

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

Delimitation of the Border (Eritrea-Ethiopia)

13 April 2002 -7 November 2002

VOLUME XXV pp. 83-229



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PART III

**Decision regarding delimitation of the border
between Eritrea and Ethiopia**

Decision of 13 April 2002

**Décision concernant la délimitation de la frontière
entre l'Érythrée et l'Éthiopie**

Décision du 13 avril 2002

DECISION REGARDING DELIMITATION OF THE BORDER BETWEEN ERITREA AND ETHIOPIA, DECISION OF 13 APRIL 2002

DÉCISION CONCERNANT LA DÉLIMITATION DE LA FRONTIÈRE ENTRE L'ÉRYTHRÉE ET L'ÉTHIOPIE, DÉCISION DU 13 AVRIL 2002

Eritrea-Ethiopia Boundary Commission (Commission) established pursuant to an agreement dated 12 December 2000, alternatively entitled “Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia” and “Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea” (December Agreement).

Commission’s mandate set forth in the December Agreement—to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law—Commission shall not have the power to make decisions *ex aequo et bono*—present decision addresses the first phase of the Commission’s work, namely, the delimitation of the border.

Treaty interpretation—general rule: a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose in order to establish the parties’ actual intent or common will—doctrine of contemporaneity: a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded thus giving expressions (including names) used in the treaty the meaning that they would have possessed at that time—the subsequent practice or conduct of the parties may not only be relevant to the interpretation of a treaty, but may also affect the legal relations of the parties even though it does not constitute practice in the application of the treaty or an agreement between them—the nature and extent of conduct effective to produce a variation of the treaty is a matter of appreciation of the same elements by the tribunal in each case: (1) an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule of treaty or customary origin; (2) the knowledge (actual or reasonably inferred) of the other party of such conduct or omission; and (3) a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first—these concepts may also apply to the attitude of a party with respect to its own conduct since that party cannot subsequently act in a manner inconsistent with the legal position reflected in such conduct—the same rules and principles of interpretation apply to words in a treaty and depiction of lines on a map.

Applicable international law is not limited to the law relating to the interpretation of treaties—Commission must also apply the rules of international law applicable generally to the determination of disputed borders, including the rules relating to the effect of three broad categories of conduct of the parties, namely: (1) maps; (2) activity on the ground tending to show the exercise of sovereign authority by the party engaging in that activity (effectivités); and (3) diplomatic and other similar exchanges and records, including admissions before the Commission, constituting assertions of sovereignty, or acquiescence in or opposition to such assertions, by the other party—map evidence: legal significance, evidential value, cautionary considerations, effect of disclaimers, reaction required by a State adversely affected by a map—effectivités: actions of a State pursued à titre de souverain either asserting that State’s position or, expressly or impliedly, contradicting the conduct of the opposing State.

Principle of respect for the borders existing at independence as stated in OAU resolution AHG/Res. 16(1) adopted in 1964—consistently reaffirmed by the Parties—consequently, the borders between them are to be determined as of the date of independence of Eritrea (27 April 1993)—subsequent developments taken into account only in so far as they constitute a continuance or confirmation of a line of conduct already clearly established or an express agreement between the Parties.

Border delimitation—delimitation of the central sector border based on the 1900 Treaty (as amended by the 1902 Treaty) and the map annexed thereto taking into consideration the subsequent conduct of the Parties and the admission of one Party during the proceedings—delimitation of the western sector border based on the contemporary understanding of the location of geographical names used in the 1902 Treaty, taking into account maps produced by the Parties amounting to subsequent conduct or practice evidencing their mutual acceptance of a boundary—delimitation of the eastern sector border based on the geometric method set forth in the 1908 Treaty, as modified by common agreement of the Parties, subject to adjustments during the demarcation stage to take account of the nature and variation of the terrain—Commission deferred until demarcation stage the determination of the boundary within rivers by reference to the location of the main channel identified during the dry season, having regard to the customary rights of the local people to have access to the river.

N.B. The references to the page numbers on which the maps appeared in the Award have been retained. As indicated in the Table of Contents to the present volume, all such maps are reproduced at the end of this volume.

Commission du tracé de la frontière entre l'Érythrée et l'Éthiopie (la Commission) créée en application d'un accord en date du 12 décembre 2000 intitulé, selon le cas, « Accord entre le Gouvernement de l'État d'Érythrée et le Gouvernement de la République fédérale démocratique d'Éthiopie » et « Accord entre le Gouvernement de la République fédérale démocratique d'Éthiopie et le Gouvernement de l'État d'Érythrée » (dit « Accord de décembre »).

Mandat de la Commission formulé dans l'Accord de décembre – Tracer et aborder la frontière établie sur la base des traités coloniaux pertinents (1900, 1902 et 1908) et du droit international applicable en la matière – La Commission n'est pas habilitée à prendre des décisions *ex aequo et bono* – La présente décision correspond à la première phase des travaux de la Commission, à savoir la délimitation de la frontière.

Interprétation des traités – Règle générale : un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but, afin d'établir l'intention réelle ou la volonté commune des parties – Doctrine du « renvoi fixe » : un traité doit être interprété par référence aux circonstances dans lesquelles il a été conclu, donc en donnant aux expressions (y compris les noms) qui y sont employées le sens qu'elles avaient à l'époque où il a été conclu – Pratique ou conduite ultérieure des parties, qui peuvent non seulement être prises en compte dans l'interprétation d'un traité, mais aussi produire un effet sur les relations juridiques entre lesdites parties même si cette pratique ou conduite ultérieure ne constituent pas à proprement parler une « pratique suivie dans l'application du traité » ou un « accord intervenu entre les Parties » – Pour déterminer quelles doivent être la nature et la portée d'une conduite pour que cette conduite ait pour effet de modifier un traité, le tribunal apprécie, dans chaque cas, les éléments ci-après : 1) les actes, conduites ou omissions commis par une partie ou sous son autorité qui manifestent l'opinion de ladite partie sur le fond de la règle de droit conventionnel ou coutumier applicable; 2) la connaissance (effective ou raisonnablement présumée) qu'avait l'autre partie de cette conduite ou omission; et 3) la question de savoir si l'autre partie s'est abstenue ou non de rejeter dans des délais raisonnables la position adoptée par la première partie ou de s'en dissocier – Ces critères peuvent également être appliqués à l'attitude d'une partie par rapport à sa propre conduite, puisqu'il n'est pas admis qu'une partie contredise par son action ultérieure la position juridique qui inspirait sa conduite initiale – Les mêmes règles et principes d'interprétation valent pour le texte d'un traité et pour le tracé de lignes sur une carte.

Le droit international applicable en l'espèce ne se limite pas au droit relatif à l'interprétation des traités – La Commission doit aussi invoquer les règles du droit international qui guident généralement la délimitation de frontières contestées, notamment les règles qui concernent l'effet produit par trois grandes catégories de conduite des parties, à savoir : 1) les cartes géographiques;

2) les activités sur le terrain qui semblent indiquer l'exercice d'une autorité souveraine par la partie qui les mène (« effectivités »); et 3) les échanges et documents diplomatiques et similaires, notamment les admissions faites devant la Commission, qui constituent des affirmations de souveraineté, ou d'acquiescement ou d'opposition aux affirmations de souveraineté de l'autre partie – Les cartes géographiques comme moyens de preuve : pertinence juridique, valeur probante, prudence à observer, effet des mentions de non-responsabilité portées sur des cartes, réaction attendue d'un État face à une carte préjudiciable à ses intérêts – Effectivités : actes de l'État accomplis à titre de souverain qui soit affirment sa position soit vont expressément ou implicitement à l'encontre de la conduite de l'État adverse.

Principe du respect des frontières héritées de l'indépendance, tel que stipulé dans la résolution AHG/Res.16(1) adoptée par l'Organisation de l'unité africaine en 1964 – régulièrement réaffirmé par les Parties – La frontière entre elles doit par conséquent être délimitée telle qu'elle se présentait à la date d'accession de l'Érythrée à l'indépendance (27 avril 1993) – Il ne sera tenu compte des événements postérieurs que dans la mesure où ils constituent le prolongement ou la confirmation d'une ligne de conduite déjà clairement établie ou un accord exprès entre les Parties.

Délimitation de la frontière – Délimitation du secteur central fondée sur le Traité de 1900 (tel qu'amendé par le Traité de 1902) et sur la carte y annexée, en tenant compte de la conduite ultérieure des Parties et de l'admission faite par l'une d'elles au cours de la procédure – Délimitation du secteur occidental fondée sur une interprétation contemporaine des toponymes employés dans le Traité de 1902, en tenant compte des cartes communiquées par les Parties en tant que ces cartes représentent une conduite ou pratique ultérieure manifestant l'acceptation mutuelle d'une frontière – Délimitation du secteur oriental fondée sur la méthode géométrique définie dans le Traité de 1908, telle que modifiée d'un commun accord par les Parties, sous réserve des ajustements à apporter, au stade de l'abornement, pour tenir compte de la nature et du relief du terrain – La Commission reporte au stade de l'abornement la définition de la frontière le long des cours d'eau, qui se fera par référence à l'emplacement du chenal principal identifié pendant la saison sèche, en tenant compte des droits coutumiers d'accès de la population locale aux cours d'eau concernés.

N.B. : Les renvois à une carte portent le numéro de la page sur laquelle était imprimée cette carte dans la décision originale. Comme l'indique la table des matières du présent ouvrage, toutes les cartes sont reproduites à la fin du volume.

Eritrea - Ethiopia Boundary Commission

DECISION

Regarding Delimitation of the Border

between

The State of Eritrea

and

The Federal Democratic Republic of Ethiopia

By the Boundary Commission, composed of:

Professor Sir Elihu Lauterpacht, CBE, QC, President

Prince Bola Adesumbo Ajibola, SAN, KBE, CFR

Professor W. Michael Reisman

Judge Stephen M. Schwebel

Sir Arthur Watts, KCMG, QC

DECISION Regarding Delimitation of the Border
between

The State of Eritrea, represented by:

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GLOSSARY OF GEOGRAPHIC PLACE NAMES

This Glossary contains names of those geographic features and locations referred to in the Decision of which there are variant spellings. The spelling used in the Decision is listed first in bold, followed by the variant(s).

