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Access to the Sea in the Context of Eritrea and Ethiopia

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Introduction

Access to the sea is currently a topic of discussion among Eritreans and Ethiopians in the mass media primarily due to continuous assertions of access to the Red Sea by Ethiopian individuals and groups, including Tigrayans.

Ethiopian assertions of access to the sea can be placed into two categories: (1) ownership of the Red Sea, the Eritrean port of Asseb in particular; and (2) the right of access to the sea and freedom of transit. The issue of ownership targets the independence, sovereignty and territorial integrity of Eritrea, issues that were litigated, and settled when Eritrea emerged as an independent and sovereign state within internationally recognized borders in the early 1990s. Thus, it is only briefly discussed here.

The right of access to the sea and freedom of transit, however, is an on-going and debatable issue and is, therefore, the focus of this essay. What does “the right of access” mean? What is the legal basis for it? And how should it be applied in general and specifically to Ethiopia and Eritrea? This essay addresses these and related questions.

Two terms that are used throughout this essay are defined as follows: “Land-locked State” means a state which has no seacoast, and “Transit State” means a state situated between a land-locked State and the sea, through whose territory traffic in transit passes.¹

¹ Definitions given in The UN Law of the Sea, Article 124 (1).



Map of Eritrea and the Red Sea, 1996 [Shading added]²

1. Claims of Ownership of Eritrea’s Red Sea Coast and/or Port of Asseb Are Dismissible

Ownership of the Red Sea coast, and especially that of the port of Asseb, appears to be a never-dying issue for some Ethiopian scholars and government officials. Even after Eritrea’s formal independence in 1993, with international recognition as sovereign State, assertions of ownership continue to be raised.

1.1. Persistent Claims of Ownership by Ethiopian Scholars

In this regard, two recent publications in particular need mentioning. One is a thesis by Abebe T. Kahsay titled, “Ethiopia’s Sovereign Right Access to the Sea under International Law,”³ and another, a book in the Amharic language by Yacob Hailemariam bluntly titled, *Asseb yeman nat?* (Whose is Asseb?)⁴ And his answer, predictably, is Ethiopia.

² The United Nations and the Independence of Eritrea, p.17, New York: UN Dept. of Public Information, 1996.

<https://digitallibrary.un.org/record/229464/?ln=en>

³ Kahsay, Abebe T., “Ethiopia’s Sovereignty Right Access to the Sea under International Law.” (2007). LLM Thesis and essay. http://digitalcommons.law.uga.edu/stu_11m/81.

⁴ Hailemariam, Yacob, አሰብ የማን ናት? (የኢትዮጵያ የባህር ቦር ጥያቄ) 2003 ዓ ም (2010) ኡዲስ አበባ።

The contents of the two publications are similar, and they feed on each other. Both writers detail the disadvantages and challenges of being a land-locked State and the desirability of having access to the sea; they both detail historical and cultural connectivity going back to the Axumite Era; they both dismiss the colonial treaties of 1900, 1902 and 1908, that defined Eritrea's territory, as "defunct, and obsolete treaties." This assertion may have a political appeal, but legally, it runs counter to the principle of African *uti possidetis*,⁵ which sanctions colonially inherited boundaries. Both authors fault the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF)⁶ for supporting Eritrea's independence, describing the support as "handing over Asseb, Ethiopia's natural outlet to the sea," to the Eritreans, notwithstanding the fact that Eritreans won the war of independence. Moreover, both writers consider the Algiers' Agreement⁷ as a missed opportunity for EPRDF to reassert Ethiopia's right to the sea. Further, they, especially Yacob, passionately call for exerting continued efforts to repossess Asseb and its environs.

1.2. Assertion of Ownership from Unexpected Quarters

Claims of ownership of the Red Sea coast and Eritrean ports made by Tigrayans may seem unexpected, but not surprising. Recently, Dedebit Media, one of the Tigrayan mass-media outlets, declared, "Tigray is the owner of a sea! It has a historical and legal right of ownership of sea."⁸ The presenter's basis for the claimed ownership is, as would be expected, historical and cultural links, going back to the Axumite Era. What is interesting is his pronouncement of ownership of the sea and the legal right of access to the sea in the same breath. If one claims ownership of sea, the right of access to the sea is moot, as the latter, as will be elaborated in Section 2, is applicable to a situation of a land-locked State and a transit State.

