

Anomalous or legitimate covetousness: Scholarly echoes of Ethiopia's claim of sovereign right for access to the sea under international law

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Abstract

Several Ethiopian intellectuals argue that Ethiopia has a legitimate sovereign right of access to the Red Sea via Eritrea. This paper emphatically refutes such claims and argues that the establishment of modern Ethiopia and Eritrea as formal states with distinct boundary lines took place in the turn of 20th century. The objective existence and integrity of the colonial boundary was affected neither by Italy's invasion of Ethiopia in 1935 nor by Eritrea's federation with Ethiopia rather it was reaffirmed during the culmination of the latter's independence; without leaving any unsettled territorial conflict. To substantiate this historically and legally untenable claim of access to the sea, the paper will critically analyze Abebe T. Kahsay's paper, titled '*Ethiopia's Sovereign Right of Access to the Sea under International Law*' – an academic literature that conspicuously reflects the wrongly held conviction among some Ethiopian scholars. The paper will critically interrogate Abebe's main arguments by making careful reference to history, the colonial treaties, the federation and the Algiers agreement. The paper will reveal Abebe's erroneous depiction of history and interpretation of the international law or norms that govern the issue of the law of treaties, the sanctity of colonial boundaries etc. This paper further observes that Abebe's arguments by and large reiterate the old argument that the Ethiopian empire made in 1940s to create a fact situation to pursue its claim for sovereignty over Eritrea. The paper likewise argues that Abebe's assertions perversely and derisively rebuff the African colonial territorial definition of a state that keeps the territorial integrity of African states intact. The paper's objective is to demonstrate that the academic claims from some Ethiopian scholars are unfounded and reflect the long held, biased and nationalistic Ethiopian scholarship on the idea of Ethiopia's access to the Red Sea.

1. Introduction

Colonial territorial determination of a territory is the African notion of nation state (Shaw, 1986) albeit the colonial boundaries were drawn without consideration of the wishes, history, culture, religion, ethnic factors, etc., of the people occupying these locations. African states got their independence during the era of decolonization based on their colonially drawn boundaries. By the same token, the colonially defined boundary of Eritrea was supposed to lead to decolonization as it was the case with the rest of African states. However, this process was unjustifiably hampered and Eritrea was federated with Ethiopia. This federal arrangement was soon annulled by Ethiopia and after a bitter and prolonged armed struggle for self-determination, Eritrea was liberated in 1991 and was officially declared as an independent state in 1993 – followed by recognition of Ethiopia and the international community. It goes without saying that Eritrea's colonial territorial definition was reaffirmed in the culmination of its independence through armed struggle. Although the Eritrean armed struggle for self-determination is ultimately solved subject to the application of the African colonial territorial definition, hitherto, there are some Ethiopian officials and intellectuals who reject the African colonial territorial integrity and claim sovereign right of access to the Red Sea via Eritrea.¹ This paper aims to critically challenge such discourses by specifically focusing on the scholarly thesis of M. General Abebe T. Kahsay. In his paper, Abebe (2007) brought too many points of assertions to substantiate his claim of sovereign right of access to the sea – ranging from historical linkage up to unviability of the Algiers agreement signed to end the 1998-2000 war fought between Eritrea and Ethiopia.

¹ Among the many scholars who argue Ethiopia's sovereign right of access to the Red Sea are: Professor Negussay Ayele, 'Asseb as Symbol for the Restoration of Ethiopia's Natural Seacoast,' www.mediaethiopia.com/Negussay_Asseb_Symbol.htm (accessed on 12/2/2016); Teodros Brehan, 'Reflections on the Political and Legal Alternatives for the Restoration of Ethiopia's Legitimate Rights to the Assab Region,' www.oocities.org/~dagmawi/NewsJuly2000/Reclaiming_Assab.html (accessed on 6/1/2016); Professor Getachew Begashaw, 'Port of Assab as a Factor for Economic Development and Regional Conflict,' www.ethiomediamedia.com/absolute/ethiopia_and_assab.pdf (accessed on 22/5/2016); Dr. Yacob Haile-Mariam, 'Ethiopia: International Support for Ethiopia's Right of Access to the Red Sea II' (Addis Tribune, NEWS, DOCUMENTS & COMMENTARY) www.allafrica.com/stories/199912030084.html (accessed on 22/5/2016).

This paper is divided into five sections: the first section deals with the historical narratives and discourses, and will show that Eritrea was not historically part of ancient Ethiopia. It will also allude to the task of historical ties in Africa and its illegitimacy to define a state's boundary. The second part will examine Italy's invasion of Ethiopia in 1935 and its effect on the colonial treaties. The third section is about the federation of Eritrea with Ethiopia; it dismisses Abebe's argument that the federation legitimates Ethiopia's sovereign right of access to the sea. The fourth section challenges Abebe's dismissive treatment of the viability of the Algiers agreement. The fifth section concludes.

2. Proper contextualization of Eritrea and Ethiopia's past

Abebe (2007) begins his thesis by confusing depiction of the history of Ethiopia and Eritrea by which he belies and blatantly distorts the two states' past. He stated that, "Ethiopia, which included the present-day Eritrea, is one of the oldest countries in the world." This statement implies that historically Eritrea was part of Ethiopia. However, there are abundant evidences which prove quite to the contrary and debunk Abebe's assertion. The following sections will vindicate the historiographical background of Eritrea as are found in different publications which Abebe completely overlooked in his analysis.

A. Eritrea's past reality of a separate and independent existence

The history of Eritrea is extended as far as 3000 B.C. An Italian historian Conti Rossini stated that around 1500 B.C. the ancient Eritrean port of Adulis was used as port of landing by the Egyptians (Araya, 1988). In about 800-700 B.C. the migration of Sabaeans from Yemen and Beja people from Sudan (Semitic settlers) took place and they settled in Eritrea and found towns like Kohaito, Yeha, Hawulti and Axum. They made Axum their seat and Adulis their port of civilization until about the 7th century A.D. (Semere, 1988). Aksum ruled the Eritrean highlands and northern part of Ethiopia; its empire expanded as far as the Sudan and Yemen (Semere, 1988; Warren & Warren, 1976). After the fall of Axum, five independent Beja kingdoms emerged covering northern part of Tigray province in Ethiopia, southern Eritrean highlands and section of the Eritrean coast of Red Sea and northeastern Sudan in 750 until the 14th or 15th century (Araya, 1988; Semere, 1988). As it is duly noted, the Axumite Empire

“broke up long before Columbus discovered America” (Bereket, 1989: 81). And, neither Eritrea nor Ethiopia were officially established even centuries after the demise of the Axumite Empire. Thus, this piece of history does not have decisive importance in supporting the claim of unity of Eritrea with Ethiopia and to define the development of both Eritrea and Ethiopia as states.² Watershed as they are, many other events took place later which lucidly defined the development of Eritrea’s separate existence; namely, the *Midre Babri* (Land of the Sea) kingdom, Turkish, Egyptian and Italian colonization.

The area called Mereb of today’s Eritrea was autonomous since the demise of the Axumite kingdom (Abbink, 2009); specifically after the 14th century, Eritrea came to be known as the country of *Midre Babri* (land of the sea) ruled by *Babre Negassi* (King of the Sea- an independently elected position by the people of *Midre Babri*) (Reid, 2001). Its boundary with Abyssinia (Ethiopia) was marked by the Mereb River (Eyassu, 1989). Giuseppe Sapetto and a 17th century writer Ludolphus tell us that the *Babre Negastat* was autonomous: he judged, administered, and appointed Chiefs of each of the confederation up on the recommendation of the people (as cited in Bocresion, 2007: 12-13). Reid (2001: 247) argued that Eritrea was not part of “historic Abyssinia”; moreover, citing Marcus at length Richard stated that “it is demonstrated by Marcus, a whole-hearted believer in the ‘Greater Ethiopia’ thesis whose own analysis of this period nonetheless indicates that Eritrea was not part of post-Axumite ‘Abyssinia’”; for the Abyssinian kingdom emerged in 15th century (Selected EPLF Publication, 1982). The famous Scottish explorer James Bruce travelled through the region in 1770 and found that *Midre Babri* (today’s Eritrea) and Abyssinia were separate political entities, often at war with one another—there was a constant invasion of *Medri Babri* by the Abyssinians of today’s Ethiopia (as cited in Reid, 2001: 248; Lobban, 1976: 336; Alemseged Tesfay, 2007).