A

Acchele Guzai – Akologuzay; Okologezy

Agame – Agamie

Ala Tacura – Ala Takura

Alitena – Alitiena

B

Baza – Baze; Basé

Belesa – Belessa; Mestai Mes; Ruba Dairo; Rubai Daro; Sur; Tserona

Bure – Burre

C

Cunama – Canama; Kunama

E

Enda Dashim – Enda Dascim; Ruba Enda Dascin

G

Gasc – Gash

Gogula – Collina Gugula

K

Kelloberda – Kolo Burdo

M

Mai Ambessa – Mai Anbessa

Mai Daro – Maidaro; Mai Doro

Maiteb – Maiteb; Maietebe; Maietebbe; Maitebbe

Maiten – Mai Ten; Mai Tenne; Mai Tenné; Maitenné

Mareb – Mereb

Mochiti – Moketti

Muna/Berbero Gado – Mai Muna; T. Mai Muna; Maj Mena; Mouna

S

Setit – Settite

Shimezana – Scimezana

Sittona – Maetebbe/Maeteb; Sittone

T

Tigray – Tigrai; Tigre

DECISION REGARDING DELIMITATION OF THE BORDER**CHAPTER I – PROCEDURAL INTRODUCTION**

1.1 The Eritrea-Ethiopia Boundary Commission (hereinafter the “Commission”) was established pursuant to an agreement dated 12 December 2000, alternately entitled “Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia” and “Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea” (hereinafter the “December Agreement”).

1.2 Article 4 of the December Agreement provides as follows:

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

2. The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902, and 1908) and applicable international law. The Commission shall not have the power to make decisions *ex aequo et bono*.
3. The Commission shall be located in The Hague.
4. Each party shall, by written notice to the United Nations Secretary-General, appoint two commissioners within 45 days from the effective date of this agreement, neither of whom shall be nationals or permanent residents of the party making the appointment. In the event that a party fails to name one or both of its party-appointed commissioners within the specified time, the Secretary-General of the United Nations shall make the appointment.
5. The president of the Commission shall be selected by the party-appointed commissioners or, failing their agreement within 30 days of the date of appointment of the latest party-appointed commissioner, by the Secretary-General of the United Nations after consultation with the parties. The president shall be neither a national nor permanent resident of either party.
6. In the event of the death or resignation of a commissioner in the course of the proceedings, a substitute commissioner shall be appointed or chosen pursuant to the procedure set forth in this paragraph that was applicable to the appointment or choice of the commissioner being replaced.
7. The UN Cartographer shall serve as Secretary to the Commission and undertake such tasks as assigned to him by the Commission, making use of the technical expertise of the UN Cartographic Unit. The Commission may also engage the services of additional experts as it deems necessary.
8. Within 45 days after the effective date of this Agreement, each party shall provide to the Secretary its claims and evidence relevant to the mandate of the Commission. These shall be provided to the other party by the Secretary.
9. After reviewing such evidence and within 45 days of its receipt, the Secretary shall subsequently transmit to the Commission and the parties any materials relevant to the mandate of the Commission as well as his findings identifying those portions of the border as to which there appears to be no dispute between the parties. The Secretary shall also transmit to the Commission all the evidence presented by the parties.
10. With regard to those portions of the border about which there appears to be controversy, as well as any portions of the border identified pursuant to paragraph 9 with respect to which either party believes there to be controversy, the parties shall present their written and oral submissions and any additional evidence directly to the Commission, in accordance with its procedures.
11. The Commission shall adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Option Rules for Arbitrating Disputes Between Two States. Filing deadlines for the parties' written submissions shall be simultaneous rather than consecutive. All decisions of the Commission shall be made by a majority of the commissioners.
12. The Commission shall commence its work not more than 15 days after it is constituted and shall endeavor to make its decision concerning delimitation of the border within six months of its first meeting. The Commission shall take this objective into consideration when establishing its schedule. At its discretion, the Commission may extend this deadline.

13. Upon reaching a final decision regarding delimitation of the borders, the Commission shall transmit its decision to the parties and Secretaries General of the OAU and the United Nations for publication, and the Commission shall arrange for expeditious demarcation.

14. The parties agree to cooperate with the Commission, its experts and other staff in all respects during the process of delimitation and demarcation, including the facilitation of access to territory they control. Each party shall accord to the Commission and its employees the same privileges and immunities as are accorded to diplomatic agents under the Vienna Convention on Diplomatic Relations.

15. The parties agree that the delimitation and demarcation determinations of the Commission shall be final and binding. Each party shall respect the border so determined, as well as the territorial integrity and sovereignty of the other party.

16. Recognizing that the results of the delimitation and demarcation process are not yet known, the parties request the United Nations to facilitate resolution of problems which may arise due to the transfer of territorial control, including the consequences for individuals residing in previously disputed territory.

17. The expenses of the Commission shall be borne equally by the two parties. To defray its expenses, the Commission may accept donations from the United Nations Trust Fund established under paragraph 8 of Security Council Resolution 1177 of 26 June 1998.

1.3 By 26 January 2001, within the time limits provided in Article 4, paragraph 4, of the December Agreement, and by written notice to the United Nations Secretary-General as further provided therein, Eritrea appointed as Commissioners Mr. Jan Paulsson and Judge Stephen M. Schwebel, and Ethiopia appointed as Commissioners His Excellency Prince Bola Adesumbo Ajibola and Sir Arthur Watts.

1.4 By virtue of Article 4, paragraph 7, of the December Agreement, Dr. Hiroshi Murakami, Chief of the Cartographic Section of the Secretariat of the United Nations, acted as Secretary of the Commission (hereinafter the "Secretary") at all material times and rendered important cartographical and other technical assistance to the Commission. He was assisted principally by Ms. Alice Chow and Ms. H  l  ne Bray. On 26 January 2001, the Parties submitted to the Secretary their claims and evidence relevant to the mandate of the Commission, as required by Article 4, paragraph 8, of the December Agreement.

1.5 In accordance with Article 4, paragraph 5, of the December Agreement, the party-appointed Commissioners selected as President of the Commission Professor Sir Elihu Lauterpacht, who accepted his appointment on 20 February 2001.

1.6 By a letter to the Secretary dated 2 March 2001, the Permanent Representative of Ethiopia lodged a challenge to the appointment by Eritrea of Mr. Paulsson. The Secretary transmitted this letter to the Commissioners, the Permanent Representative of Eritrea and the Secretary-General of the United Nations.

1.7 On 2 March 2001, Ethiopia informally notified the International Bureau of the Permanent Court of Arbitration of the designation of His Excellency Seyoum Mesfin, Minister of Foreign Affairs of the Federal Democratic Republic of Ethiopia, as Agent, and of His Excellency Ambassador Fisseha Yimer, Permanent Representative of the Federal Democratic Republic of Ethiopia to the United Nations at Geneva, as Co-Agent.

1.8 On 14 March 2001, Eritrea informally notified the International Bureau of the Permanent Court of Arbitration of the designation of His Excellency Ali Said Abdella, Foreign Minister of Eritrea, as Agent, and of Professor Lea Brilmayer as Co-Agent.

1.9 Article 4, paragraph 9, of the December Agreement charged the Secretary with, *inter alia*, making findings identifying those portions of the border as to which there appeared to be no dispute between the Parties. On 12 March 2001, the Secretary transmitted his findings to the Parties and to the Commissioners. On 23 March 2001, the Government of Ethiopia reserved its position with respect to those findings. The Secretary's findings were based entirely on the materials theretofore made available to him by the Parties, and were not intended to be dispositive of any aspects of the delimitation. According to Article 4, paragraph 10, of the December Agreement, the Parties' subsequent submissions to the Commission were to address those portions of the border about which there appeared to be controversy, as well as any portions of the border identified by the Secretary with respect to which either Party believed there to be controversy.

1.10 The Commission met in The Hague on 25 March 2001. On 26 March 2001, an informal meeting was held between the Commission and representatives of the Parties to discuss procedural matters, without prejudice to the position of the Parties pending the resolution of the outstanding challenge to Mr. Paulsson. The Secretary was also present. At this meeting, the Parties agreed that, in addition to the Secretary provided for in the December Agreement, there should be appointed to assist the Commission a legally-qualified Registrar. Ms. Bette E. Shifman, Deputy Secretary-General of the Permanent Court of Arbitration, was accordingly appointed, and she has so acted throughout the proceedings, with the assistance principally of Mr. Dane Ratliff and of the staff of the Permanent Court of Arbitration.

1.11 Among the matters discussed and tentatively agreed on at the meeting of 26 March 2001 was a schedule for the first phase of the Commission's work (the delimitation of the border), according to which the Parties would simultaneously file written Memorials on 30 June 2001 and Counter-Memorials on 22 September 2001. Consideration would then be given to whether the Parties would exchange Replies. A pre-hearing consultation between the Commission and the Parties was scheduled for 6 November 2001. It was tentatively agreed that hearings would be held in The Hague between 10 and 21 December 2001. Although Article 4, paragraph 12,

of the December Agreement stipulates that the Commission is to “endeavor to make its decision concerning delimitation of the border within six months of its first meeting,” it was accepted by the Parties and the Commission that this was not practicable.

1.12 On 5 April 2001, the President of the Commission signed an Order, adopting an “Interim Rule of Procedure” as follows:

Whereas Article 4, paragraph 11, of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of 12 December, 2000, requires the Commission to adopt its own Rules of Procedure;

whereas one of the Commissioners has been challenged by a Party, thus occasioning an immediate need for a Rule of Procedure to regulate the matter;

and whereas the Commission has not as yet prepared a complete set of Rules of Procedure including a rule relating to challenge;

the Commission has adopted the following Interim Rule of Procedure limited to one aspect of this matter and without prejudice to the adoption in due course of a full set of Rules of Procedure within which this Rule (subject to any necessary amendment) will be incorporated:

CHALLENGE OF COMMISSIONERS – A challenge to a member of the Commission shall be decided by those members of the Commission whose appointments are not challenged. If they cannot reach a decision, the President shall refer the challenge to the Secretary-General of the United Nations for decision.