A group calling itself the Global Society of Tigray Scholars and Professionals (GSTS), and claiming to represent over 3,500 Tigrayan scholars and professionals, stated as one of seven "non-negotiable vital interests of Tigray, stating, "[R]elated to the territorial integrity of Tigray is access to international borders, and the right of access to and from the sea and freedom of transit as provided in article 125 of the Law of the Sea."⁹ Putting aside whether the Group sees Tigray as an already independent sovereign entity, or is anticipatory, what is relevant here is that the Group's reference to article 125, again, as will be shown in Section 2, is distorted, or more correctly, incomplete.¹⁰

⁵ The African *uti possidetis* is a reference to the principle adopted in 1964 (when the Eritrean war of independence was on-going), by the then Organization of African Unity (OAU) which declared sovereignty and inviolability of colonially inherited boundaries regardless of pre-colonial territorial configurations. The principle has acquired a status of international law.

⁶ The Ethiopian People's Revolutionary Democratic Front (EPRDF) was the coalition party dominated by the Tigray People's Liberation Front (TPLF) that ascended to power when Eritrea became formally independent in 1993.

⁷ The Algiers Agreement was the peace agreement signed by Eritrea and Ethiopia in 2000, following the border war of 1998-2000, on the basis of which the Eritrea-Ethiopia Border Commission (EEBC) ruled on the border dispute between the two countries.

⁸ In Tigrinya: ትግራይ ወናኒት ባሕሪ አይ! ባሕሪ ናይ ምውናን ታሪኻውን ሕጋውን መሰል አለዎ! Dedebit Media, disseminated through YouTube on 01/02/2022.

⁹ <https://globenewsnet.com>, December 24, 2021.

¹⁰ A reminder to Tigrayans: The assertions that Tigray has ownership of the Red Sea coast, hopefully, is the position of some fringes in the Tigray cause. However, to the extent that Dedebit claims to advocate for the cause, and in the

1.3. Claim of Ownership is an Affront to Eritrea's Sovereignty and Territorial Integrity

The claim of ownership of the Red Sea coast, and/or of the port of Asseb, by certain elements within Ethiopia, be they Tigrayans or others, is an affront to Eritrea's sovereignty and territorial integrity. Eritrea has been an internationally recognized sovereign State for the last thirty years. Its internationally recognized territory was defined by the colonial treaties of 1900, 1902 and 1908 which includes the Red Sea coast and its ports. It is the same definition that the U.N. took up for disposal, as one of three former Italian colonies, following Italy's defeat in World War II; the same definition for which a costly war and political struggles were conducted for self-determination for over five decades; the same definition on which the internationally observed referendum of 1993 was conducted resulting in formal independence supported by a vote of 99.8%; the same definition to which recognition was extended by the international community (including Ethiopia itself) as an independent, sovereign State; and the same definition the Eritrea Ethiopia Border Commission (EEBC) considered for adjudicating the border conflict in 2001.

The claims of ownership, such as the ones mentioned above, are consistent with the "Greater Ethiopia" narrative advanced in opposition to Eritrea's struggle for self-determination and independence. That narrative asserted that Eritrea, before Italian colonization, was an integral part of Ethiopia, going back to the Axumite Era, and the federation and eventual union with Ethiopia in 1962 comprised the restoration of a lost territory. This contrasts with the Eritrean narrative, which is: As a former Italian colony for nearly 60 years, Eritrea should have been entitled to self-determination and national independence, as was the typical outcome for colonized peoples. Instead, the Western powers imposed an ill-conceived, faulty federation with neighboring Ethiopia, contrary to the wishes of the majority of the people of Eritrea. Left with no other option, the Eritreans waged an armed struggle for self-determination that resulted in winning independence and establishing a national sovereignty in 1993. This narrative is consistent with the African *uti possidetis*. There is a rich body of literature on the Eritrean narrative.¹¹

The Eritrean narrative was borne out by the emergence of Eritrea as an independent sovereign State, following an internationally observed referendum that was held in 1993. Thus, the issues of Eritrea's self-determination, and sovereignty have already been litigated and settled. There is a

case of GSTS, to the extent the group claims to represent 3,500 scholars and professionals, it is prudent to remind both that Eritreans, regardless of their position in the country's current political spectrum, are unanimous about and very protective of their country's sovereignty and territorial integrity.