By 1557 A.D., the Ottoman put the Red Sea coastlines of Eritrea under their occupation; it was even extended as far as Dubarwa, Sahel and Keren (territories inside Eritrea), thereupon became the colonial power in Eritrea for 300 years (Astier, 2006; Cumming, 1953). The Egyptians started to replace the Turks when

² However, this should not be taken as an assertion that the Axumite kingdom was not part of the Eritrean history. The statement should be understood simply in relation to the development of Eritrea and Ethiopia as separate political entities as they stand today.

the latter were falling in 1850 (Cumming, 1953).³ Egyptian forces attempted to invade Abyssinia; however, they were defeated by King Yohanes of Tigray at Gundet (1875) and Gura (1876), Eritrean towns at the border (Semere, 1988; Eyassu, 1989). King Yohanes's General, Ras Alula overran the *Midre Babri* and Egyptians pulled back leaving the Eritrean highland under the temporary occupation of the General. "Ethiopian occupation of the highlands was short lived" and was purely military—it lasted for the period 1876-1889 (Bocresion, 2007: 17; Semere, 1988: 15-6; Reid, 2001: 255). As a matter of fact, Ethiopians were protecting their territory from the invasion of Egypt; they did not fight to liberate Eritrea from Egypt. They briefly occupied parts of the highland of Eritrea only when they defeated Egypt to defend their territory, Ethiopia. Even during this brief occupation, the highlands of present day Eritrea were administered by its own customary laws, procedures and traditions (Bocresion, 2007) while the Abyssinians were using the *Fitha Negest* (Bocresion, 2007; Melly, 1936)⁴ which is different in its substance from that of the customary laws of the Eritrean highlands. This evidences that Abyssinians never considered Eritrea as part of their territory as they would have imposed their laws upon the people of Eritrea during their occupation. Thus, Eritrea was not part of the historic Abyssinia. Neither were the Eritrean plateau and lowlands an integral part of Ethiopia in any period of time preceding the coming of the Italians (Reid, 2001; Bereket, 1989).

Italians started buying coastal strips around Assab in 1869 from local Chiefs. During 1880s they converted these lands into colony (Eyassu, 1989). Italy continued to occupy further territories of Eritrea aiming to control the territories which Egypt was abandoning (Eyassu, 1989). Italy took Massawa from Egypt in 1885 without armed resistance (Alemseged Abay, 1998; Keller, 1981). The Eritrean territory was transferred into another colonial power, Italy. Worth noting as it is, it was the separate status of the Eritrean coastal areas especially Massawa from any foreign colonial power that helped Italy to use it as a basis for her colonial ambitions (Habtom, 2003; Cumming, 1953; Smidt, 2012). The architect

³ Luwam Dirar and Kibrom Tesfagabir, Introduction to Eritrean Legal System and Research, <http://www.nyulawglobal.org/globalx/Eritrea1.htm> (accessed on 20/5/2016).

⁴ Bocresion (2007: 20) wrote that "Each region of Eritrea had its customary laws (law of culture and authority respecting tradition). Starting from 13th century Eritreans continued to be administered by their own laws, procedures and traditions even during the Italians and British."

of modern Ethiopia King Menelik concluded the treaty of *Wichale* in 1889 with Italy to harden his position and to be recognized as emperor against any potential challenger (Alemseged Abay, 1998; Lobban, 1976). The same treaty also defined the line of the boundary with Eritrea—King Menelik accepted Mereb River as an official boundary of Italian Eritrea (Alemseged Abay, 1998; Lobban, 1976). King Menelik recognized Italy's sovereignty over Eritrea and Italy considered King Menelik as the legitimate Emperor of Ethiopia (Eyassu, 1989). Italian occupation of Eritrea was completed then and in 1 January 1890, Italy officially declared the colony in East Africa and named it Eritrea (Araya, 1988; Semere, 1988).

Following its defeat at the battle of Adwa (Eyassu, 1989),⁵ Italy concluded peace treaty in 1896 and it recognized the absolute independence of Ethiopia and in turn the later recognized Italian sovereignty over Eritrea (Habtom, 2003; Asteir, 2006; Eyassu, 1989). The international boundaries of Eritrea were fixed by negotiations in 1897 and later in 1900s (Semere, 1988; Reid, 2001; Eyassu, 1989). Italy gave Eritrea its distinct and definite border by signing multiple boundary treaties during which the modern political map of Africa was also being drawn (Eyassu, 1989).

Taking into account the different political scenarios of the horn region, the *official* establishment of the states including Eritrea in the horn emanates from the presence of the rival European colonialists in the region. Eyassu has duly noted that the consequence of the colonialists' (Eyassu, 1989) rivalry and cooperating interaction gave birth to Italian Eritrea on the Red Sea, French, British and Italian Somaliland in the east and modern Ethiopia in the middle (Eyassu, 1989). It was only the 'will and interaction' of the rival and expansionist colonialists that caused the formation of the modern states of the region. The architect of modern Ethiopia King Menelik could not have "manage[d] to create modern Ethiopia by incorporating the vast territory" he conquered without the external support from the Europeans (Eyassu, 1989: 21-22). It follows then that Eritrea was not detached from Ethiopia whereas "Eritrea emerged as a modern political

⁵ Taking advantage of the 1894 rebellion that broke out against Italians in Akele Guzai province, one Tigray Chief, Ras Mengesha, took the chance to cross the Mereb but it was checked by Italians and the Italians managed to take the capital of Ras Mengesha, Mekele, but were crushed in Adwa in 1896 by the combined forces of Emperor Menelik.

entity at the same time as modern Ethiopia and many other African nations were being constituted” (Eyassu, 1989: 22; Rey, 1922: 284). Therefore, contrary to Abebe’s assertions, the historic episodes that defined the historical development of Eritrea has nothing to do with the history of Ethiopia but are linked to that of the *Midre Babri* and the three successive colonialists who colonized Eritrea for centuries.

B. The creation of modern Ethiopia and its territorial ambitions in Eritrea

There is a portrayal of Ethiopia as a unique case of ancient nation and that Eritrea was detached from the former with the emergence of colonialism in Africa. Hitherto, this has been advocated by several Ethiopian intellectuals leaving the true case of Eritrea and Ethiopia shrouded in ambiguity. Nevertheless, the following paragraphs will attempt to show that linking Eritrean history with that of Ethiopia arose in 1940s as a continuation of Ethiopia’s ambition of colonial expansion by taking advantage of Italy’s defeat leaving administrative gap in the region.

Holcomb and Sisai (1990) argued that Ethiopia was created in 1880s when Abyssinia—a cluster of small kingdoms—expanded by invading the independent nations in the region with the help of European colonialists (Kornprobst, 2002). Holcomb and Sisai (1990), Habtom (2003) and Keller (1981) argued that Ethiopia was a “*dependent*” colonial empire which enclosed many nations by conquering the then independent nations of the Oromo, Ogaden, Sidama, Afar etc. During the expansion of colonialism in Africa in 1880s, the colonial powers in the horn region did not want any monopolistic possession of the land of Abyssinia by them. Thus, to solve their internal conflicts by avoiding monopolization of the area they carved out Ethiopia (Holcomb and Sisai, 1990). This geographical carving out of Ethiopia was completed in 1906 when the tripartite treaty was signed between France, Italy and Britain (Astier, 2006; Holcomb and Sisai, 1990). It was a treaty signed to internationalize and recognize Ethiopia as a sovereign state with an international safeguard (Holcomb and Sisai, 1990).

Ethiopia participated in the Berlin conference of 1884 as a colonial empire in the scramble for Africa to occupy and partition territories with its European counterparts (Shaw, 1986; Bereket, 1989; Babu, 1988; Markakis, 1989). Ethiopia’s act

was an exceptional case of Africans colonizing their African brothers (Kornprobs, 2002; Yasin, 2008; Markikas, 2003). Ethiopia's colonialist expansionism did not stop even after its final carving out. Later, during the time of decolonization, it claimed Djibouti, Somalia and Eritrea based on historical grounds (Shaw, 1986). After Eritrea was federated with Ethiopia in 1952, Ethiopia annexed Somali territory, the Haud in 1954, through negotiations with Britain (Holcomb and Sisai, 1990; Habtom, 2003). As a pattern of "colonial expansion of territories", this was the newest colony annexed under Ethiopia's empire (Holcomb and Sisai, 1990: 229). The war of liberations of different groups of people still being fought in Ethiopia is, arguably, the result of their colonial relationship with the empire (Holcomb and Sisai, 1990; Habtom, 2003). As the following shows, Ethiopian rulers recognized Eritrea as an independent entity which challenges Abebe's mantra that Eritrea was historically part of Ethiopia.