This Order was duly communicated to the Parties by the Registrar.

1.13 Also on 5 April 2001, the President of the Commission informed the Secretary-General of the United Nations of the contents of the Order, and of the fact that the four Commissioners whose appointments had not been challenged had been unable to reach a decision on the challenge to Mr. Paulsson, and accordingly referred the challenge to the Secretary-General for decision.

1.14 By a letter dated 15 May 2001, Mr. Paulsson tendered his resignation as a member of the Boundary Commission, it being understood that this resignation did not imply any acceptance of the validity of the alleged grounds for the challenge. In accordance with Article 4, paragraph 6, of the December Agreement, Eritrea appointed, on 12 June 2001, Professor W. Michael Reisman to fill the vacancy created by Mr. Paulsson’s resignation.

1.15 On 20 June 2001, the Commission adopted its Rules of Procedure (hereinafter the “Rules”), based, as required by Article 4, paragraph 11, of the December Agreement, on the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. Article 16(2) of the Rules sets forth the schedule for written submissions tentatively agreed at the meeting of 25 March 2001, i.e., a Memorial to be filed by each Party by 30 June 2001, a Counter-Memorial to be filed by each Party not later than 22

September 2001, and any other pleading that the Commission deemed necessary after consulting the Parties, to be filed not later than one month after filing of the Counter-Memorials.

1.16 Both Parties filed their Memorials with the Registrar within the time limits provided in the Rules. On 16 July 2001, the President held an informal meeting with the representatives of the Parties in order to discuss various matters relating to the ongoing work of the Commission.

1.17 The Parties filed their Counter-Memorials on 30 September 2001 and, pursuant to Article 16(2) of the Rules, the Commission decided, after consulting the Parties, to authorize an exchange of Replies. These were duly filed with the Registrar on 29 October 2001.

1.18 As provided in Article 16(4) of the Rules, the written phase of the pleadings was closed upon the filing of the Replies. A pre-hearing consultation was held with the Parties on 6 November 2001, at the premises of the Permanent Court of Arbitration in The Hague, at which procedural details relating to the hearings were settled. At that meeting, the Commission requested the Parties to provide to the Commission, as expeditiously as possible, originals or full-scale copies of all maps that had been produced in evidence, and these were subsequently submitted by the Parties.

1.19 Hearings were held at the Peace Palace in The Hague from 10 through 21 December 2001, during which oral arguments and replies were heard from the following:

For Eritrea: His Excellency Ali Said Abdella,
Foreign Minister of Eritrea, Agent
Professor Lea Brilmayer, Co-Agent
Mr. O. Thomas Johnson
Professor James Crawford, SC

For Ethiopia: His Excellency Seyoum Mesfin,
Minister of Foreign Affairs of Ethiopia, Agent
Mr. B. Donovan Picard
Mr. Ian Brownlie, CBE, QC
Mr. Rodman R. Bundy
Ms. Loretta Malintoppi
Mr. Dylan D. Cors

1.20 In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of Eritrea,
in the Memorial:

For the reasons set out in this Memorial, which Eritrea reserves the right to supplement and develop further in subsequent pleadings and oral argument, it is respectfully submitted that the boundary between the two parties is that depicted in Figure 2.1 above and in Map 1 in Eritrea's Atlas.

in the Counter-Memorial:

For the reasons set out in this Counter-Memorial, which Eritrea reserves the right to supplement and develop further in subsequent pleadings and oral argument, it is respectfully submitted that the boundary between the two parties is that depicted in Figure 2.01 in Eritrea's Memorial and in Map 1 in Eritrea's Memorial Atlas.

in the Reply:

For the reasons set out in this Reply, which Eritrea reserves the right to supplement and develop further in subsequent pleadings and oral argument, it is respectfully submitted that the boundary between the two parties is that depicted in Figure 2.01 in Eritrea's Memorial and in Map 1 in Eritrea's Memorial Atlas.

On behalf of Ethiopia,

in the Memorial:

On the basis of the facts and legal arguments presented in this Memorial; and *Considering that* Article 4 of the 12 December 2000 Agreement provides in the relevant part of paragraph 2 that –

The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law;

and in paragraph 10 that –

With regard to those portions of the border about which there appears to be controversy, as well as any portions of the border identified pursuant to paragraph 9 with respect to which either party believes there to be controversy, the parties shall present their written and oral submissions and any additional evidence directly to the Commission, in accordance with its procedures;

The Federal Democratic Republic of Ethiopia, while reserving the right to supplement or amend these Submissions in the light of further pleadings in the case, respectfully requests the Commission to adjudge and declare:

- That the boundary in accordance with the Treaty of 1900 is constituted by the line described in Chapter 4, paragraph 4.7 above;
- That the boundary in accordance with the Treaty of 1902 is constituted by the line described in Chapter 4, paragraph 4.8 above;
- That the boundary in accordance with the Treaty of 1908 is to be delimited and demarcated on the basis of the *modus operandi* described in Chapter 3, paragraphs 3.216 to 3.223 and Chapter 4, paragraph 4.9 above.

in the Counter-Memorial:

On the basis of the facts and legal arguments presented in Ethiopia's Memorial and Counter-Memorial; and

Rejecting the Submissions of Eritrea set forth in her Memorial;

The Federal Democratic Republic of Ethiopia, while reserving its right to supplement or amend these Submissions in the light of further pleadings in the case, respectfully requests the Commission to adjudge and declare:

- That the boundary in accordance with the Treaty of 1900 is constituted by the line described and illustrated in Chapter 2 of this Counter-Memorial;
- That the boundary in accordance with the Treaty of 1902 is constituted by the line described and illustrated in Chapter 3 of this Counter-Memorial; and
- That the boundary in accordance with the Treaty of 1908 is constituted in accordance with the methodology and considerations described and illustrated in Chapter 4 of this Counter-Memorial.

in the Reply:

On the basis of the foregoing, and rejecting Eritrea's contentions to the contrary, Ethiopia confirms the Submissions as set out at the end of her Counter-Memorial.

In the oral proceedings, the following submissions were presented by the Parties:

On behalf of Eritrea,

at the hearing of 20 December 2001:

It is respectfully submitted that the boundary between the two parties is that depicted in map 1 of Eritrea's memorial atlas, the coordinates of which are more fully described in the 1:50,000 map that Eritrea has deposited with the Secretary.

On behalf of Ethiopia,

at the hearing of 21 December 2001:

The Federal Democratic Republic of Ethiopia respectfully requests the Commission to adjudge and declare, first, that the boundary, in accordance with the treaty of 1900, is constituted by the line described and illustrated in chapter 2 of the counter-memorial; secondly, that the boundary in accordance with the treaty of 1902 is constituted by the line described and illustrated in chapter 3 of the counter-memorial; and, thirdly, and finally, that the boundary, in accordance with the treaty of 1908, is constituted in accordance with the methodology and considerations described and illustrated in the oral hearings.

CHAPTER II – SUBSTANTIVE INTRODUCTION

2.1 The present Decision will be developed in eight Chapters.

2.2 Following this substantive introduction, the Commission will, in Chapter III, present its understanding of its task and of the law to be applied to it.

2.3 In Chapters IV, V and VI, the Commission will examine the border in the three sectors – central, western and eastern – corresponding to the portions initially defined by the three Treaties of 1900, 1902 and 1908 respectively.

2.4 Chapter VII will consider the question of the boundary within the relevant rivers.

2.5 Lastly, Chapter VIII will contain the *Dispositif* of the present Decision.

A. BACKGROUND

2.6 There is little need to present any detailed account of the history of the Parties or their relations outside the events that are immediately relevant to the issues before the Commission and which will be treated at appropriate points in this Decision. However, a few introductory historical notes are in order.

2.7 Ethiopia has for long been an independent member of the international community. Apart from the period following its annexation by Italy in 1935 (see below), there has been no relevant discontinuity or change in its status. The position of Eritrea is different. Prior to the 1880s, large parts of it had been subject to Ottoman and Egyptian authority. During that decade, Italy began to assert a colonial presence in the region, first at the Red Sea port of Assab and in 1885 at Massawa. Subsequent Italian attempts to expand its control inland were successfully resisted by Ethiopian forces. However, in 1889, by the Treaty of Ucciali, Ethiopia and Italy established the boundary between the Empire of Ethiopia and the areas of Eritrea then in Italian possession. On 1 January 1890, Italy formally established the Colony of Eritrea. In 1893, the Ethiopian Emperor Menelik denounced the Treaty of Ucciali, but Italian expansion inland continued until the battle of Adwa in 1896, in which Italian forces were defeated. A temporary boundary arrangement was then established between Ethiopia and Italy. Subsequently, in 1900, 1902 and 1908, Ethiopia and Italy concluded three boundary agreements that, together, addressed the entire common boundary of the Colony of Eritrea and the Empire of Ethiopia. None of the boundaries thus agreed was demarcated. Indeed, as will be seen, each of these boundaries was, to varying degrees, not fully delimited.

2.8 In 1935, Italy invaded, occupied and annexed the whole of Ethiopia. In 1941, the United Kingdom expelled Italian forces from both Ethiopia and Eritrea and established a British Military Administration, which governed both countries from headquarters in Addis Ababa. The British Military Administration ended in Ethiopia with the conclusion of an agreement between the United Kingdom and Ethiopia on 31 January 1942. Emperor Haile Selassie then resumed control of his country. The former Italian Colony of Eritrea remained under British control until 1952.

2.9 By Article 23 of the Treaty of Peace with the Allied Powers of 1947, Italy renounced "all rights and title to the Italian territorial possessions in Africa" and agreed that "pending their final disposal, the said possessions shall continue under their present administration." As the Allied Powers were not able to agree upon the disposition of Eritrea within the time period established by the Peace Treaty, the matter was referred to the United Nations General Assembly under Paragraph 3 of Annex XI of the Treaty. On 2

December 1950, the General Assembly adopted Resolution 390A(V), which recommended that “Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown.” The Federation of Eritrea with Ethiopia was accordingly established on 11 September 1952.