¹¹ To cite a few: Travaskis, GKN, *Eritrea: A colony in Transition* (1960); Bereket Habte Selassie, *Conflict and Intervention in the Horn of Africa* (1980); Gebre H. Tesfagiorgis, "Self-Determination: Its Evolution and Practice by the UN and Its Application to the Case of Eritrea" in *Wisconsin International Law Journal*, Vol. 6, No. 1, (pp 75-127) Fall 1987; Tekie Fessehatzion, "Eritrea from Federation to Annexation," a working paper (1990); Ogbazghi Yohannes, *Eritrea: A Pawn in World Politics* (1991); Jordan Gebremedhin, *Peasants and Nationalism in Eritrea* (1993); Gebre-Ab Habtu, *Ethiopia and Eritrea* (1993); Ruth Iyob, *The Eritrean Struggle for Independence: Resistance and Nationalism, 1941-93* (1995); Tekeste Negash, *Eritrea and Ethiopia: The Federal Experience* (1997); Alemseged Tesfai, a trilogy of books in Tigrinya titled: *Aynfalale* (2002), *Federation Ertra ms Etiopia kab Matiense ksab Tedla 1951-1955* (2005), and *Ertra kab federation nab GobeTan sewran 1956-1962* (2016); Andebrhan Welde Giorgis, *Eritrea at a Crossroads* (2014).

saying in Tigrinya that aptly describes this situation: *Weyo tQalinas tewadiQna'qua* (loosely translated, “We have already wrestled, and landed on the ground.)”¹²

Any assertion of ownership of the Red Sea coast, or ownership of Asseb, typified by the ones mentioned above, is an affront to the sovereignty and territorial integrity of Eritrea, and therefore dismissible. The issue of the right of access to the sea, however, has legitimacy, and is taken up in the following section.

2. Right of Access to the Sea and Freedom of Transition

Globally, there are forty-four land-locked states, sixteen of them, including Ethiopia, are in Africa.¹³ Right of access to the sea and freedom of transition is a legitimate issue for land-locked countries. The question is: What does it mean and how should it be implemented?

First, a brief history of the concept and how it developed into an internationally recognized principle and right.

2.1. Brief History of the Right of Access to the Sea

The history of the issue of access to the sea is marked by land-locked states desiring and pushing for unrestricted right of free access countered by transit states pushing back, claiming the supremacy of territorial sovereignty. Historically, several conventions were held to reconcile the two competing principles. Following are some of the significant ones.¹⁴

In 1804 The Convention of Vienna adopted the principle of the freedom of navigation on the Rhine, an important international river in Europe. That convention laid the foundation for another one that followed, the Vienna Congress of 1814 that established the freedom of navigation without discrimination in international rivers and their tributaries.¹⁵

The Barcelona Convention of April 20, 1921, established the principle of freedom of transit by requiring “all contracting states to facilitate freedom of transit by rail or international navigable waterway.” However, it added, “provided the security and vital interests of the transit country are not adversely affected.”¹⁶

The New York Convention of 1965 (came into force in 1967) adopted a resolution “advocating the necessity of recognizing the right of free transit to the sea” for land-locked states. However, it added that such a right is “permitted under mutually acceptable means.”¹⁷ The New York Convention is significant on two counts: one, it was the first international agreement that dealt

¹² ወዮ ተባለናልናል ተባለናልናል እኩዋ!

¹³ The land-locked countries in Africa are Botswana, Burundi, Burkina Faso, Central African Republic, Chad, Ethiopia, Eswatini (Lesotho), Malawi, Mali, Niger, Rwanda, South Sudan, Swaziland, Uganda, Zambia, and Zimbabwe. See Thought Co., part of Dotdash Publishing family, June 22, 2019.

¹⁴ For a detailed discussion on the history and development of the principle of the right of access to the sea, See Uprety, Kishor, “Landlocked States and Access to the Sea: An Evolutionary Study of a Contested Right,” in *Penn State International Law Review*, Vol. 12, No. 3, Article 2 (1994).

¹⁵ See Statute on Freedom of Transit, adopted by the Convention of Vienna, April 20, 1921, 7 L.N.T.S. 11

¹⁶ See The Statute of Barcelona on Freedom of Transit, April 20, 1921, reported in the League of Nations, Treaty Series, Vol. VII, at 37.

¹⁷ See Convention on Transit Trade of Landlocked States, held in New York, July 8, 1965, 597 U.N.T.S. 42.

exclusively with the specific issue of transit trade; and two, and more importantly, it recognized the access issue as “right,” as opposed to “need,” described in previous conventions. But, like its predecessor conventions, its provisions attempted to establish a balance between the principles of freedom of transport and that of sovereignty.