Before and after the final carving out of Ethiopia, there were conducts and statements of the Abyssinian Kings and rulers which demonstrate that Eritrea had never been part of Ethiopia. Nugus Teklehaymanot king of Gojjam invited an Italian company to build a bridge for him and said, "ivory, gold, civet and coffee are to be found and thus the bridge will be good for your Assab." The construction was begun in 1884 (Holcomb and Sisai, 1990: 122). It is clear that even before Italy's formal declaration of its colony Eritrea, Ethiopians knew that Assab (Eritrean territory) was not part of Ethiopia—a territory which Abebe strongly claims as historic part of Ethiopia. Alfred Ilg, King Menelik's Swiss advisor, proposed to Menelik to build a railway to connect Ethiopia with the coast to have a link with shipping lines (Holcomb and Sisai, 1990). The construction of the "Franco-Ethiopia" railway started in 1896 by Paris firm through the French Somaliland (today's Djibouti) (Holcomb and Sisai, 1990; Manheim, 1932). Djibouti was then made a free port for Ethiopia (Manheim, 1932). An issue arose as big as an issue of access to the sea by then, however, Eritrea did not come into picture. The message that king Menelik's move heralded is clear; that is, Eritrea was not in any way linked to Ethiopia. Had it been so, Menelik would at least have decided to connect his empire to the sea via Assab in Eritrea or he would have claimed Eritrea.

There were Ethiopian rulers who even did not want Ethiopia to be connected to the sea (Holcomb and Sisai, 1990: 129).⁶ This evidences that the issue of connection with the sea was even not embraced in the thinking of the then rulers of Ethiopia.

King Menelik's successor Lij Iyasu, despite his short reigning time, had different plans and ambition from his predecessors. He had a plan to unite Somalia with Ethiopia by ejecting the Europeans disregarding the sacredness of the colonial boundaries; he introduced a policy of equal treatment of Islam with Christians (Holcomb and Sisai, 1990). But he did not claim Eritrea. Ras Tefari who later became Emperor Haile Selassie was the main critique of Lij Iyasu. He stated that "Lij Iyasu failed to help the Allies—French, Italy and Britain who were *Ethiopian neighbors at the frontiers*" (Holcomb and Sisai, 1990: 162, 168). This evidences that Ras Tefari who presented his claim of Eritrea to the UN and the international community in 1940s, after he became King, had already acknowledged and recognized that Eritrea under Italian colonialism was a mere Ethiopian *neighbor at the frontier*.

Menelik died before the completion of the 'Franco-Ethiopia' railway. As soon as Tefari became crown prince he supervised the completion of the railway project. In 1917 it started its service from Addis Ababa to Djibouti (Holcomb and Sisai, 1990). Ras Tefari—who became King Haile-Selassie in 1930—simply went on to complete the construction of the railway to connect Ethiopia with the sea via Djibouti (Holcomb and Sisai, 1990). If Ras Tefari had believed that Eritrea was part of Ethiopia or if he had an intention of having access to the sea via Eritrea, he could have stopped the construction of the railway forthwith and put forth his claim of the territory of Eritrea. But, Eritrea for Ras Tefari was Ethiopia's *neighbor at the frontier*. Affirming Eritrea as a distinct entity, the successors of King Menelik, Iyasu, Zewditu (Melly, 1936), and Haile-Selassie did not question the validity of the colonial treaties until Italy was forced to withdraw from Eritrea. Ethiopia has been portrayed as a unique black state which fought European colonialists. However, it did not fight to liberate Eritrea during its occupation by Italy (Babu, 1988). Ethiopia defeated the Italian colonialist at Adwa in 1896

⁶ One Abyssinian nobleman commented to British envoy Rennell Rodd, "we don't want rapid communication with the coast; it will be useful in our interior, once finished we shall destroy connection with the sea."

but “the Ethiopians did not pursue the Italians up to the sea” (Reid, 2001: 256; Astier, 2006: 108). Had King Menelik believed that Eritrea was part of Ethiopia, there was no barrier to stop his troops to pursue the Italians up to Eritrea or its Red Sea. In another scenario, King Haile Selassie joined the Allied Forces in 1940 to restore his throne and defend Ethiopia from Italian occupation. If Ethiopian rulers believed that Eritrea was part of their land, nothing could have stopped them from raising their arms to defend her from colonialists. Thus, if their claim that “Ethiopia as fighter of colonialist” and “Eritrea as part of ancient Ethiopia” is to make sense, Ethiopia should have defended Eritrea against the successive colonialists or it should have fought for its liberation. Concrete evidence as it is, it proves that Eritrea was not detached from Ethiopia; it was developed as an independent entity historically, geographically and politically.

The aforementioned narratives being the historical background of Eritrea, it is compelling to discuss as to why and how Eritrea was federated with Ethiopia in 1952. Four years after the defeat of Italy in 1945, Haile Selassie met USA's President Roosevelt in Cairo, Egypt. He appeared with long wish list; including a request of US support for return of Eritrea and to provide a solution of “access to the sea” (Holcomb and Sisai, 1900: 225, 253). By then Ethiopia was admitted as member of the UN. It was making political maneuver to have control over the former Italian colonies *Eritrea* and *Somalia* which were its key demands in field of its foreign affairs (Holcomb and Sisai, 1900; Alemseged Abay, 1998; Okbazghi, 1987; Bereket, 1989).

Ethiopia agreed to allow the USA to have an Eritrean base of operation for surveillance and other installations and facilities in return for US support of Ethiopia's claim of Eritrea (Connell, 2009; Holcomb and Sisai, 1900; Bereket, 1989). To prove its loyalty toward USA, Ethiopia sent troops to the Korean War in 1950 and contributed 100,000 US dollar for the cost of the war too (Connell, 2009; Holcomb and Sisai, 1900; Astier, 2006). The advantage Ethiopia got from the above mentioned undertakings was USA's firm standing behind the idea of Ethiopia's control over Eritrea. The majority of Eritrean people “represented by their own socioeconomic and political groups petitioned the UN for direct and complete independence of Eritrea,” while USA in the UN sessions was bringing arguments to protect her strategic interest (Habtom, 2003; Eyassu, 1989; Holcomb and Sisai, 1990). This move of the US was against its prior firm support

for the right of self-determination of colonies (Holcomb and Sisai, 1990). However, the strategic interest it had in the horn region outweighed the right of the people in the case of Eritrea. This *quid pro quo* nature of US and Ethiopia relation was clearly expressed in the ill-reputed statement of John F. Dallas – Head Delegation of USA. In his formal speech to the UNSC he said:

From the point of view of justice, the opinion of the Eritrean people must receive consideration. Nevertheless, the strategic interest of the US in the Red Sea basin and considerations of security and world peace make it necessary that the country has to be linked with our ally, Ethiopia (Connell, 2009; Holcomb and Sisai, 1990).

To sum up, the strategic interest of the big powers and the effort of Ethiopia's propagandist work of creating confusion in the international community by presenting her own side of story were the only factors that enabled her to have control over Eritrea in the name of Federation. Ethiopia claimed Eritrea not because it really believed that the latter was historically linked to it. The claim, however, arose all of a sudden to quench its desire of access to the sea when it appreciated that the sovereignty of Eritrea fell at the hands of the four powers following Italy's defeat. Created by conquests of territorial expansion, thus, Ethiopia's claim of Eritrea was just continuance of its *imperial* territorial expansion.

C. Colonial territorial unit: African definition of nation state

Abebe's claim of sovereign right of access to the sea based on historical ties could be easily defeated based on the notion of African nation state. The following paragraphs discuss how an African states' territory is defined and accepted as legitimate.