2.10 On 11 September 1952, Ethiopia declared null and void the Treaties of 1900, 1902 and 1908.¹ On 14 November 1952, Ethiopia declared the Eritrean Constitution void, ended the federal status of Eritrea, dissolved the Eritrean parliament and incorporated Eritrea into Ethiopia as a province.

2.11 Shortly after the incorporation of Eritrea into Ethiopia, an armed Eritrean resistance developed. In 1974, the Ethiopian armed forces deposed Emperor Haile Selassie, and a junta or Dergue, led by Mengistu Haile Mariam, took control of Ethiopia. The Dergue continued to prosecute the war against the Eritrean People’s Liberation Front (“EPLF”). By the late 1980s, the EPLF controlled most of Eritrea except for Asmara and Massawa. In February 1990, the EPLF captured Massawa. In 1991, Mengistu fled Ethiopia and the Ethiopian People’s Revolutionary Democratic Front (“EPRDF”) established an interim government, while the EPLF took control of Asmara. At a Conference on Peace and Democracy held in Addis Ababa in 1991, the right of the people of Eritrea to determine their own political future by an internationally supervised referendum was recognised. In April 1993, the referendum was held in Eritrea, supervised by international observers. Eritreans abroad were also enabled to vote. Over 99% of the voters favoured independence. The United Nations Special Representative announced that the referendum process had been free and fair.

2.12 On 27 April 1993, Eritrea became independent and was admitted as a member of the United Nations. On 29 April 1993, Ethiopia recognised Eritrea’s sovereignty and independence and on 30 July 1993, the two Governments concluded an Agreement of Friendship and Co-operation.

2.13 In May 1998, hostilities broke out between Eritrea and Ethiopia. After a number of attempts to re-establish peace between the two Parties, the December Agreement was signed on 12 December 2000, providing for the permanent termination of military hostilities between them. A major component of this Agreement was Article 4, the terms of which have been set out above, providing for the establishment of the present Commission.

B. THE SUBJECT OF THE DISPUTE – GEOGRAPHICAL DESCRIPTION OF THE BOUNDARY

2.14 The dispute relates to the precise location of extensive parts of the boundary between Eritrea and Ethiopia.

2.15 It will be convenient to begin by describing geographically the areas in which the location of the boundary is contested, without referring, for

¹ Order No. 6 of 1952.

the moment, to the chronological order of the treaties mentioned in Article 4 of the December Agreement.

2.16 For convenience, maps of each sector are provided on the pages following. A number of points on these maps have, for ease of reference, been given numbers. A complete list of all the points to which numbers have been given will be found in Chapter VIII, paragraph 8.3 (see p. 101), together with their coordinates. These coordinates are not necessarily final and the Commission may have to adjust or vary them in the course of demarcation. Only the final demarcation map will be definitive.

1) The termini

2.17 The boundary runs from the border with the Sudan in the west to the border with Djibouti in the east. At each end, there is a tri point between the three relevant States.

2.18 The tri point in the west was stated by the 1902 Treaty to be at Khor Um Hagar (Point 2). However, by subsequent agreement among Eritrea, Ethiopia and Sudan, the tri point was moved to the confluence of the Khor Royan with the Setit (Point 1), a short distance west of Khor Um Hagar.

2.19 The tri point at the eastern end has never been agreed, but, as a result of the delimitation established in the present decision, will be where the Eritrea/Ethiopia boundary meets the western boundary of Djibouti (Point 41).

2) The three sectors of the boundary

2.20 The boundary divides into three sectors, to each of which a different treaty is addressed: the western sector by a treaty of 1902 (the “1902 Treaty” – see Chapter V, below); the central sector by a treaty of 1900 (the “1900 Treaty” – see Chapter IV, below); and the eastern sector by a treaty of 1908 (the “1908 Treaty” – see Chapter VI, below). The boundaries laid down in the Treaties have never been implemented by demarcation.

3) The western sector

2.21 The boundary in the western sector was originally part of the subject of the 1900 Treaty but was amended by the 1902 Treaty (see Map 2, p. 14). This Treaty is written in three languages, all of which are official: Amharic, English and Italian. All three texts prescribe that the boundary shall run eastwards along the Setit to the point where it is met by a named river. In the English and Italian texts, this river is called the Maiteb. In the Amharic text, it is called the Maiten. This difference between the Amharic and the other language texts is one aspect of a confused nomenclature and has been a source of major contention between the Parties. A river called Maiteb meets the Setit at Point 3 (see Map 2, p. 14), about 20 km east of Khor Um Hagar (Point 2). Another river, flowing into the Setit about 89 km east of Khor Um Hagar, is on some maps also identified as “Maetebbe”/“Maeteb” (Point 4). On some maps, another river, identified as the Maiten (sometimes “Mai Ten”

or “Maitenne”), meets the Setit 25 km further to the east (Point 8). Once the point on the Setit where it is met by the correct river is identified, both Parties are agreed that the boundary runs in a generally northeastwards direction to the confluence of the Mareb and the Mai Ambessa (Point 9); however, Ethiopia contends that the boundary runs first to the headwaters of the Maiteb and only from there does the boundary run in a straight line to the northeast.

2.22 Although there are considerable disparities between the maps that show this part of the Setit, the line of the river runs from the western terminus of the boundary in a generally west-east direction. At about 37° 04' E longitude, however, there is a long northwards-pointing hump or curve in the river that extends as far as 37° 26' E, at which point, having reached the same latitude at which the curve started, the line of the river continues in a southeasterly direction.

2.23 Between the western terminus (Point 1, at about 36° 34' E longitude) and 37° 40' E longitude, the right bank of the Setit is joined by a number of tributaries of which the following (going from west to east) may be mentioned: the Maiteb (Point 3), the Sittona (Point 4), the Meeteb (Point 5), the Tomsa (Point 6) and the Maiten (Point 8). The locations of the confluences of each of these rivers with the Setit varies in the earlier maps, but has been stabilized in cartographic representations for some ninety years. The name Meeteb, for example, appeared on an 1894 map somewhat to the east of where it appears on later maps, but on that same map there is no river named the Maiteb. In a sketch of 1900 limited to a short stretch of the Setit, the Meeteb again appeared, in approximately the same location. In later maps of, for example, 1902, 1913 and 1922, there is both a river Maiteb (in the west) and a river Meeteb (in the east).

2.24 The determination of the river to which the Treaty refers as joining the Setit and as marking the point at which the boundary turns towards the northeast is to be decided in accordance with the 1902 Treaty and applicable international law. This will be considered in Chapter V, below.

4) The central sector

2.25 Once the boundary reaches the Mareb at Point 9, it is defined by the 1900 Treaty, which takes the boundary eastwards along the Mareb until Point 11 at which that river is joined by another, the Belesa, flowing from the east, thus following the first part of a line described in the 1900 Treaty as the line “Mareb-Belesa-Muna.”² There is no dispute between the Parties about the

² The part of the 1900 Treaty line that runs from Tomat to Todluc on the Mareb can for all practical purposes be disregarded, because in the 1902 Treaty the reference to that part was dropped and was replaced by the line to the Mareb along the Setit and Maiteb that has already been mentioned. The Commission’s task in this sector is limited to identifying the line of the “Mareb-Belesa-Muna.”

line in this section. Their differences begin as the line moves upstream the Belesa.

2.26 As already stated, the 1900 line was traced on a map annexed to the Treaty. Both Parties agree that that map, being “annexed” to the Treaty, is a visual or linear exposition of its content and has the same force as the Treaty. One would expect, therefore, to look first to that map for assistance in defining the line in this section. The difficulties, recognised to differing degrees by both Parties, are that the Treaty map was drawn on a very small scale, 1:1,000,000, and the features marked on it do not correspond exactly with the topography and toponymy appearing in modern maps.

2.27 Nevertheless, Eritrea contends that the Treaty map provides sufficient guidance to enable the Commission to identify each of the disputed components of the Mareb-Belesa-Muna line. Thus, Eritrea points to the fact that the branch of the Belesa that the Treaty map shows as being connected by a land link to the Muna corresponds with the western branch of that river as it appears on the 1894 map that formed the basis of the Treaty map, that that line turns to run southwards and then leaves the Belesa by a small unnamed stream to run almost due eastwards over the watershed to join the Muna as it rises on the eastern side of the watershed (Point 20). It then continues again in a roughly easterly direction until it meets the Endeli at Massolae (Point 27).

2.28 In marked contrast, Ethiopia’s interpretation of this part of the 1900 Treaty involves three elements.

2.29 The first contention in the Ethiopian approach is that the formula Mareb-Belesa-Muna is to be taken as intended to reflect the *de facto* administrative division between the districts of Acchele Guzai in the north, under Italian control, and Agame in the south, under Abyssinian control. Thus, for Ethiopia, the task of the Commission is not so much to interpret and apply in a geographical sense the Treaty’s Mareb-Belesa-Muna formula as it is to determine the actual division at the time between Acchele Guzai and Agame.

2.30 The second element in the Ethiopian approach involves a comparison between the map annexed to the 1900 Treaty and a modern map based on satellite imaging. Ethiopia contends that the former does not accurately represent the relevant geography. In particular, the depiction of the rivers on the 1900 map is not consistent with the rivers as they appear on the modern map.

2.31 The third element involves the assertion that the names “Belesa” and “Muna” do not describe relevant rivers in the region. Ethiopia names the western branch of the “Belesa” the “Rubai Daro” and the eastern “the Mestai Mes,” the latter being joined by the “Sur.” The name “Berbero Gado” is given to the river that the 1900 map calls the “Muna.” Indeed, Ethiopia maintains that there was no “Muna” identifiable in 1900 at the location at which the 1900 Treaty map places it or, indeed, at all. Ethiopia further contends that the Berbero Gado really forms part of a larger river system, the Endeli, whose

source lies somewhat further to the north; that that river formed the boundary between Acchele Guzai and Agame; and, therefore, that it was really along the line of that river that the boundary marked “Muna” on the 1900 Treaty map was meant to run.

