was the one principally disputed between the parties, was constructed at a point which was not intervisible with the preceding pillar. Although the Tribunal acknowledged that the Agreement did not provide for any exception to intervisibility, it nonetheless found that “during the critical period, the location of the pillar had come to be recognized by the Parties and was accepted by them.”
- 3.11 As to the manner in which the parties in that case had “recognised” the location of the pillar, the Tribunal observed:

... where the States concerned have, over a period of more than fifty years, identified a marker as a boundary pillar and acted upon that basis, it is no longer open to one of the Parties or to third States to challenge that longheld assumption on the basis of an alleged error. The principle of the stability of boundaries, confirmed by the International Court of

⁶ *Temple of Preah Vihear (Cambodia v. Thailand) (Merits)*, ICJ Reports 1962, p. 6 (hereinafter “*Temple*”).

⁷ See, for example, the views expressed by the International Court of Justice in the *Nuclear Tests Case (Australia v. France)*, ICJ Reports 1974, p. 253, at pp. 267-268, regarding the legal effect of unilateral declarations.

⁸ *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) (hereinafter “*Taba*”).

Justice . . . ,⁹ requires that boundary markers, long accepted as such by the States concerned, should be respected and not open to challenge indefinitely on the basis of error.¹⁰

- 3.12 In approaching its task, the Commission will also bear in mind the following observation of the International Court of Justice in the *Kasikili/Sedudu Island* case:

In order to illuminate the meaning of words agreed upon in 1890, there is nothing that prevents the Court from taking into account the present-day state of scientific knowledge, as reflected in the documentary material submitted to it by the Parties.¹¹

- 3.13 The Commission also recalls the observations, generally pertinent to the interpretation of a boundary treaty, in the *Palena* case:

The Court is of the view that it is proper to apply stricter rules to the interpretation of an Award determined by an Arbitrator than to a treaty which results from negotiation between two or more Parties, where the process of interpretation may involve endeavouring to ascertain the common will of those Parties. In such cases it may be helpful to seek evidence of that common will in preparatory documents or even in subsequent action of the Parties.¹²

B. APPLICABLE INTERNATIONAL LAW AND THE SUBSEQUENT CONDUCT OF THE PARTIES

- 3.14 Turning to the requirement in Article 4, paragraphs 1 and 2, of the December Agreement that the decision of the Commission shall also be based “on applicable international law,” the Commission is much assisted by the consideration by the International Court of Justice of a comparable requirement in the *Kasikili/Sedudu* case.¹³ In that 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, for example, prescription and acquiescence,

⁹ Citing the *Temple* case, *ICJ Reports 1962*, at p. 34.

¹⁰ *Taba*, 80 ILR 226 (1988), 27 ILM 1421 (1988), para. 235.

¹¹ *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*, *ICJ Reports 1999*, p. 1060 (hereinafter “*Kasikili/Sedudu*”).

¹² *Palena*, 38 ILR 10, at p. 89 (1969).

¹³ *ICJ Reports 1999*, at pp.1101-1102, paras. 91-93.

even if such rules might involve a departure from the position prescribed by the relevant treaty provisions. Thus the Court accepted the possibility that an attribution of territory following from its interpretation of the relevant boundary treaty could be varied by operation of the customary international law rules relating to prescription. As it turned out, the Court 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.

3.15 The Commission reaches the same conclusion as the International Court of Justice. It does not read the reference to “applicable international law” as being limited to the law relating to the interpretation of treaties. Thus it finds itself unable to accept the contention advanced by Ethiopia that the Commission should determine the boundary exclusively on the basis of the three specified Treaties as interpreted in accordance with the rules of international law governing treaty interpretation. The Commission considers that it is required also to apply those rules of international law applicable generally to the determination of disputed borders including, in particular, the rules relating to the effect of conduct of the parties.

3.16 In the present case, the conduct of the Parties falls into three broad categories: maps; activity on the ground tending to show the exercise of sovereign authority by the Party engaging in that activity (*effectivités*); and a range of diplomatic and other similar exchanges and records, including admissions before the Commission, constituting assertions of sovereignty, or acquiescence in or opposition to such assertions, by the other Party.

1) Maps

3.17 The Commission has been presented with an abundance of maps put in evidence by the Parties, consisting of map atlases comprising 156 maps (Eritrea, Memorial), 25 maps (Ethiopia, Memorial), 30 maps (Eritrea, Counter-Memorial), 57 maps (Ethiopia, Counter-Memorial), and 13 maps (Eritrea, Reply) – a total of 281 maps. In addition, Eritrea submitted a full copy of an Ethiopian volume of some 150 pages entitled “Atlas of Tigray.” As is often the case in circumstances such as those facing the Commission, many maps are in effect copies of other, earlier maps. While adding to the apparent number of different maps, they do not in substance do so – except as possibly showing a consistent course of conduct by a Party. The number of what may be regarded as original maps is thus more limited than the long list of maps presented by the Parties would suggest. Allowing for this, a realistic total is in the region of 250 maps. Also, the Parties’ pleadings included copies of a number of lesser maps and figures that were not included in their map atlases.