Bereket stated that "Ethiopia's claim that Eritrea was historically part of Ethiopia which colonial history could not change was not accepted by the UN when it was federated as an autonomous entity" (1989: 81). The UN Resolution (that federated Eritrea with Ethiopia) and all other laws that followed it recognized Eritrea as colonially defined separate entity (Bereket, 1989). The special treatment extended to colonial boundaries in Africa is that having historical, ethnic,

religious etc. ties does not guarantee modification or adjustment of such boundaries—this received strong affirmation and support from Ethiopia too.⁷ Shaw (1986) also properly noted that the notion of nation state in Africa is not defined in the western sense; the acceptability of nation state in Africa is found in the colonial territorial unit not on ethnic, cultural, etc. characteristics. That is why none of the territorial claims based on historical grounds found legitimacy in international law (Shaw, 1986). Against this background, Abebe's move of referring to historical or other ties for the sake of grounding his assertion is misguided.

Ethiopia is the only state that defined its own territory by signing international colonial boundary treaties with the European colonial powers,⁸ albeit all other colonial boundaries of African states were imposed by the colonialists upon the people disregarding historic, cultural, ethnic and other ties. It is crystal clear that African states are not, under any circumstances, allowed to claim readjustment of the colonial boundary treaties let alone Ethiopia having this *sui generis* case—which defined its border through its own bilateral treaties. Above and beyond, the Somali people inhabit Ethiopia and Somalia; the Afar people too inhabit Eritrea, Djibouti and Ethiopia. This being the case, averring that having similar language, culture, ethnicity or language guarantees to claim a territory is simply a sheer disregard of the African norm.

3. Italy's invasion of Ethiopia in 1935 and its impact on the colonial treaties

This section critically analyses Italy's invasion of Ethiopia in 1935 and its subsequent impact on the colonial treaties that define the Eritrea-Ethiopia boundary. Abebe (2007), based on Art 60(3) of the Vienna Convention on the Law of Treaties (hereinafter VCLT), argued that Italy's invasion of Ethiopia was a material breach of the colonial treaties of 1900s, and he added that Ethiopia had the right to declare the same null and void. First, as he has admitted in one of

⁷ See also Ghidewon Abay Asmerom, The Ethio-Eritrean Border and the Treaties that Delimited it (Abstract of a talk presented in Washington DC, on 27 September 1998), available at www.dehai.org/conflict/articles/borderabstract.html (accessed on 8/4/2016).

⁸ Judge Abdulqawi A. Yusuf, Separate Opinion: Frontier Dispute, *Burkina Faso V. Niger*, www.legal.un.org/ICJsummaries/documents/english/197_e.pdf (last accessed on 18/5/2015).

his prior arguments,⁹ his move to apply the Vienna Convention retroactively to treaties entered before the entry into force of the VCLT is simply an utter wrong application of the same law. Above all, the outbreak of hostilities or the effect of war on treaties is excluded from the scope of the VCLT too (Article 73 of the VCLT; Fitzmaurice, 2003), which Abebe blindly overlooked. Although his invocation is wrong from the start, for the proper understanding of the VCLT, I will proceed to specifically challenge the reasoning he made by raising some provision of the VCLT to prove that his claim is tenable.

According to the VCLT, treaties can be invalidated as null and void or can be terminated or suspended after certain time of its function. The reasons for nullification of a treaty are municipal law, error, fraud and corruption, coercion or *jus cogens* (Articles 48-53 of the VCLT; Shaw, 2008). Treaties can also be terminated or suspended on the grounds of consent or treaty provision, material breach, fundamental change of circumstances, or supervening impossibility of performance (Articles 54-64; Shaw, 2008). Considering Italy's invasion as material breach of the colonial treaties, Abebe argues that Ethiopia can declare the treaties null and void. As a matter of fact, invalidation by rendering the treaty null and void amounts to discarding the treaties as if it did not exist in fact or it was not valid from the scratch. Termination or suspension, however, is rendering a valid treaty non-functional for the reasons put above, but only after it has been in force for certain period of time. Bearing this in mind, there is vivid incompatibility in Abebe's argument. Although Abebe invoked the right of Ethiopia to invalidate the boundary treaties by declaring it null and void, he grounded that right on material breach. Material breach exists while the treaty is functioning and only guarantees termination or suspension by the injured state. Abebe admitted that the boundary treaties were valid but were breached materially when Italy invaded Ethiopia. But, declaring a treaty null and void and invoking material breach for such invalidation shows Abebe's significant error of applying the VCLT.

⁹ Abebe said that there are Ethiopians who argue that the 1900s colonial treaties were made under duress and coercive pressure thus, the treaties were *void ab initio*. Abebe himself responded to the foregoing argument, "Even if it was signed under duress, it was not unlawful at that time and non-retroactivity of the VCLT forbids its applications in such circumstances." Thus, it is inscrutable why he forgot the non-retroactive application of the VCLT on his case.

Whether Ethiopia can invoke termination of the treaties because of Italy's invasion is worthy of discussion. Firstly, if Abebe really considered Italy's invasion as material breach of the treaties as a ground for Ethiopia to declare the treaties null and void (termination, for the proper discussion of the law of treaties), he should have been concerned about the timing to invoke termination. That is to say, according to Art 45 of the VCLT, a party loses its right to invoke termination if after it become aware of the fact, by which it can invoke termination, it expressly agree the treaty to remain in force or by reason of its conduct it acquiesces to the maintenance of the treaty in force (Malanczuk, 2002; Shaw, 2008). Abebe (2007: 13) stated, "Eritrea was federated in 1952. [*The same year*], Emperor Haile Selassie declared the treaties signed with Italy null and void." Italy's invasion took place in 1935, thus, Ethiopia declared the treaties null and void almost after two decades. Provided that material breach does not guarantee an automatic termination but an option, Ethiopia's late invocation clearly indicates that it acquiesced that the invasion does not affect the colonial treaties.

For the proper discussion of the VCLT, Abebe should have raised the principle of the *rebus sic stantibus* rule (Shaw, 1986). According to this rule, a treaty may be unilaterally terminated or suspended on the ground of fundamental change of circumstances (Article 62(1) of the VCLT). The International Court of Justice (ICJ) has stated, "a radical transformation of the extent of obligation imposed by a treaty is a fundamental change of circumstances" (Shaw, 2008: 949). Even if there is a radical transformation of an obligation, treaties establishing a boundary are, however, an exception to this rule (Article 62(2)(a) of the VCLT). "The demise of colonialism and establishment of self-determination" were regarded as fundamental change of circumstances to the colonial treaties (Shaw, 1986: 231); invasion and occupation of territory; disregarding colonial treaties also fundamentally changes the already prevailing circumstance of respecting the sovereignty of the concerned states. Considering Italy's invasion as a fundamental change of circumstance, Ethiopia had never had the right to declare the colonial treaties null and void or ask for termination. Italy's invasion might have fundamentally changed the circumstances, indeed it did—one an invader and the other victim of invasion—however such changes are exceptionally made to leave boundary treaties unaffected. The International Law Commission (ILC) stated that, "treaties establishing a boundary should be accepted as an exception to the rule (*rebus sic stantibus*), otherwise the rule instead of being an instrument of

peaceful change it might become a source of dangerous friction” (Shaw, 1986: 231). Especially the fate of the African boundaries which are colonially determined would be subject to revision or adjustment causing chaos and fragmentation of states. Against this background and the rules of the VCLT, Abebe’s argument that Ethiopia can declare the treaties null and void or ask termination is erroneous.

On top of that, Abebe (2007) omitted one very important aspect of the characteristics of boundary treaties. Citing the ICJ’s decision on the *Libya vs. Chad* case, Shaw stated that “a boundary established by a treaty achieves a permanence which the treaty does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary” (Shaw 1997: 490). That is to say, a treaty could be violated or breached, however, the boundary stands and remain fixed. A boundary established by a treaty has legal life of its own despite the fate of the treaty it established (Shaw, 1997; Shaw, 1986). The ICJ recalls it as a principle of *objectivization of boundary treaties* in international law (Alberto, 2012). Therefore, under any circumstances, the boundary between Eritrea and Ethiopia cannot be changed or devoid of its legal existence as an international boundary. “Once agreed, the boundary stands” (Shaw, 1997: 490). In this case, as Shaw (1997) has rightly noted, the rule with regard to treaties that establish boundaries is clear and noncontroversial. Furthermore, “states that have subsequently invoked the nullity of boundary treaties have not found a receptive court to uphold such claims”(Alberto, 2012: 509).