2.32 This sector, the “Mareb-Belesa-Muna” line, will be considered in Chapter IV, below.

5) The eastern sector

2.33 From the terminus of the central sector defined in the 1900 Treaty the boundary continues southeastwards to the tri point with Djibouti. This sector is the subject of the 1908 Treaty, which prescribes that the boundary shall run parallel to the coast but sixty kilometres inland from it. The Parties disagree not only as to its starting point but also as to the proper way of drawing such a line and, therefore, as to its eastern terminus. This sector will be considered in Chapter VI, below.

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

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

1. Consistent with the provisions of the Framework Agreement and the Agreement on Cessation of Hostilities, the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.
2. The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law. The Commission shall not have the power to make decisions *ex aequo et bono*.

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

A. TREATY INTERPRETATION

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

3.4 The meaning of these Treaties is thus a central feature of this dispute. In interpreting them, the Commission will apply the general rule that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Each of these elements guides the interpreter in establishing

what the Parties actually intended, or their “common will,” as Lord McNair put it in the *Palena* award.³

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

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

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

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

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

3.8 Thus, the effect of subsequent conduct may be so clear in relation to matters that appear to be the subject of a given treaty that the application of an

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

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

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

otherwise pertinent treaty provision may be varied, or may even cease to control the situation, regardless of its original meaning.

3.9 The nature and extent of the conduct effective to produce a variation of the treaty is, of course, a matter of appreciation by the tribunal in each case. The decision of the International Court of Justice in the *Temple* case⁶ is generally pertinent in this connection. There, after identifying conduct by one party which it was reasonable to expect that the other party would expressly have rejected if it had disagreed with it, the Court concluded that the latter was stopped or precluded from challenging the validity and effect of the conduct of the first. This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement. But in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule – whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from, the position taken by the first. Likewise, these concepts apply to the attitude of a party to its own conduct: it cannot subsequently act in a manner inconsistent with the legal position reflected in such conduct.⁷

3.10 The possibility that a clear treaty provision may be varied by the conduct of the Parties was also clearly acknowledged in a particularly relevant manner in the award in the *Taba* arbitration between Egypt and Israel.⁸ There, the relevant Agreement provided that pillars should be erected at intervisible points along the boundary. The final pillar, which was the one principally disputed between the parties, was constructed at a point which was not intervisible with the preceding pillar. Although the Tribunal acknowledged that the Agreement did not provide for any exception to intervisibility, it nonetheless found that “during the critical period, the location of the pillar had come to be recognized by the Parties and was accepted by them.”

3.11 As to the manner in which the parties in that case had “recognised” the location of the pillar, the Tribunal observed:

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

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

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

⁸ *Arbitral Award in the Dispute concerning certain Boundary Pillars between the Arab Republic of Egypt and the State of Israel*, 80 ILR 226 (1988), 27 ILM 1421 (1988) (hereinafter “*Taba*”).

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

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

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

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

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

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

3.14 Turning to the requirement in Article 4, paragraphs 1 and 2, of the December Agreement that the decision of the Commission shall also be based “on applicable international law,” the Commission is much assisted by the consideration by the International Court of Justice of a comparable requirement in the *Kasikili/Sedudu* case.¹³ In that case, the parties by agreement prescribed that the decision should be made “on the basis of the . . . Treaty . . . and the relevant principles of international law.” The Court decided that the words “and the relevant principles of international law” were not limited in their effect to the international law applicable to the interpretation of treaties; they also required the Court to take into consideration any rules of customary international law that might have a bearing on the case, for example, prescription and acquiescence, even if such rules might involve a departure from the position prescribed by the relevant treaty provisions. Thus the Court accepted the possibility that an attribution of territory following from its interpretation of the relevant boundary treaty could be varied by operation of the customary international law rules relating to prescription. As it turned out, the Court found in that case that there was insufficient prescriptive conduct to affect its interpretation of the treaty. But what matters

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

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

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

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

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

for present purposes is that the Court read the applicable law clause before it as including recourse to such rules of customary international law.

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

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

1) Maps

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

3.18 The Commission is aware of the caution with which international tribunals view maps. Those which are made authoritative by, for example, being annexed to a treaty as a definitive illustration of a boundary delimited by the treaty, are in a special category, since they “fall into the category of physical expressions of the will of the State or States concerned.”¹⁴ The Treaty map annexed to the 1900 Treaty is such a map.

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

3.19 The Commission is also aware that maps, however informative they may appear to be, are not necessarily accurate or objective representations of the realities on the ground. Topography is dependent upon the state of knowledge at the time the maps were made, and particularly with older maps this may have been inadequate. When man-made features are superimposed, such as places of habitation or territorial limits, there is room for political factors to play a part. Particularly in the case of maps portraying a boundary which is in the interests of the Party responsible for the map, the possibility exists that they are self-serving.

3.20 These cautionary considerations are far from requiring that maps be left out of account. As already noted, where a map is made part of a treaty then it shares the legal quality of the treaty and is binding on the parties. That is the case with the map annexed to the 1900 Treaty (see para. 4.8, below). It needs to be scrutinised with the greatest care, since the detail it contains can greatly assist in giving specific meaning to an otherwise insufficiently detailed verbal description.

3.21 The effect of a map that is not part of a treaty will vary according to its provenance, its scale and cartographic quality, its consistency with other maps, the use made of it by the parties, the degree of publicity accorded to it and the extent to which, if at all, it was adopted or acquiesced in by the parties adversely affected by it, or the extent to which it is contrary to the interests of the party that produced it. A map that is known to have been used in negotiations may have a special importance. A map that emanates from third parties (albeit depending on the circumstances), or is on so small a scale that its import becomes a matter for speculation rather than precise observation, is unlikely to have great legal or evidentiary value. But a map produced by an official government agency of a party, on a scale sufficient to enable its portrayal of the disputed boundary area to be identifiable, which is generally available for purchase or examination, whether in the country of origin or elsewhere, and acted upon, or not reacted to, by the adversely affected party, can be expected to have significant legal consequences. Thus a State is not affected by maps produced by even the official agencies of a third State unless the map was one so clearly bearing upon its interests that, to the extent that it might be erroneous, it might reasonably have been expected that the State affected would have brought the error to the attention of the State which made the map and would have sought its rectification.

3.22 In these instances it is not the maps “in themselves alone” (to use the language of the Chamber of the International Court of Justice in the *Frontier Dispute* case¹⁵) which produce legally significant effects, but rather the maps in association with other circumstances. A map *per se* may have little legal weight: but if the map is cartographically satisfactory in relevant

¹⁵ *Ibid.*, at p. 583, para. 56.

respects, it may, as the material basis for, e.g., acquiescent behaviour, be of great legal significance.

3.23 The Commission must also address another aspect of map evidence which played a large part in the arguments of the Parties. It was contended that a boundary can be determined by reference to its “signature” – that is, its general shape, silhouette, contour or outline on maps, as distinct, that is, from its particular details.

3.24 The Commission does not reject this contention, but approaches it with caution. It is of the nature of boundaries that they need to be geographically specific. A general shape may not have that degree of specificity, or be capable of interpretation with sufficient clarity or definition, to allow for its accurate transposition to maps of a suitably large scale. It is not enough to demonstrate that the general shape of the boundary slopes in a certain direction, or in places rises, falls or curves. Those slopes, ascents, declines and curves must identify with sufficient clarity particular geographic features which are relevant to the course of the boundary. But if a general shape is sufficiently clear and specific, and is both distinctive in itself and depicted with clarity in that distinctive form on a range of maps in a consistent, or near consistent, manner, particularly on maps published or used by both parties in a dispute, the Commission must attribute to such a general shape the appropriate legal consequences. Such maps may indicate a general awareness and acceptance of the line prescribed in a boundary treaty and the approximate location of that line. However, the effect of such maps will be less in a situation where there is annexed to the treaty an illustrative map that forms part of it than in cases where there is no such map.

3.25 The Commission also notes the distinction that may be drawn between establishing a boundary by reference to such a “signature” and confirming by such means a boundary which has been established in other ways. There is also a distinction to be drawn between reliance on such means to establish a boundary in a particular location, and reliance on them negatively so as to demonstrate that a boundary does not exist somewhere else. A “signature” being relied on in either a confirmatory or a negative role may be both less clear and less specific than a signature that is relied upon to establish a boundary, yet still have the effects referred to. It is also important to bear in mind that though a series of maps may show a consistent, or possibly inconsistent, treatment of one section of the boundary, this may not be so in relation to another part. The map evidence has to be considered separately in relation to each particular part of the boundary. Also, in considering the general significance of map evidence, if that evidence is uncertain and inconsistent, its value will be reduced in relation to the endorsement of a conclusion arrived at by other means, as also its support for any alteration of a result reached on the basis of textual interpretation.¹⁶

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

3.26 Another aspect of the map evidence to which the Parties devoted argument was the effect of so-called “disclaimers” which appear on a number of maps. The wording of these disclaimers varies. For example, some state “[t]his map must NOT be considered an authority on the delimitation of international boundaries”¹⁷ or “[b]oundary representation is not necessarily authoritative.”¹⁸ A map prepared by the Geographer of the Department of State of the United States stated that it was “not necessarily authoritative.” Maps prepared by the United Nations often state that they do not imply “official endorsement or acceptance by the UN.” A number of Ethiopian maps state that “[t]he delimitation of international boundaries shown on this map must not be considered authoritative.”

3.27 The question that requires consideration is to what extent, if any, such disclaimers may affect the evidential quality of the maps. The Commission is of the view that such disclaimers do not automatically deprive a map of all evidential value. The map still stands as an indication that, at the time and place the map was made, a cartographer took a particular view of the features appearing on the map. The disclaimer is merely an indication that the body making the map (or its Government) is not to be treated as having accorded legal recognition to the boundaries marked thereon or to the title to territory of the States concerned as indicated by the marked boundary.

3.28 As regards the State adversely affected by the map, a disclaimer cannot be assumed to relieve it of the need that might otherwise exist for it to protest against the representation of the feature in question. Nor does the disclaimer (whatever may be its legal effect on the content of the map) neutralize the fact that that State itself published the map in question. The need for reaction will depend upon the character of the map and the significance of the feature represented. The map still stands as a statement of geographical fact, especially when the State adversely affected has itself produced and disseminated it, even against its own interest. The disclaimers may influence the decision about the weight to be assigned to the map, but they do not exclude its admissibility.