A series of conventions and discussions held by the UN and its specialized agencies in the 1970s and early 1980s, led to the emergence of the U.N. Convention on the Law of the Sea (often called “The Law of the Sea” for short), now considered as the international law governing the right of a land-locked state’s access to the sea and free transition.

2.2. The United Nations Law of the Sea

The United Nations Convention on the Law of the Sea, an international agreement adopted in 1981 (came into force in 1994), establishes a legal framework for maritime activities. Part X of the convention, covering Articles 124-132, deals with rights of access of land-locked states. Article 125 is the one that addresses specifically the right of access to and from the sea and freedom of transit. It is helpful to look at its text verbatim:¹⁸

Article 125 (1). Land-locked states shall have the right of access to and from the sea for the purpose of exercising the rights provided in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.

Article 125 (2). The terms and modalities for exercising the freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional or regional agreements.

Article 125 (3). Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for the land-locked States shall in no way infringe their legitimate interests.

It is not uncommon for land-locked states to invoke just 125 (1), ignoring 125 (2) and 125 (3), to assert their right of access to the sea. (That is what the Tigrayan’s GTSP statement did.) However, invoking Paragraph 1 alone is incomplete. Paragraph 2 of the Article makes it clear that the land-locked state’s right is contingent on an agreement between the land-locked and transit states. Further, Paragraph 3 of the Article reiterates that the transit state exercise its full sovereignty over its territory in the execution of the land-locked state’s rights. Thus, a land-locked state’s right of access to the sea and freedom of transit, as articulated in Article 125, is not absolute. In other words, when viewed in its totality, Article 125 of the U.N. Law of the Sea balances the right of the land-locked state with the sovereignty and territorial integrity of the transit state.

¹⁸ See United Nations Convention on the Law of the Sea (Law of the Sea, for short), adopted on December 7-11, 1982, with 130 votes for, four against, and seventeen abstentions. Copy available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

2.3. Land-Locked State Ethiopia and Transit State Eritrea

In view of the above-described UN Law of the Sea provisions, Ethiopia as one of the sixteen African countries that do not have access to the sea, can invoke its right of access to the Red Sea through the transit State of Eritrea. But, as pointed out above, that right can only be exercised through an agreement between the two States.

There is, in fact, a precedent. On August 2, 1929, Italy (then colonizer of transit Eritrea) and land-locked Ethiopia concluded an agreement addressing Ethiopia's access to the sea. Italy granted to Ethiopia a free zone in the Port of Asseb and allowed it to construct warehouses in the zone. Further, the agreement dealt with the construction of a road linking Asseb to the City of Dessie in Ethiopia.¹⁹ Following are examples of other agreements signed between land-locked and transit states.

A Protocol was signed between land-locked Rwanda and Kenya on February 26, 1992, allowing Rwanda to construct warehousing facilities at Kenya's port of Mombasa. On a more general level, the states of Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda belong to the East African Community (EAC), a regional economic integration bloc. The Community facilitates access to the sea for the land-locked States of Burundi, Rwanda, South Sudan, and Uganda through the territories of the transit States of Kenya and Tanzania.²⁰

A Treaty of Commerce exists between Nepal and India, signed on July 31, 1950. The State of India recognizes the State of Nepal's "full and unrestricted right of transit of all goods and manufactures through the territory of India. Further, goods and merchandize originating from Nepal, in transition through India, are exempt from excise and import duties."²¹

Mali and Senegal signed an agreement on June 8, 1963, which created a free zone for land-locked Mali at the two ports of the transit State of Senegal, Dakar and Kaolack.²²

The International Court of Justice case between Bolivia and Chile provides a good lesson on what can happen when a bilateral agreement between a land-locked state and a transit state does not work, or when the land-locked state becomes overzealous.

Bolivia and Chile had signed a Treaty of Peace and Friendship on October 20, 1904, that granted Bolivia a complete right of transit of trade on Chile's territory and authorized Bolivia to establish customs offices in Chile's ports.²³ Bolivia was not satisfied with the agreement, and petitioned the International Court of Justice (ICJ) on April 24, 2013, asking the Court to obligate Chile to negotiate to reach an agreement that grants Bolivia "a fully sovereign access to the Pacific Ocean." On October 1, 2018, the Court concluded that Chile has no obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. But the Court added that its finding does not "preclude the

¹⁹ See Report of the Secretariat of the Economic Commission for Africa, Transition Problems of Eastern African Landlocked States, at 14, UN Doc. E/CN.14/INR/44 (1963).