Abebe (2007) argued that invoking material breach to invalidate territorial treaty is supported by state practices. He brought two cases and stated, “The Munich Agreement and Riga Treaty of 1921 represent contemporary state practice that reflects the customary law to invoke a material breach and declare a territorial treaty null and void” (Abebe, 2007: 26-30). In the first place, these agreements were in force in 1938 and 1921 respectively—almost aged a century. What test or standard of contemporariness he used to argue that these treaties ‘represent contemporary state practice’ is really absurd.¹⁰ To disregard the changes in

¹⁰ Pursuant to Art 38 of the statute of the ICJ, customary law is the second source of international law source. It is inclusive of many elements namely a state practice which is “common, consistent and concordant,” *opinion juris*, generality of practice; persistent objection to that rule from a state affected by the practice and dissenting state’s right, etc. But, Abebe’s attempt to call the two treaties as customary laws without checking them whether they fulfill the above elements

the world legal order resulted by the post WWII scenarios, UN Charter and Cold War and regard these old treaties as contemporary state practice is basically erroneous and unscholarly. After all, these treaties or agreements were not specifically entered into to fix a specific and new boundary line among the concerned states. As it can be seen from the treaties, due to the frequent wars and other factors these states were transferring territories among themselves—making concessions. These two treaties were serving to transfer territories (territorial sovereignty) already with defined and distinct boundary line.¹¹ The states which were declaring the treaties null and void did not invoke a material breach of the treaty. As it can be seen from Abebe's writing, they were simply nullifying it because Germany and Poland invaded the concerned states disregarding the treaty. This is because the very aims of the treaties were to avoid war; they were peace treaties.¹² The context in which the Eritrea-Ethiopia boundary was established is different in a sense that the treaties Ethiopia signed with Italy were colonial treaties to establish an international boundary which have been commonly accepted practice in Africa. It was neither a treaty to transfer territory nor peace treaty as in the aforementioned cases. Therefore, Abebe's argument to refer and assimilate the two cases with the Eritrean colonial boundary treaties is utterly amiss.

As noted in the above section, the 1906 tripartite treaty internationalized and recognized Ethiopia as sovereign and independent state benefiting guarantee of protection by the then powerful states (Holcomb and Sisai, 1990). And, both Italy and Ethiopia were members of the League of Nations when the former

or whether they pass the threshold of customary law shows the lack in his arguments of the required thoroughness.

¹¹ See the Munich Agreement, <http://www.britanica.com/events/Munich-Agreement> (accessed on 25/1/2016). The Munich agreement for example was a settlement reached by Germany, Great Britain, France, and Italy that permitted German annexation of the territory of Sudetenland in western Czechoslovakia. In the Munich agreement France, England, Germany and Italy agreed the cession to Germany from Czechoslovakia of the territory known as the Sudetenland, but when Germany invaded Czechoslovakia, France and England vowed they would not be bound to transfer the Sudetenland territory to Germany according to the Munich agreement.

¹² See the Riga treaty, www.forost.ungarisches-institut.de/pdf/19210318-1.pdf (accessed on 25/1/2016). The treaty is titled as 'Treaty of Peace between Poland, Russia and The Ukraine, Signed at Riga, March 8TH 1921'. Poland, on the one hand, and the Russia and the Ukraine, on the other, being desirous of putting an end to the war and concluding a final, lasting and honorable peace based on mutual understanding. This clearly tells that the treaty was a peace settlement but not boundary treaty.

invaded the latter (Holcomb and Sisai, 1990). Two premises can be borne out of these scenarios which reveal the flaws on Abebe's assertion for the nullification of the colonial treaties. First, according to the Tripartite Treaty, Italy's invasion was a violation of the same treaty and Ethiopia's sovereignty. France and Britain were obliged to force Italy to reverse its actions and to respect the 1906 treaty of protecting Ethiopia as they were obliged by the treaty (Holcomb and Sisai, 1990).¹³ In 1940, despite Italy's complete occupation, Britain declared Ethiopia as sovereign state and King Haile Selassie as a legitimate ruler (Holcomb and Sisai, 1990). When Italy declared war on Britain and France on 10 June 1940, Britain had already formed the Allied Global Strategy to attack the enemy or the Axis or Intente camp that includes Italy, Japan and Germany. Ethiopia was made part of the alliance (Holcomb and Sisai, 1990). Therefore, Italy's invasion was then supposed to be governed by the Tripartite Treaty without calling the termination of the boundary treaties; the invasion was violation of Ethiopia's sovereignty. Affirming this Britain maintained its previous recognition of Ethiopia's sovereignty and made Ethiopia part of the Allied force to fight against Italy. Second, Ethiopia appealed to the League of Nations when it was invaded by Italy.¹⁴ According to Article 10 of the covenant of the League of Nations, the members were obliged to "respect and preserve... the territorial integrity and existing political independence of all members."¹⁵ Besides, Ethiopia and Italy had already signed a treaty called 'Italo-Ethiopian Treaty of Friendship and Arbitration' in 1928 that obliged both states to refer any conflict to the League of Nations.¹⁶ That is why Ethiopia brought Italy's aggression before the League's attention and appealed to the League to take measures against Italy. On 7 October 1935, the League declared Italy an aggressor.¹⁷ Thus, Italy's invasion of a sovereign state was addressed by the then rules of international law. It was handled by the Covenant when the League decided that Italy was an aggressor and it was handled by the Tripartite Treaty when UK declared its recognition of Ethiopia's

¹³ Steven Schoenherr, 'Ethiopia Invaded by Mussolini,' <http://history.sandiego.edu/gen/ww2time-line/Prelude05a.html>(accessed on 25/1/2016).

¹⁴ Ibid.

¹⁵ 'The Covenant of the League of The Nations, http://avalon.law.yale.edu/20th_century/leag-cov.asp (accessed on 25/1/2016)

¹⁶ Laura Kolehmainen, 'Why was Italy allowed to invade Ethiopia in 1935-1936?' (TikkurilankukioHistoria), www2.aka.fi/Tiedostot/Viksu/2012työt/Laura%20Kolehmainen%20kilpailutyö.pdf (accessed on 6/2/2016).

¹⁷ See Schoenherr, above no. 13.

sovereignty and its commitment to protect the King and Ethiopia from Italy's occupation. The issue of invasion thus had aptly found its panacea—regression or reversal of aggression—without the need to call for invalidation.

According to Abebe's (2007: 23-24) descriptions, "Italy not only invaded Ethiopia but rearranged the boundaries of Somalia, Eritrea, and Ethiopia to form the colony of Italian East Africa." If this is the case, Abebe's assertion that Ethiopia can nullify the colonial treaties would affect the whole Italy's former colony in the horn. Italy used both Eritrea and Somalia to invade Ethiopia (Eyassu, 1989; Negussay, 2000). Thus, it was not only the treaty that established the Eritrea and Ethiopia border that bore the brunt by the invasion but the treaty that established Somalia and Ethiopia boundary as well. If Ethiopia opts for invalidation of the colonial treaties with regard to Eritrea, because of Italy's invasion of Ethiopia, by the same token, either Ethiopia itself or Somalia can do the same with regard to the treaty that define their common border. Thus, according to Abebe's line of thought, Somalia's irredentist claim of the Ogaden territory which met strong Ethiopian and international community opposition will be legitimate. This makes Abebe's argument an emotional one which cuts no ice.

4. The Federation and its viability to solve territorial conflict between Eritrea and Ethiopia

The federation case or the United Nations General Assembly (UNGA) No. 390A (v) Resolution (hereinafter the Resolution) is another version of Abebe's argument under which he posits the legitimacy of Ethiopia's sovereign right of access to the sea. The following paragraphs will reveal his failure to ably apprehend the federation's legal applicability and viability to any conflict between Eritrea and Ethiopia.