2) *Effectivités*

3.29 As to activity on the ground, the actions of a State pursued *à titre de souverain* can play a role, either as assertive of that State’s position or, expressly or impliedly, contradictory of the conduct of the opposing State. Such actions may comprise legislative, administrative or judicial assertions of authority over the disputed area. There is no set standard of duration and intensity of such activity. Its effect depends on the nature of the terrain and the extent of its population, the period during which it has been carried on and the extent of any contradictory conduct (including protests) of the opposing State. It is also important to bear in mind that conduct does not by itself produce an

¹⁷ British maps, 1942-1946.

¹⁸ A British map of 1997.

absolute and infeasible title, but only a title relative to that of the competing State. The conduct of one Party must be measured against that of the other. Eventually, but not necessarily so, the legal result may be to vary a boundary established by a treaty.

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

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

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

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

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

3.32 On 10 June 1998 the Heads of State and Government of the Organization of African Unity submitted to the Parties for their consideration the elements of a “Framework Agreement” based on three principles of which the third was “respect for the borders existing at independence as stated in the Resolution of the OAU Summit in Cairo in 1964.”

3.33 This Framework Agreement was accepted by the Parties. On 14 September 1999, following further consideration of the dispute within the OAU and the UN Security Council, “Technical Arrangements for the Implementation of the Framework Agreement” were agreed by the Parties. Again, the principle of respect for the borders existing at independence was reaffirmed.

3.34 Prior to the adoption of the Technical Arrangements, Ethiopia requested a series of clarifications relating to them, including one regarding the law to be applied to the settlement of the dispute. Two of the clarifications stated as follows:

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

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

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

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

D. THE PRESENT DECISION DOES NOT DEAL WITH DEMARCATION

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

CHAPTER IV – THE SECTOR COVERED BY THE 1900 TREATY (CENTRAL SECTOR)

A. THE INTERPRETATION OF THE 1900 TREATY

4.1 The Commission will begin its consideration of the sector of the border covered by the 1900 Treaty by interpreting the Treaty itself and the annexed Treaty map. The outcome of this interpretation will determine the border in this sector, subject only to two important qualifications flowing from the subsequent conduct of the Parties and an admission made by one Party during the proceedings.

4.2 Article I of the Treaty (in English translation) provides:

The line Tomat-Todluc-Mareb-Belesa-Muna, traced on the map annexed, is recognized by the two Contracting Parties as the boundary between Eritrea and Ethiopia.¹⁹

¹⁹ The English translation is that given in Sir E. Hertslet, *The Map of Africa by Treaty*, Vol. 2, p. 460 (3d ed., 1967). The Amharic text is similar. No difference between the texts is alleged by the Parties to be material to the course of the boundary in this sector. The Treaty itself provides that it is written "in the Italian and Amharic languages, both to be considered official save that in case of error in writing the Emperor Menelik will rely on the Amharic version."

Tomat and Todluc are the names of towns; Mareb, Belesa and Muna are references to rivers.

4.3 The line described in Article I delimits the boundary from the frontier with Sudan in the west to a point in the east the exact location of which is a matter of dispute but which, in general terms, is where the Muna in its Treaty sense may be held to end.

4.4 By the 1902 Treaty (as to which see Chapter V, below), the Parties altered the western part of the boundary. The line from Tomat to Todluc and its continuation along the Mareb to its confluence with the Mai Ambessa (Point 9) was replaced by a line which, coming from the Setit, reached the Mareb at its junction with the Mai Ambessa. Effectively, therefore, after the 1902 Treaty, the boundary defined by the 1900 Treaty dealt only with the central sector, represented by “the line Mareb [effectively from its junction with Mai Ambessa]-Belesa-Muna, traced on the map annexed.” It is this line which the Commission is now called upon to interpret and apply.

4.5 In adopting the Mareb-Belesa-Muna line in the 1900 Treaty, the Parties were evidently confirming, in a legally definitive manner, a line that – though not specifically delimited – had been accepted in practice for several years on a *de facto* or provisional basis, and which was identified as a dividing line between the two regions of Acchele Guzai (falling within Eritrea) and Agame (falling within Ethiopia).

4.6 Thus the 1896 armistice arrangement was followed by the Italy-Abyssinia Peace Treaty of 26 October 1896.²⁰ Article IV of that Treaty provided that the Parties would by agreement fix the definitive frontiers between them within one year, and that

[u]ntil these frontiers have been thus fixed, the two Contracting Parties agree to observe the *status quo ante*, strictly prohibiting either of them from crossing the provisional frontier, determined by the courses of the Mareb, Belesa, and Mouna Rivers.²¹

4.7 Ethiopia and Italy soon began their negotiations for a definitive frontier. Emperor Menelik of Ethiopia at first sought a frontier considerably to the north of the Mareb-Belesa-Muna line, but eventually agreed in 1900 to keep to that line (in exchange for a payment of 5,000,000 lire, apparently for forgoing a more extensive claim). Although the Parties failed to conclude the definitive frontier agreement within the one year envisaged by Article IV, they did conclude the necessary agreement on 10 July 1900.

4.8 The 1900 Treaty described the boundary in economical language, referring only to three river names, “Mareb-Belesa-Muna.” As a delimitation which could form the basis for a demarcation of the boundary on the ground,

²⁰ Treaty between Italy and Abyssinia, signed at Addis Ababa, 26 October 1896, Hertslet, note 19, above, at p. 458.

²¹ The Commission’s translation.

it fell short of a desirably detailed description, particularly in the light of the uncertain knowledge at the time concerning the topography of the area and the names to be given to geographical features. Rivers, in particular, were frequently given different names along different stretches of their courses. The Parties, however, clarified their agreement by adding to the brief verbal description of the boundary the words “as traced on the map annexed.” That map, which will be referred to as the “Treaty map,” is accordingly of critical importance for the determination of the course of the boundary. A copy of that map appears as Map 5, on page 32. It cannot be regarded as just offering a general indication of the course to be followed by the boundary. By virtue of the words the “line . . . traced on the annexed map,” the map contained the Parties’ agreed delineation of the boundary that they intended to adopt. Although the Treaty map consists primarily of the depiction of a line, with a very few names identifying some locations near that line, the Commission considers that the same rules and principles of interpretation must be applied to the map as apply to the words used in the Treaty.

4.9 In order to understand and properly assess the Treaty map, it is necessary to say something about its background. At the end of the nineteenth century, there were not many published maps of the relevant area of sufficient detail or reliability. The principal map was prepared by an Italian geographer, Captain Enrico de Chaurand, and published in 1894. It was not the result of personal exploration and recording by de Chaurand, but was rather a compilation of information from many sources. In some areas the map provided detailed information, but if the sources available to de Chaurand did not cover a particular area, then that deficiency was perforce reflected in a corresponding thinness of relevant detail in his map. Despite its early date and certain inaccuracies which are now apparent, de Chaurand’s map can be regarded overall as providing reasonable coverage on a consistent scale. The Treaty map states that it was based on de Chaurand’s map of the Tomat-Todluc-Mareb-Belesa-Muna area, and it is apparent that the Treaty map was in fact a tracing or other direct copy of the relevant part of the de Chaurand map, omitting certain features so as to give prominence to the features most relevant to the 1900 Treaty line. Depictions on de Chaurand’s map are therefore directly relevant to an understanding of the Treaty map.

4.10 The Treaty map depicts the boundary by a single dotted red line across the overland stretch from Tomat to Todluc, and then by a double dotted red line along each bank of the rivers called Mareb, Belesa and Muna (including the overland stretch between the headwaters of the Belesa and Muna), until at its eastern extremity the boundary reaches the Salt Lake. After that it continues as a single dotted red line in a southeasterly direction for a short distance along the northeastern shores of that lake.

1) The Mareb River

4.11 Starting at the junction of the Mareb and Mai Ambessa (Point 9), the boundary following the course of the Mareb eastwards and upstream to its

junction with the Belesa (Point 11) is not in dispute. The identity and course of the Mareb, the location of its confluence with the Mai Ambessa, and the location of its confluence with the Belesa, are all agreed by the Parties. The only matter of uncertainty in this stretch of the river, as with all rivers, may be the precise location of the boundary within the river. The boundary within rivers is dealt within Chapter VII, below.

2) The Belesa River

4.12 Before considering the depiction of the Belesa on the Treaty map, it is necessary to make three observations. First, the description of the boundary is complicated by the fact that the boundary is defined in terms that take it from west to east, while the waterways which form the boundary in the western part of this sector flow from east to west.

4.13 Second, although the actual shape of the Belesa river system can be seen on modern mapping not to be exactly the same as depicted on the Treaty map (and on de Chaurand's map), the general similarity of the Treaty map's depiction with what is known today of the Belesa's course is evident.

4.14 Third, the Parties are in dispute about the appropriate river nomenclature for various stretches of relevant waterways, and in particular the Belesa and the Muna. Both Parties acknowledge that names given to rivers in this region vary. This is particularly the case with older maps and documentary references issued at a time when geographical knowledge of the area was relatively limited. The Commission will note such problems of nomenclature as and when it comes to particular rivers which give rise to them, and will adopt the nomenclature which seems appropriate in the context and which designates its subject with maximum clarity. What matters most is the identification of what the Parties intended in referring to a watercourse as a feature in the landscape, rather than its name. If the name used is incorrect, then it is the Parties' intentions with respect to the reality on the ground rather than the name which is decisive. The Parties agree on the relevant verbal description, the "Belesa-Muna" line, but do not agree where the line which those words are intended to describe actually runs. Moreover, while they appear to agree that the Mareb-Belesa-Muna line laid down in the 1900 Treaty was supposed to represent a *de facto* line which had been observed for a number of years, they do not agree where that *de facto* line ran.

4.15 At the confluence of the Mareb and the Belesa (Point 11), about which point there is no dispute between the Parties, the Treaty map shows the boundary as turning eastwards and following the course of the Belesa upstream. Just to the east of the confluence, the river is clearly marked "T. Belesa," followed by its Amharic equivalent.