3.18 The Commission is aware of the caution with which international tribunals view maps. Those which are made authoritative by, for example, being annexed to a

treaty as a definitive illustration of a boundary delimited by the treaty, are in a special category, since they “fall into the category of physical expressions of the will of the State or States concerned.”¹⁴ The Treaty map annexed to the 1900 Treaty is such a map.

- 3.19 The Commission is also aware that maps, however informative they may appear to be, are not necessarily accurate or objective representations of the realities on the ground. Topography is dependent upon the state of knowledge at the time the maps were made, and particularly with older maps this may have been inadequate. When man-made features are superimposed, such as places of habitation or territorial limits, there is room for political factors to play a part. Particularly in the case of maps portraying a boundary which is in the interests of the Party responsible for the map, the possibility exists that they are self-serving.
- 3.20 These cautionary considerations are far from requiring that maps be left out of account. As already noted, where a map is made part of a treaty then it shares the legal quality of the treaty and is binding on the parties. That is the case with the map annexed to the 1900 Treaty (see para. 4.8, below). It needs to be scrutinised with the greatest care, since the detail it contains can greatly assist in giving specific meaning to an otherwise insufficiently detailed verbal description.
- 3.21 The effect of a map that is not part of a treaty will vary according to its provenance, its scale and cartographic quality, its consistency with other maps, the use made of it by the parties, the degree of publicity accorded to it and the extent to which, if at all, it was adopted or acquiesced in by the parties adversely affected by it, or the extent to which it is contrary to the interests of the party that produced it. A map that is known to have been used in negotiations may have a special importance. A map that emanates from third parties (albeit depending on the circumstances), or is on so small a scale that its import becomes a matter for speculation rather than precise observation, is unlikely to have great legal or evidentiary value. But a map produced by an official government agency of a party, on a scale sufficient to enable its portrayal of the disputed boundary area to be identifiable, which is generally available for purchase or examination, whether in the country of origin or elsewhere, and acted upon, or not reacted to, by the adversely affected party, can be expected to have significant legal consequences. Thus a State is not affected by maps produced by even the official agencies of a third State unless the map was one so clearly bearing upon its interests that, to the extent that it might be erroneous, it might reasonably have been expected that the State affected would have brought the error to the attention of the State which made the map and would have sought its rectification.

¹⁴ *Case concerning the Frontier Dispute (Burkina Faso v. Mali)*, ICJ Reports 1986, at p. 582, para. 55 (hereinafter “*Frontier Dispute*”).

- 3.22 In these instances it is not the maps “in themselves alone” (to use the language of the Chamber of the International Court of Justice in the *Frontier Dispute* case¹⁵) which produce legally significant effects, but rather the maps in association with other circumstances. A map *per se* may have little legal weight: but if the map is cartographically satisfactory in relevant respects, it may, as the material basis for, e.g., acquiescent behaviour, be of great legal significance.
- 3.23 The Commission must also address another aspect of map evidence which played a large part in the arguments of the Parties. It was contended that a boundary can be determined by reference to its “signature” – that is, its general shape, silhouette, contour or outline on maps, as distinct, that is, from its particular details.
- 3.24 The Commission does not reject this contention, but approaches it with caution. It is of the nature of boundaries that they need to be geographically specific. A general shape may not have that degree of specificity, or be capable of interpretation with sufficient clarity or definition, to allow for its accurate transposition to maps of a suitably large scale. It is not enough to demonstrate that the general shape of the boundary slopes in a certain direction, or in places rises, falls or curves. Those slopes, ascents, declines and curves must identify with sufficient clarity particular geographic features which are relevant to the course of the boundary. But if a general shape is sufficiently clear and specific, and is both distinctive in itself and depicted with clarity in that distinctive form on a range of maps in a consistent, or near consistent, manner, particularly on maps published or used by both parties in a dispute, the Commission must attribute to such a general shape the appropriate legal consequences. Such maps may indicate a general awareness and acceptance of the line prescribed in a boundary treaty and the approximate location of that line. However, the effect of such maps will be less in a situation where there is annexed to the treaty an illustrative map that forms part of it than in cases where there is no such map.
- 3.25 The Commission also notes the distinction that may be drawn between establishing a boundary by reference to such a “signature” and confirming by such means a boundary which has been established in other ways. There is also a distinction to be drawn between reliance on such means to establish a boundary in a particular location, and reliance on them negatively so as to demonstrate that a boundary does not exist somewhere else. A “signature” being relied on in either a confirmatory or a negative role may be both less clear and less specific than a signature that is relied upon to establish a boundary, yet still have the effects referred to. It is also important to bear in mind that though a series of maps may show a consistent, or possibly inconsistent, treatment of one section of the boundary, this may not be so in relation to another part. The map evidence has to be considered separately in relation to each particular part of the boundary. Also, in considering the general significance of map evidence, if that evidence

¹⁵ *Ibid.*, at p. 583, para. 56.

is uncertain and inconsistent, its value will be reduced in relation to the endorsement of a conclusion arrived at by other means, as also its support for any alteration of a result reached on the basis of textual interpretation.¹⁶