After its defeat on the WWII, Italy was made to renounce the rights and title it had over its former colonies pursuant to art 23(1) of the peace treaty it concluded with the United States, the Soviet Union, France and the United Kingdom (victorious four powers) (Semere, 1988). Abebe (2007) argued, as Italy renounced its rights it was the end of the colonial treaties and a new legal regime started to govern. He averred that Ethiopia had superior right over Eritrea then. He seems to base his argument of superior right on his previous assertion that historically

Eritrea was part of Ethiopia. Taking into account the *mythical* nature of Abebe's argument and the process of *decolonization* of African colonial territories (Shaw, 1997), the argument of superior right is simply wishful or unfounded argument.

During the first session of the four powers that was discussing the future of the Italian colonies, Ethiopia came up with a proposal called 'Green Memorandum' and claimed both Eritrea and Somalia. It claimed Somalia based on the strategic justification that Somalia was used by Italy to invade Ethiopia in 1935 (Eyasu, 1989; Bamfo, 2010; Alemseged Tesfay, 2007). During the five sessions of the UNGA that were discussing to reach into a decision with regard to Eritrea, different proposals were being proposed including the *Bevin-Sforza* formula which called for the partition of Eritrea between Sudan and Ethiopia (Alemseged Tesfay, 2007; Semere, 1988; Astier, 2006). To protect Eritrea's territorial integrity intact, the formula was rejected by all Eritrean political parties and other states. However, Ethiopia had accepted and voted for the partition (Eyassu, 1989; Bocresion, 2007; Bereket, 1989) abandoning its prior claim of Eritrea in its entirety. This proves that, it was only the undetermined future of Eritrea that triggered Ethiopia to be engaged in political campaign so decisively to control the former. If Ethiopia truly believed that Eritrea was part of its ancient territory, it would have been unthinkable for its leaders to accept a proposal which totally lay waste the integrity of Eritrea.

Abebe (2007) admitted that when the UN decided to federate Eritrea with Ethiopia, the "interest of the inhabitants" was not taken into account as a result of which a fundamental right of the inhabitants is deemed derogated (PPTILRLP, 1980). Abebe (2007: 52, 57) argued that if the UN, especially the victorious powers, supported giving Ethiopia sea outlet based on their political and strategic considerations, "one can safely conclude that Ethiopia's sovereign right of access to the sea was not tied up or dependent on the wishes of the then inhabitants of Eritrea." If the wishes of the people of Eritrea were not decisive, the same people would not have fought for thirty years of independence and the international community would not have accepted and affirmed Eritreans wishes in 1993. The wishes of the people was deliberately set aside not because it had no legal or moral anchor, but it was compromised for the geo-political interest of the superpowers or for the *quid pro quo* relationship of Ethiopia and the super powers. Admitting the deliberate setting aside of the right of self-de-

termination, Abebe (2007: 51) himself echoed the critique of Cassese at length, which states “the UN failed to organize a referendum in 1950 to establish the wishes of Eritreans that political and strategic considerations took the upper hand, and self-determination — as the ‘genuine and free expression of will’ of the people— was set aside.” It is recorded in history as a shameful betrayal of the Eritrean people of its strong case of self-determination (Reid, 2009; Fenet, 1988). Thus, legally Ethiopia’s right of access to sea outlet should have been definitely tied up and dependent on the wishes of the people. It is worth noting that the UNGA blatantly *reduced international law to politics* when it federated Eritrea with Ethiopia. The UNGA’s defiance to the early 20th century right of self-determination of the people made politics take the upper hand over international law. Abebe’s move to echo and argue based on this sheer injustice made by the UNGA to the Eritrean people demonstrates an Ethio-centric nature of his arguments that are devoid of any legal significance. He rather should have left the federation case as a sorry epitaph and fiasco than rekindling it for of no use.

Pakistan and Guatemala—members of the commission that were sent to Eritrea—argued that based on the majority wishes of the people and for the security and peace of the region Eritrea should be independent (Abebe, 2007; Eyassu, 1989).¹⁸ Abebe (2007: 41) negatively described these two states’ arguments on the peace and security of east of Africa as “ridiculous and shortsighted which did not reflect the then existing geo-politics of the region.” He tried to substantiate his argument and stated that Italy used Eritrea as a “spring board” to invade Ethiopia; Ethiopia was a “Christian island” and it has a major threat from Arab countries like Egypt. First, Italy used both Eritrea and Somalia to invade Ethiopia (Alemseged Tesfay, 2007). If this is the case his argument implies that Ethiopia can claim Somalia for security reasons too; for the later was used as a spring board to invade Ethiopia. Second, Italy’s use of Eritrea to invade Ethiopia is of no relevance to his assertion of claiming sovereign sea outlet. Abebe might think that there was a threat to Ethiopia’s security during Italy’s colonization; however, it was already obviated as Italy was defeated and it was followed by the process of decolonization. It was the failure of decolonizing Eritrea and guarantying the people of their fundamental right of self-determination that sparked Africa’s

¹⁸ The United Nations Commission of Enquiry, made up of Burma, Pakistan, Guatemala, South Africa and Norway was sent to Eritrea in 1949 to make studies for the final disposition of Eritrea.

longest ever struggle for independence, as Pakistan, Guatemala and many other countries instantly predicted (Semere, 1988; Bereket, 1989; Babu, 1988). Needless to say, their prediction proved prophetic. Abebe echoed the portrayal of Ethiopia as a Christian island: but the proportion of Muslims and Christians in Ethiopia is the same if not tilting towards Muslim majority in number (Bocresion, 2007). Affirming this, even the successor of King Menelik, Lij Iyasu introduced the policy of equality of Islam and Christian (Holcomb and Sisai, 1990). Contrary to Abebe's assertions, during the UN discussions regarding the future of Eritrea, that the Arab countries supported an immediate independence of Eritrea, some countries considered Ethiopia's claims for sea outlet (Habtom, 2003). Though Egypt initially supported Eritrea's independence, during the vote in the UNGA, it voted for the Federation (Redie, 2000). Had Arabs were threat to Ethiopia, they would have never wanted to see Ethiopia with sea outlet via Eritrea or Eritrea federated with Ethiopia. Therefore, his position that Arab countries were threats to Ethiopia is unfounded.

Abebe (2007) argued that granting Ethiopia right of access to the sea (through the federation) was to minimize the security threat in the horn and with an ultimate intention to make Eritrea part of Ethiopia. He claimed to premise this argument up on the operative provisions, the preamble and the travaux preparatoires of the Resolution. Abebe is telling us that the UN viciously federated Eritrea aiming for further abrogation of the federation so that Eritrea becomes complete part of Ethiopia. The UN left a bad precedent in history. As a result, the UN that was constituted under the pillars of guarantying fundamental rights of peoples is going to be viewed as an untrusted organization and complete instrument that serve the self-serving interest of few states by compromising the opportunities and rights of people. Abebe admits that the federation which was imposed discourteously by deceiving the Eritrean people was bereft of legal and moral justification. Despite his admission of its unsoundness, inscrutably, Abebe argued Ethiopia's claim for sea outlet is legitimized by the federation.

Abebe (2007: 45) attempts to inform us that when Eritrea got its independence in 1993 the issue of territory was "not raised and was in suspension till 1998 and still not solved." By assimilating the Resolution (federation) with "agreement of marriage", thus Abebe (2007: 45) averred that it has to serve as a point of reference and basis to solve any territorial conflict. In the first place, as the ICJ

has duly noted, formal non-boundary international instruments do not solve territorial disputes or determine boundaries (Alberto, 2012). Likewise, the Resolution's function was mere administration of the territory of Eritrea in a federal arrangement with Ethiopia (Fenet, 1988). The Resolution did not alter the existing colonial treaties nor did it envisage a new frontier. It was *non-boundary* instrument. Abebe's (2007) reference of the Resolution as a basis to solve any territorial dispute is misleading which reveals his fundamental mistake of appreciating the application and nature of international non-boundary instruments. When Eritrea became independent in 1993, it was admitted as a member of the UN and recognized by the international community within its colonially defined territory. That is to say, the colonial boundaries were considered as international boundaries (Shaw, 1997). Thus, his argument that "*the issue of territory was not solved*" is incontrovertibly misguided.