4.16 Close to this confluence, the Treaty map shows a small unnamed tributary flowing into the Belesa from the south. Otherwise the map shows the Belesa as continuing in a generally easterly direction until, at Point 12 just below the space between the first two letters of the Amharic version of "T.

Belesa,” the Belesa appears to unite two upstream rivers: one flows in from the south, while the other flows in from a generally easterly direction. Modern mapping shows two rivers in those places. The Commission will refer to these two rivers, each put forward by one of the Parties as its “Belesa” as, respectively, “Belesa A” (flowing in from the south) and “Belesa B” (flowing in from the east).²²

4.17 It is noteworthy that the Treaty map does not show any tributary flowing into the Belesa from the north in the stretch between its confluence with the Mareb (Point 11) and the point at which the Belesa A and Belesa B merge (Point 12). In fact, there is a substantial tributary in this sector that flows into the Belesa from the northeast: it is clearly shown and named “T. Tserona” on the de Chaurand map, joining the Belesa at a point about one-third of the way between Points 11 and 12.

4.18 Eritrea argues that the tributary shown on the Treaty map as flowing into the Belesa from the east (which the Commission has designated the Belesa B) was intended to represent the Tserona. This would leave Belesa A as the Belesa named in the 1900 Treaty. Eritrea has drawn attention to a number of maps that have adopted this nomenclature, and which Eritrea characterises as the “standard nomenclature.” Ethiopia considers the Tserona to be irrelevant to the boundary (for which reason it contends it was omitted from the Treaty map), leaving Belesa B and Belesa A as the two Belesa tributaries shown on the Treaty map, and considers Belesa B to represent the course of the boundary as shown on that map.

4.19 The Parties’ contentions place in dispute sovereignty over a considerable tract of territory comprising roughly two sections: one is the area between Belesa A and Belesa B (shaded yellow on Map 6, p. 36); the other, adjoining it, extends eastward from Belesa B and is bounded, on the north, by the tributary that joins Belesa B from the east at Point 13 (which for convenience will be called “Belesa C”) and, on the south, by the link in the Eritrean claim line, partly land and partly river, between Belesa A and one of the headwaters of the Muna (shaded pink on Map 6, p. 36). This tract will, for convenience, be referred to as “the Belesa projection.”

4.20 Eritrea’s contention that the boundary follows what the Commission is referring to as the Belesa A cannot be reconciled with the indication of the course of the boundary as marked on the Treaty map. On that map itself, the name “T. Belesa” (and its Amharic equivalent) are written as covering both the main stretch of the Belesa and its extension along Belesa B; and, being so written, it must be taken as showing what the Parties intended when using the word “Belesa” in the 1900 Treaty.

²² The Parties have expressed differing views as to which of these tributaries was the smaller or larger. No detailed evidence on this point was put to the Commission. However, the Commission does not regard the question as material. The Treaty map depicts a particular watercourse as the boundary, without reference to whether it was the smaller or larger tributary.

4.21 Furthermore, the Eritrean choice of Belesa A as the intended boundary line would not attribute a role to Belesa C, which the Treaty map clearly utilizes as part of the boundary. Nor can Belesa C be confused with any other tributary flowing into Belesa A at about the latitude shown on the Treaty map.

4.22 The Commission concludes that the omission from the Treaty map of the Tserona as shown on the de Chaurand map was deliberate, and that the depiction of the boundary as following the Belesa eastwards to Belesa B was deliberate and is so shown on the Treaty map.

4.23 Following Belesa B upstream (eastwards) from Point 12, the Treaty map shows this branch of the Belesa as following a course describing a rough quarter circle. Just at the southeastern end of that quarter circle, the Treaty map shows a small tributary flowing into Belesa B from the east. Though this small tributary is not named on the Treaty map (or on the underlying de Chaurand map), the location of its confluence with the Belesa B is shown on the Treaty map to be (as measured on the underlying de Chaurand map) about 20 km southwest of Senafe, and about 15 km WSW of Barachit. Modern mapping confirms that the tributary corresponding to these requirements, which Ethiopia identifies as the Sur, is Belesa C. The Commission concludes that, as a matter of treaty interpretation, this unnamed tributary marked on the Treaty map is the continuation of the boundary line as it runs towards one of the headwaters of the Belesa.

4.24 The Treaty map depicts the Belesa C as a short single blue line of about 8 km in length. On modern mapping, the network of small headwater streams feeding the Belesa C is complex. These various smaller tributaries and streams are not depicted on the Treaty map, which instead marks the boundary with a double row of red dots going overland until it meets one of the headwaters of the Muna. For this overland stretch, the boundary is depicted as running in an ESE direction. The Commission finds that the Treaty boundary follows the line of the most southerly of the small tributaries of the Belesa C. That tributary, on modern mapping, has its source close to the modern town of Zalambessa.

3) The upper reaches of the Muna and the overland link between the Belesa and the Muna

4.25 Both Parties accept that the Treaty boundary follows the line “Belesa-Muna” and that those names refer to rivers flowing in opposite directions from a watershed divide lying between their headwaters. Consequently, the Parties acknowledge, as they must, that the Treaty reference to the boundary in this sector as following two rivers cannot be literally correct. There must be a short overland stretch of boundary between and joining the headwaters of the two relevant rivers. The Commission has already identified in paragraphs 4.22-4.24, above, the Belesa selected by the Parties in the Treaty. It is now necessary to consider the overland Belesa-Muna sector.

4.26 This overland sector cannot be established without first locating the Muna to which the Treaty intended the link to run. The Parties disagree as to the identity of the Muna.

4.27 Ethiopia has identified a discrepancy between, on the one hand, the Treaty map and the underlying de Chaurand map and, on the other hand, what is shown on modern mapping. The Treaty map (and the de Chaurand map) shows the river designated as the Mai Muna (“Maj Mena” on de Chaurand’s map) flowing in a relatively straight line in a generally ESE direction from its headwaters south of Barachit until it reaches what the de Chaurand map names as the Endeli and Ragali. But neither the Treaty map nor the de Chaurand map shows any tributary flowing from the north or northwest into the central part of the Mai Muna. There is, however, an additional and substantial river, with its headwaters near the town of Senafe, that flows eastwards and is called the Endeli. The lower reaches of this river are already depicted on de Chaurand’s map. This much larger Endeli is the major river into which the Muna flows at a point (if the Upper Endeli were on the Treaty map) just beneath the hyphen below the first symbol of the Amharic texts of the name “T. Mai Muna” (Point 27). Nonetheless, both on this map and de Chaurand’s map, the river that is, in fact, the Endeli, still carries the name Muna. In that eastern portion, the river, whether called Endeli or Muna, continues to flow in a generally ESE direction until, as it approaches and eventually dries up in the Salt Lake, it is denominated the Ragali.

4.28 The Parties propose very different ways of dealing with the omission of the upper reaches of the Endeli from the Treaty map (and from the underlying de Chaurand map). Ethiopia notes that the Treaty map contains inconsistent indications: on the one hand, that the river constituting the boundary is the northernmost branch of the river system depicted on the map but, on the other, that that northernmost branch is depicted as having its source south of Barachit. Ethiopia contends that the northernmost branch, although named “Muna” on the Treaty map, is the stream which is in fact the northernmost and is now known to be the upper reaches of the Endeli. Thus, Ethiopia maintains, in effect, that the Treaty map, despite naming the boundary river the Mai Muna, must be taken to be referring to the real Endeli further north, while the river depicted in the position of what is named the Mai Muna is in fact another river, called the Berbero Gado. Given this disagreement on nomenclature, the Commission will refer to this last river as the Muna/Berbero Gado.

4.29 Ethiopia also draws attention to persistent confusion after 1900 over the location of the river designated “Muna.” Thus Ethiopia notes that: (i) Ciccodicola, the principal Italian negotiator, recorded in 1903 that “the Endeli, a tributary of the Muna, [had been] designated to him [i.e., Emperor Menelik] as waters of the Muna,” and that it was on that basis that the Emperor had signed the 1900 Treaty; (ii) in January 1904 the Italian Governor of Eritrea noted in his diary that “[o]ur mistake is to have confused it [the Muna] with the Endeli,” a confusion which Ethiopia suggests shows that the Parties

intended the boundary to follow the northernmost branch of the Endeli system, thereby leaving the Irob district to Ethiopia; (iii) the Italian Boundary Commission of 1904 (the “1904 Commission”)²³ was unable to find a river clearly identified as the “Muna,” observing that it was referred to by many other names – but not including “Muna” – in various stretches along its course, and expressed considerable uncertainty in its attempt to identify the Berbero Gado as the river corresponding to the “Muna”; and (iv) an Italian writer, Captain Mulazzini, in “Geography of the Colony of Eritrea,” in 1904 described the boundary (going westwards) as following the upper Endeli to just short of Senafe and then turning sharply southeast down to “the Mai Muna, also known as the Ruba Enda Dascin,”²⁴ which it crosses and then continues towards the Belesa and the Mareb – thus identifying a line broadly consistent with this part of Ethiopia’s claim line. Indeed, Ethiopia even argues that at the time of the Treaty, there was no river in the area known as the Muna.

4.30 By reference to these considerations, Ethiopia maintains that the land link between the Belesa and the Muna follows a line markedly different from that depicted on the Treaty map. The boundary having followed the course of the Sur (Belesa C) to within about 2 km of Zalambessa would, in the Ethiopian contention, then turn north eastwards to pass overland in a straight line across the Zalambessa-Barachit road. About one kilometre beyond the road, it would rejoin a waterway (unnamed) leading into the Enda Dashim. It would then turn northwards and pass, partly by waterways, partly overland, to the upper waters of the Endeli²⁵ and would then follow the course of that river southeastwards to Rendacoma, being joined some 44 km east of Zalambessa by the waters of the Muna (Berbero Gado).

4.31 Eritrea has maintained, in effect, that: the Treaty map identifies the “T. Mai Muna,” with its headwaters south of Barachit, as the boundary; there is a river of that name in that place (as shown on the underlying de Chaurand map as well as on other maps); and therefore that river constitutes the boundary in accordance with the 1900 Treaty.