²⁰ Nkusi, Fred, "Being Landlocked Country," Opinion in The New Times, Rwanda's daily, January 14, 2019.

²¹ Articles 1 and 2 of the Treaty of Commerce between India and Nepal of 31 July 1950.

²² Upreti, Kishor, *supra* note 13, at 455.

²³ Treaty of Commerce, Aug. 6, 1912, Bol.-Chile, art 7, 4 B.O.T.V. 463 (Bolivia), cited in Upreti, Kishor, *supra* note 13, at 456.

parties from continuing their dialogue and exchanges, in a spirit of good neighbourliness, to address the issues relating to the landlocked situation of Bolivia, the situation to which both had recognized to be a matter of mutual interest.”²⁴

Recently, the BBC News, Tigrinya, posed the question: “Red Sea: Can Ethiopia force Eritrea to grant her access to the sea?” By interviewing four experts on maritime laws, it arrived at an answer in the negative.²⁵

3. Summary and Conclusion

To summarize, any claim of ownership of the Red Sea coast portion of Eritrea or ownership of the Port of Asseb is a direct affront to the sovereignty and territorial integrity of Eritrea. Claims for Eritrea (or any territorial pieces thereof), based on historical background or cultural similarities, were already litigated, and settled when Eritrea emerged as an independent sovereign state in 1993 with internationally recognized boundaries. What remains to be amicably resolved is Ethiopia’s right of access to the sea, which, according to international law, should be implemented through a bilateral agreement between the land-lock State of Ethiopia and the transit State of Eritrea. Thus, two main suggestions are in order:

First, Ethiopians should accept the independence and sovereignty of Eritrea. Eritrea, for the last 30 years, has been an internationally recognized sovereign state, covering a territory that includes the coasts of the Red Sea and its ports of Massawa and Asseb. Neither voluminous reciting of historical and cultural connections nor emotional appeals can change that fact. Eritrea, defined as such, is here to stay. Any dealings between the two countries must start with that reality as the premise.²⁶

Second, Eritrea and Ethiopia should negotiate for a bilateral agreement that provides Ethiopia an access to the sea and freedom of transit of its goods in a way that does not infringe on Eritrea’s sovereignty and territorial integrity. The precedent of the 1929 agreement between colonial Italy and Ethiopia was already mentioned. A much better and mutually benefitting agreement between the two states can be reached if approached in good faith. Eritrea is not the only transit State for Ethiopia’s trade and commerce. Djibouti, Somalia, and even Sudan and Kenya, also are transit States for land-locked Ethiopia. Thus, the establishment of a regional economic bloc should be explored covering at least Eritrea, Ethiopia, Djibouti, and Somalia, which can facilitate Ethiopia’s access to sea and transit of goods, similar to how the East African Community (EAC) facilitates for the land-locked States of Burundi, Rwanda, South Sudan and Uganda.

²⁴ International Court of Justice (ICJ), *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, <https://www.icj.org/en/case/153>.

²⁵ ቀይሕ ባሕሪ፡ ኢትዮጵያ ኣፍደገ ባሕሪ ንክትረከብ ንኤርትራ ከተገድዳ ትክእል ድያ? See The B.B.C. News, Tigrinya, February 11, 2022. <https://www.bbc.com/tigrinya/60296050>.

²⁶ The experiences of Sweden and Norway can be instructive (Their relationship has parallels with that of Ethiopia and Eritrea, except no issue of access to sea is involved). Norway was forcibly linked to Sweden to form an uneasy Union in 1815. When Norway declared its independence following a referendum, based on the principle of self-determination, and gained international recognition in 1905, there was consternation on the part of the Swedes. But the latter eventually accepted the status of Norway and the two states now co-exist cooperating and respecting each other’s sovereignty and territorial integrity.

As a final note and reminder: There is no denying of the historical and cultural connections between the peoples of Eritrea and Ethiopia, the legacy of the Axumite Era and subsequent periods. But that is history, a history the people of the region should be proud of and should teach to current and future generations. Much has happened since then, the most significant of which was the nearly sixty years of Italian colonial rule over Eritreans. Also, there is no denying of the special cultural and emotional ties between the two peoples. But this aspect should be channeled towards friendship and cooperation between the peoples of the two countries for mutual benefits, respecting each other's sovereignty and territorial integrity, rather than towards making territorial claims.