- 3.26 Another aspect of the map evidence to which the Parties devoted argument was the effect of so-called “disclaimers” which appear on a number of maps. The wording of these disclaimers varies. For example, some state “[t]his map must NOT be considered an authority on the delimitation of international boundaries”¹⁷ or “[b]oundary representation is not necessarily authoritative.”¹⁸ A map prepared by the Geographer of the Department of State of the United States stated that it was “not necessarily authoritative.” Maps prepared by the United Nations often state that they do not imply “official endorsement or acceptance by the UN.” A number of Ethiopian maps state that “[t]he delimitation of international boundaries shown on this map must not be considered authoritative.”
- 3.27 The question that requires consideration is to what extent, if any, such disclaimers may affect the evidential quality of the maps. The Commission is of the view that such disclaimers do not automatically deprive a map of all evidential value. The map still stands as an indication that, at the time and place the map was made, a cartographer took a particular view of the features appearing on the map. The disclaimer is merely an indication that the body making the map (or its Government) is not to be treated as having accorded legal recognition to the boundaries marked thereon or to the title to territory of the States concerned as indicated by the marked boundary.
- 3.28 As regards the State adversely affected by the map, a disclaimer cannot be assumed to relieve it of the need that might otherwise exist for it to protest against the representation of the feature in question. Nor does the disclaimer (whatever may be its legal effect on the content of the map) neutralize the fact that that State itself published the map in question. The need for reaction will depend upon the character of the map and the significance of the feature represented. The map still stands as a statement of geographical fact, especially when the State adversely affected has itself produced and disseminated it, even against its own interest. The disclaimers may influence the decision about the weight to be assigned to the map, but they do not exclude its admissibility.

2) *Effectivités*

- 3.29 As to activity on the ground, the actions of a State pursued *à titre de souverain* can play a role, either as assertive of that State’s position or, expressly or

¹⁶ See *Kasikili/Sedudu*, ICJ Reports 1999, p. 1100, para. 87.

¹⁷ British maps, 1942-1946.

¹⁸ A British map of 1997.

impliedly, contradictory of the conduct of the opposing State. Such actions may comprise legislative, administrative or judicial assertions of authority over the disputed area. 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 and the extent of any contradictory conduct (including protests) of the opposing State. It is also important to bear in mind that conduct does not by itself produce an absolute and infeasible title, but only a title relative to that of the competing 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.

3) Diplomatic and other exchanges tending to evidence admissions or assertions

- 3.30 The observations by the Commission in paragraphs 3.6-3.13, above, are as applicable to conduct evidencing a departure from or a variation of a treaty in the context of “applicable international law” as they are to the actual interpretation of the treaty itself. No more need be said about such conduct except that it may extend also to assertions or admissions made in the course of the proceedings before a tribunal.

C. RELEVANCE OF THE REFERENCE TO THE 1964 OAU SUMMIT DECLARATION

- 3.31 Reference needs also to be made to the wording of Article 4, paragraph 1, of the December Agreement, which contains the following phrase:

... the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.

- 3.32 On 10 June 1998 the Heads of State and Government of the Organization of African Unity submitted to the Parties for their consideration the elements of a “Framework Agreement” based on three principles of which the third was “respect for the borders existing at independence as stated in the Resolution of the OAU Summit in Cairo in 1964.”
- 3.33 This Framework Agreement was accepted by the Parties. On 14 September 1999, following further consideration of the dispute within the OAU and the UN Security Council, “Technical Arrangements for the Implementation of the Framework Agreement” were agreed by the Parties. Again, the principle of respect for the borders existing at independence was reaffirmed.
- 3.34 Prior to the adoption of the Technical Arrangements, Ethiopia requested a series of clarifications relating to them, including one regarding the law to be applied to the settlement of the dispute. Two of the clarifications stated as follows:

A.1.1. In this regard, it is useful to underline that the preamble to the Framework Agreement sets forth both a principle and an approach.

A.1.2. The principle set forth is that of “the respect for the boundaries existing at independence,” as stated in the [1964 OAU Resolution] . . .

3.35 The Parties committed themselves to these principles in the Agreement on the Cessation of Hostilities concluded between them on 18 June 2000, and reaffirmed their respect for the principle of respect for the borders existing at independence appears in Article 4, paragraph 1, of the December Agreement.

3.36 In the light of the manner in which the text of the provision in the December Agreement developed, the Commission does not read the terms of Article 4, paragraph 1, as altering the general direction given to it in paragraph 2 of the same Article and examined above. However, the Commission does see the provision as having one particular consequence. It is that the Parties have thereby accepted that the date as at which the borders between them are to be determined is that of the independence of Eritrea, that is to say, on 27 April 1993. Developments subsequent to that date are not to be taken into account save in so far as they can be seen as a continuance or confirmation of a line of conduct already clearly established, or take the form of express agreements between them.

D. THE PRESENT DECISION DOES NOT DEAL WITH DEMARCATION

3.37 The task of the Commission extends both to delimitation and to the making of arrangements for the expeditious demarcation of the boundary (Art. 4, paras. 2 and 13). The latter aspect of the Commission’s work is not covered by the present decision and will be the subject of the next phase of its activities.

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