Abebe (2007) added that Eritrea was federated with Ethiopia and the colonial boundaries were 'internalized' while its borders with Sudan and French Somaliland remained unaffected. As he stated that the boundary was internalized by the Resolution, impliedly he recognizes the valid existence of the colonial boundaries before the federation which is discordant with his prior holding of the invalidity of the colonial boundary treaties. Regarding whether the boundary was internalized; first, territory, the determinant of jurisdiction is an area where legislative, executive and judicial functions are specifically exercised (Shaw, 1986). During the federation, the Eritrean government was constituted, having the power of exercising judicial, executive and legislative function within its territory defined by the colonial treaties. When UN federated Eritrea with Ethiopia, its conception of the territory upon which these functions supposed to be exercised were irrefutably the colonial treaties of the 1900s. Otherwise, it would have envisaged other boundary. As many authors—Shaw among others—confirmed, incontrovertibly, the territorial integrity of Eritrea was not affected by the federation (Article 2 of Re. No 390(A) v; Shaw, 1986; Bereket, 1989). It is noteworthy to cite at length Fenet's note on this case:

It is important to emphasize that the [federation] respected, within the legal context of that time the principle of the inviolability of boundaries. Constituting Eritrea as an autonomous unit federated with Ethiopia, it maintained Eritrea within its colonially defined

boundaries and drew practical conclusions on the political, administrative, fiscal and custom levels (1988: 42).

Thus, the federation did not internalize the colonial boundary as Abebe blatantly averred; but it was *unlawfully internalized* only when Ethiopia abrogated the federation and annexed Eritrea.

Discursively, Abebe (2007) went on to state that the UN Resolution and its acceptance by Ethiopia makes it to have the characteristics of a treaty, thus, it has to be interpreted in light of the law of treaties to secure Ethiopia's sovereign right of access to the sea. In the first place, if he considers the federation as a treaty, he cannot assert its validity and seek for its application, for Ethiopia not only breached but it exterminated the federation. That is to say, the federation is a dead case. Second, according to the Charter, the UN is not authorized to make laws or binding decision (Schachter, 1991); however, it was upon the unique authority empowered by the four powers (due to their incapacity to reach on an agreement) that it resolved a binding resolution on behalf of them (Semere, 1988; Fenet, 1988). Thus, it was a resolution like any other resolution of the UNGA except for its binding nature which was agreed among the four powers to be so. According to the practice of the UN, there are many resolutions which became a basis of making other treaties—but a resolution cannot be a treaty *per se* (Schachter, 1991). Again, the Resolution did not pass through the formal stages and procedures that a treaty is supposed to pass. It was also not unanimously resolved resolution—47 states voted in favor of federation, 10 against the federation and 4 abstained (Habtom, 2003). Ultimately, it is bereft of the distinctive characteristics or attributes that a treaty is supposed to have. After all, even if Abebe considered it as a treaty, he should have refrained from attempting to apply the law of treaties retroactively to a treaty entered into force in 1950s.

Untenable though, Abebe (2007: 60) argued that “Eritrea's right of self-determination and independence does not contradict with Ethiopia's right of access to the sea because these two rights coexisted during the development of Eritrea as a state; Ethiopia demand only territorial adjustments and compromises.” How come the claim of sovereign right of access to the sea is not contradictory to Eritrean people's right of self-determination (Shaw, 1997) and independence unless Abebe is unabashedly eschewing from acknowledging the juridically established

territorial integrity of Eritrea. Abebe cannot honestly (with valid reasons) expect Eritrea to make a compromise for the sake of granting Ethiopia sea outlet if, for all intents and purposes, he genuinely considers the fact that Ethiopia itself was not ready to make a compromise when Somalia claimed and fought for the Ogaden territory. Holding such a position means that all the African boundaries have to undergo readjustments. However, the grand norm of the ‘sanctity and legal finality’ of colonial borders which received Ethiopia’s overwhelming *undergird* was resolved to avoid such re-adjustments for the sake of peace, security and stability of the continent. Abebe’s position is simply emotional which ignores the special political and legal meaning of African colonial boundaries and the territorial integrity norm.

Abebe (2007: 61) tells the reader that “there have been territorial settlements after wars, even by negotiations and compromises and he added modern states continued to survive, in fact most of them flourished as states; similarly, Eritrea can exist as an independent state even if Ethiopia gets back its coast of the Red Sea Afar.” To substantiate, he stated that Germany lost territories to Czechoslovakia, and Italy lost territories to former Yugoslavia and France after the WWII but these two states came out with strongest economy and their territorial integrity intact (Abebe, 2007). First, Abebe seems to have no sense of the definition of African nation state which is quite different from that of other continents’ definition – as a result of which he did not even try to bring a single negotiation or compromise made with regard to African colonially defined territory. He is not expected to come up with a single example for there is no compromise made by African states thereof. Second, Ethiopia is claiming that it is on its way of creating strong economy in Africa. Indeed, it is surviving as independent state without getting sovereign right of access to the Red Sea. If this is the case, what is the point of entering into negotiation or compromise with Eritrea? If Eritrea, according to Abebe, can exist as independent state after giving Ethiopia the Red Sea Afar, by the same token, Ethiopia too can exist and flourish as independent state even without having the sea. Obviously in this regard, Abebe is just hoisted by his own petard. His arguments also demonstrate an inconsistency with his previous postulations. That is to say, initially, the voidness of the colonial boundaries and the claimed legitimacy of Ethiopia’s sovereign right of access to the sea based on the Resolution were at the heart of his thesis. However, abandoning these arguments, Abebe come up with another contradictory argument

that Eritrea's integrity will not be affected if Ethiopia gets back the coast of the Red Sea Afar. Abebe's darting to set forth the preceding argument is totally inconsistent with his previous arguments and it shows a see-sawing character of his assertions which are deficient of logic and coherence.

5. The Algiers peace agreement and the colonial treaties

As part of his analysis to assert sovereign right of access to the sea, Abebe visited and examined the Algiers Agreement with an outmoded fashion and misguided approach. The following paragraphs will analyze and defeat his assertions.

Abebe's (2007: 64) poignant indifference and derisiveness to the legal finality of the colonial boundaries is again manifested when he argued that "given the political, economic, historical, and security considerations discussed above, Ethiopia's claim for an out let to the sea as a condition of peace treaty cannot be seen as unlawful." By this he meant that putting a caveat to the Algiers Peace Agreement which was signed to end the 1998-2000 Eritrea-Ethiopia boundary dispute is not unlawful. It is bewildering what conception of lawfulness he bears in his mind. From the legal context, the cause of the 1998-2000 war was a border dispute, specifically the Badme territory. Thus, Badme being the flash point of the war, how can a claim to sea outlet be put forth as a condition to the Algiers Agreement? He tried to justify his argument by bringing the early 20th century's post war exchange of territories and acquisition of territories by war (Abebe, 2007). This rule totally lost its international contemporariness and normativeness a century ago. On top of that, the case of the sanctity of the colonial boundaries takes precedence over any other state practice in Africa (Malanczuk, 2002), which is a bar to any territorial readjustments or exchanges by any means; however, Abebe inscrutably ignored it time and again.

Abebe (2007: 64) cited Zacher's (2001) work and stated that "80 percent of territorial wars led to re-distribution of territory for all periods prior to 1945 and 30 percent after 1945." From this selected citation, he deduces that the Eritrea-Ethiopia war was supposed to lead to territorial redistribution outside the main cause of the war. His citation, however, misses an important part of Zacher's work that gives African cases of territorial wars especial treatment from other non-African cases. Zacher properly stated that almost all African territorial

wars were met with the strong OAU's (today's AU) norm of upholding the legal finality of colonial boundaries (Zacher, 2001). Many states were pressured by the AU to withdraw from territories they held by aggression (Zacher, 2001). Most of the conflicts were thus solved according to the AU principle of territorial integrity.¹⁹ After all, Zacher (2001: 215) is of the view that "the territorial integrity norm refers to the growing respect for the proscription that force should not be used to alter interstate boundaries." Thus, Abebe's argument that sought for the redistribution of territory after the Eritrea-Ethiopia war is contrary to the *jus cogens* norm (prohibition of force) (Milojević, 2001) and Zacher's affirmation of such norm. The Eritrea-Ethiopia Border Commission's decision (EEBC, 2003) had it that Ethiopia's claim of Badme was substantially based on *effectivites*—and was rejected based on rules of international law—whereas Eritrea's claim was based on the colonial treaties and received the Commission's confirmation according to the accepted territorial integrity norm. In a nut shell, Abebe's argument for post-war redistribution of territories coupled with mistaken and incompatible citation of Zacher's writing is injudicious.

Recognizing Eritrea's independence, Abebe (2007: 70, 71) went on to state that "the handling of the succession and especially the territorial disputes, was a disaster and lacked statesmanship." He added that while many were expecting Ethiopia to claim the restoration of its right of access to the sea, the Algiers Agreement restored the dead colonial treaties and rendered Ethiopia land locked (Abebe, 2007). Despite the known and accepted law of state succession (Malanzcuk, 2002),²⁰ he seems to assert an outlandish law of state succession. Following and applying the pertinent international rules of state succession is neither disaster nor lack of statesmanship. During Eritrea's independence, Ethiopia and Eritrea had no option but to succeed the colonial treaties that define their boundary without any alteration. Bringing the colonial treaties in the Al

¹⁹ Zacher stated that 'since 1973 the norm has been tested by eight territorial aggressions, and most OAU members have consistently upheld it'. He cited the Libya–Chad, 1973-87; Mali–Burkina Faso, 1975; Somalia–Ethiopia, 1976-80; Morocco–Spanish Sahara, 1975-present; Uganda–Tanzania, 1979; Libya–Chad, 1981-82; Mali–Burkina Faso, 1985; and Eritrea–Ethiopia, 1998-2000 cases.

²⁰ Vienna Convention on Succession of States in respect of Treaties, Done at Vienna on 23 August 1978 Vienna, entered into force on 6 November 1996, article 11. The rules of state succession in case of boundary treaties are different. Newly independent states are obliged to inherit boundaries drawn by the former colonial powers.

giers Agreement emanates from the strongly upheld principle of the legal finality of colonial boundary treaties in Africa. Abebe's assertion of expiry of the colonial boundary is simply a reiteration of his indifference and derisiveness to the grand norm that protects the African states' territorial integrity intact.

By referring to a clause from the Algiers agreement which stated that "according to the Cairo Resolution and pertinent colonial treaties", Abebe (2007: 71) argued "Eritrea was a province during the Cairo declaration...as far as Ethiopia is concerned; pertinent colonial treaties could only mean international treaties between Ethiopia and colonial powers surrounding it." Indifferently, Abebe attempted to sanitize Eritrea's provincial arrangement during the Cairo Resolution and claim that there was no international boundary between Eritrea and Ethiopia to which the Cairo Resolution applies. Unlawful and forceful annexation rendered Eritrea a province despite an express pledge to respect the terms of the federation by Ethiopia (Alemseged Tesfay, 2007; Ikome, 2012; Semere, 1988). Inextricably, it was not legally founded provincial arrangement and neither could it make the colonial boundary treaties devoid of its international pertinence. As newly independent state which does not wish to see its borders called into question (Malanczuk, 2002), and being assured by the undisputed African states' consent to the Cairo Resolution of 1964, Eritrea took the colonial boundaries as its international borders (Ruth, 2000). Ethiopia, which was the prime country involved to resolve the Cairo Resolution (Shaw, 1986; Malanczuk, 2002), acknowledged independent Eritrea within its colonially defined boundary in 1993 (Eritrea-Ethiopia Claims Commission, 2004). The international community too, recognized Eritrea's independence in the same vein (Shaw, 1997). This was also strengthened "by the absence of any territorial claims by Ethiopia during the extended discussions to formalize Eritrea's independence and membership in the United Nations" (Ruth, 2000: 663). Thus, contrary to Abebe's contention, the Cairo Resolution was the most relevant and legitimate instrument which obliges states to settle their territorial conflict according to the pertinent colonial boundary treaties.

"The winner is necessarily in a stronger position than the loser", argued Abebe (2007: 73), and he added that Ethiopia was the winner in the war and it should refuse the unjust agreement and "has to initiate a territorial dispute settlement process.....so that peace stability and finality are achieved." Abebe seems to

invoke the historical evolution of making a treaty — following a conquest or war, treaties used to emerge as an imposition of the will of the winner of war (Bereket, 1989). Abebe wishes Ethiopia to initiate another territorial settlement process other than the Algiers Agreement by imposing its will and terms against Eritrea for it was the winner in the war. Without the need to contemplate who was the loser or winner on the Eritrea-Ethiopia war, Abebe's argument is too obsolete and outmoded to find a place in the whole context of contemporary international legal order, specifically in the law of treaties. Above all, this is an irresponsible argument. His belief that peace or stability can be achieved by letting the fate of the weaker or loser be at the hand of stronger or winner is simply warmongering and Ethio-centric assertion that flagrantly disrupt the rule of international law.

Abebe (2007: 18-19) went on to inform us that Ethiopia “is militarily the strongest country in the region and one of the strongest on the continent. Ironically, however, it is in the verge of losing its right of access to the sea despite having won the war with Eritrea.” As to why did he cast military might and wining a war as a base for his assertion is opaque. It has been almost a century since conquest or war lost its legitimacy as a source of acquiring territory or legitimizing territorial readjustment at the will of the winner. It is *ignorance of international law* to claim having access to the sea based on military might, and it is *arrogance* over the people of Eritrea and the continent to show-off and call Ethiopia powerful state which can take the law in its own hand to get sovereign right of access to the *Red Sea*.

6. Conclusions

The first impression of Abebe's engagement on his paper is that he simply reiterated the rhetoric and the well-known political bias against Eritrea, which suffers extreme deficiencies of legitimacy and validity under international law. Although he claimed to base his assertion of sovereign right of access to the sea on international law, I critically challenged his thesis by emphatically reflecting on all his assertions.

Abebe's argument based on history is untenable on two grounds. One is, the historical development of Eritrea has nothing to do with the history of modern

Ethiopia; most importantly, Eritrea was officially defined as a state at the same time when Ethiopia and other African states were officially carved out as states. Second, I argue that Abebe even lacks a clear understanding of the task of history and the African definition of nation state; he fails to appreciate the fact that historical ties do not determine the fate of African states.

His assertion of the invalidation of the colonial boundary treaties up on Italy's invasion of Ethiopia is deeply flawed. His invocation of the VCLT to substantiate his argument has fundamental error. Irrefutably, boundary treaties are specifically made not to accommodate exceptions to any grounds of termination or invalidation.

Indeed, in a vilifying manner, Abebe attempted to prove that the Resolution that federated Eritrea with Ethiopia legitimized the latter's sovereign right of access to the sea till now. His assertions of the viability of the federation are senseless based on two premises: First, Ethiopia abrogated the federation and annexed Eritrea and it can no longer be rekindled to solve any conflict; it is dead. Second, up-on its liberation and independence through armed struggle, the international community and Ethiopia itself recognized Eritrea as a sovereign independent state within its colonially defined territory. Thus, the issue of federation that once linked Eritrea and Ethiopia is supplanted by the independence of Eritrea.

Dwelling on the Algiers Agreement, Abebe argued that Ethiopia should initiate another dispute settlement which guarantees sovereign right of access to the sea; he argued for the legitimacy of readjustment or redistribution of territory after war. A simple chance of taking note at the UN or AU Charter could have enabled Abebe to appreciate the sovereign equality of states in negotiations of treaties, the repugnancy of war to effect readjustment of international boundaries, the finality, objectivity and inviolability of international boundaries.

I argue that, putatively Abebe's claim of sovereign right of access to the sea is simply prompted by the point of view that Ethiopia as big and historic nation has to have sovereign right of sea outlet, which is by and large a fetishisation on the importance of Ethiopia. His attempt to ground this claim under international law is a mere shamming and window-dressing which cannot win any sort of legitimacy but an affront to the inviolability of Eritrea's territorial integrity

in particular and to the vehemently ossified territorial integrity norm of Africa in general.

Lastly, historical and legal arguments are discussed on this paper to refute Abebe's arguments. It is demonstrated that the legal history of the development of Eritrea, and of course that of Ethiopia, does not open a space for the later to claim sovereign access to the Red Sea. Apart from the legal history, Abebe is stuck on the formal rules of international law to justify his claim. And, I conclude that, legal scholars should not shy away from history by sticking to formal rules and at the same time they should at all times remain honest to history or at least they should maintain objectivity and impartiality. Finally, Abebe's thesis informs us that some part of Ethiopian studies on Eritrea's case is a *militant scholarship* that lacks proper historical context and tried to express resentment from sections of Ethiopian society.

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