4.32 These different submissions relate to an area within the district of Irob, a roughly triangular area bounded to the west by the generally north-south link between the upper waters of the Endeli and the upper waters of the Enda Dashim, to the north by the Endeli upstream from its confluence with the Muna and, to the south, by the Muna/Berbero Gado. For convenience, the Commission will refer to this area as the “Endeli projection” (shaded blue on

²³ See Appendix A to this Decision, beginning at p. 107.

²⁴ Spelling as in the original.

²⁵ There is no clear explanation of why the depiction of the upper reaches of the Endeli was omitted from the de Chaurand map, and thus from the Treaty map based on it. The Commission would, however, observe that in this general area the de Chaurand map contains much less detail than it does in other areas. This may indicate that the sources upon which de Chaurand relied in compiling his map provided only incomplete, or little, information for that area.

Map 6, p. 36). Ethiopia regards the Irob Wereda (i.e., administrative subdivision) as part of Agame, which is a political subdivision of the Ethiopian province of Tigray; Eritrea denies that Irob is part of Agame.

4.33 The Commission has already noted that the naming of rivers in this general region is not without its problems (para. 4.14, above). What matters is what the Parties intended, of which the principal evidence is what they said in the Treaty and, more particularly, illustrated in the Treaty map. It is clear that the Parties agreed to a Treaty which referred to the Muna and that the Treaty map depicted a boundary line following a river (designated as the Muna) flowing from south of Barachit and running generally ESE towards the Salt Lake and the Danakil Depression. That Treaty line must be taken to represent what the Parties intended, particularly since a river of the name (Muna) and in the place shown on the Treaty map was also identified on maps, including the de Chaurand map, known at the time. Moreover, an Endeli was also known at the time, with its upper course more or less correctly depicted on some earlier maps. Had the Parties intended that the boundary should follow the course of that river, they could have said so; alternatively, if they did not know of that river's upper reaches, then they could not have intended the boundary to follow them.

4.34 The fact that the waterway later depicted as the boundary on the Treaty map is shown on the de Chaurand map as "Maj. Mena" and "Endeli" and "Ragali" does not mean that any one of those terms is a synonym for the others. As is common practice, the different names reflect different stretches of the single watercourse. That the Treaty map designated all three stretches as "T. Mai Muna" appears to the Commission merely to have been a matter of simplification and convenience acceptable to the Parties.

4.35 In relation to the "Muna," the Commission notes that the existence of a river of that name was known to the Parties for several years before the conclusion of the 1900 Treaty, as shown by the references to such a river in the armistice arrangement of March 1896 and the Peace Treaty concluded in October that year. Moreover, a river "Muna" was depicted, in the same general area south and southeast of Barachit and flowing generally ESE so as to join the Endeli, on maps in existence when the 1900 Treaty was concluded.²⁶ These depictions are consistent with the depiction of the "T. Mai Muna" on the Treaty map. The Commission is satisfied that the Parties, in concluding the Treaty and annexing the Treaty map, intended to refer to that river.

4.36 The map may be followed so long as it is not shown to be so at variance with modern knowledge as to render it valueless as an indicator of what the Parties could have intended on the ground. Nor should the

²⁶ Examples are the de Chaurand map (1894), and the British War Office map of 1884, revised in 1895 (which shows the "Muna" flowing east from the area south of Barachit and joining the Endeli, itself shown as a distinct river flowing southeast from near Senafe).

Commission be over zealous in attributing far-reaching consequences to relatively minor discrepancies. Overall, despite some inaccuracies and simplifications, the Treaty map is an acceptable indicator of key features, including the location of Barachit, Senafe, Debra Damo and Adigrat, and the flow of rivers in the area between them.

4.37 The Commission can now return to the question of the overland link between the Belesa and the Muna.

4.38 The Commission has already identified the course of the upper part of the Muna. In its upper reaches, the Muna/Berbero Gado is shown on the Treaty map as comprising several small headwater tributaries. The Treaty map, while not depicting the several tributaries flowing into the river further downstream, seems carefully to distinguish these headwater tributaries. Indeed it is somewhat more detailed in this respect than the underlying de Chaurand map, suggesting that particular care was taken with this part of the Treaty map. It shows the boundary river as flowing in this headwater area generally from the west. As it goes downstream, it is shown passing a substantial tributary system flowing in from the northwest, then after a short stretch passing another tributary system flowing in from the southwest, while the boundary river itself follows a tributary in between these other tributary systems.

4.39 The tributary depicted on the Treaty map as flowing into the boundary river from the northwest is shown as having headwaters consisting of two small forked tributaries due south of Barachit. It is also shown as flowing into the boundary river some 16 km southeast of Barachit. The only river meeting this description, with its headwaters close to and due south of Barachit, is the river now known as the Enda Dashim. It flows into the Muna/Berbero Gado at about the same position in relation to Barachit, as shown on the Treaty map, as does the tributary of the Muna just mentioned. This identification of the Enda Dashim as a river other than the one which is depicted as the boundary can only mean that the boundary river is the one into which the Enda Dashim flows.

4.40 The upper reaches of the Muna/Berbero Gado are, in reality, more complicated than the single short blue line depicted on the Treaty map sandwiched between the two pecked red lines as marking the boundary. However, the map depicts a boundary which, from the west-east line of the relevant Belesa C head water slopes in an ESE direction overland to the relevant headwaters of the river designated as the Mai Muna.

4.41 With respect to the Ethiopian contention set out in paragraph 4.28, above, the Commission is unable to read the Treaty as establishing a boundary so at variance with the Treaty map as to involve a longer and less direct overland sector than that which the map shows. The Treaty map does not support any such marked northwards deviation from the generally ESE direction of the Treaty boundary in this area, nor does it support the kind of overland sector which would be needed to link the headwaters of the Belesa C with those of the Endeli. It is also noteworthy that the de Chaurand map

depicts Mounts Auda and Silah to the north of the river which it depicts as the “Muna” and which the Treaty map adopted as the boundary line. Those two mountains lie to the north of the Muna/Berbero Gado, but would not lie to the north of a boundary following the upper Endeli.

4.42 The Commission accordingly concludes that as a matter of the interpretation of the Treaty and the Treaty map, the overland link between the Belesa and the Muna proceeds from the headwater of the Belesa C just to the northwest of present-day Zalambessa (Point 19) to one of the headwaters of the Muna/Berbero Gado (Point 20). It then proceeds in a SSE-trending line following the divide between, to the north, the headwaters of the Enda Dashim and, to the south, the headwaters of the streams flowing southward and then eastward to join the Muna/Berbero Gado at the point where it is also joined by the Enda Dashim (Point 21).

4.43 Below that point, the “Mai Muna” of the Treaty map may be identified with the “Maj Mena” of the de Chaurand map (the river that the Commission is referring to as the Muna/Berbero Gado). This continues in an identifiable course until it joins the Endeli at Massolae at Point 27.

4.44 From Massolae, the Treaty map shows the river, which it still designates the Muna, continuing downstream in a generally ESE direction, its course providing the boundary line. Although the Treaty map identifies the whole length of the watercourse as the “T. Mai Muna” and its Amharic equivalent, it is apparent, from a comparison with the underlying de Chaurand map, that that was a cartographic simplification for the purposes of the boundary Treaty. The de Chaurand map indicates that the “Maj Mena” flows into the Endeli, which in turn flows into a watercourse identified as the Ragali. It is this series of differently named stretches of rivers – from west to east, Muna, Endeli and Ragali – which the Treaty map refers to by the single name “T. Mai Muna.”

4) The eastern terminal point of the 1900 Treaty boundary

4.45 The Parties disagree as to where, to the east, the 1900 Treaty boundary line ends. Eritrea has argued that the Muna ends at the confluence with the Endeli (located at the village of Massolae, Point 27) and that therefore that must be the eastern terminal point of the 1900 Treaty line. From this point, Eritrea contends that, to take account of the local geography, the boundary follows the Endeli for a short distance southeast to Rendacoma (where the Endeli turns northeast and becomes the Ragali), and there leaves the river to continue overland southeast to Djibouti. For its part, Ethiopia has argued that the river depicted as the Muna continues as far as the town of Ragali, and that it is therefore there that the terminal point lies.

4.46 The matter is important not only because of the need to know where the boundary established by the 1900 Treaty ends, but also because Article I of the 1908 Treaty makes “the most easterly point of the frontier established by [the 1900 Treaty]” the starting point for the boundary described

in that Treaty. The matter can only be resolved in the first place by a careful consideration of the 1900 Treaty map and the topography of the area.

4.47 The Commission finds no support in the 1900 Treaty and its annexed map for a terminus of the 1900 Treaty boundary at Massolae. The designation on the Treaty map of the river named “Muna,” and the depiction of the boundary line itself, extend well beyond the location of Massolae. The fact that Massolae may be about 60 km from the coast, and that the 1908 Treaty subsequently required the boundary to follow a line that distance from the coast, does not of itself require that Massolae be regarded as the terminal point of the 1900 Treaty and the starting point of the 1908 Treaty. “Distance from the coast” was not a consideration relevant to the boundary laid down by the 1900 Treaty. So its use in the 1908 Treaty cannot be related back to the earlier Treaty.

4.48 The 1904 Commission charged with following the border settled by the 1900 Treaty concluded that its own mission terminated at Massolae. There is, however, no basis in the text of Article I of the Treaty or in the Treaty map for the conclusion that the 1900 boundary terminated at Massolae. Moreover, as the Commission notes below (Appendix A, para. A.1), the 1904 Commission was essentially an Italian commission, though with an Ethiopian observer who did not sign the final report, which therefore did not express the shared views of the Parties. While the Commission does not exclude the possible evidential value of the findings of the 1904 Commission insofar as they illuminate the intentions of the Parties with regard to Article I of the 1900 Treaty, it cannot assign decisive weight to those of its observations which are not supported by the provisions of the Treaty. The Commission cannot, therefore, accept Eritrea’s contention that the boundary established by the 1900 Treaty terminated at Massolae.

4.49 The designation “Muna” therefore extends beyond Massolae, even though the contemporary and current names distinguished the Muna from the Endeli and, nearer the Salt Lake, the Ragali. The Treaty map clearly identifies as the river which the Parties were calling the Muna the one which continued eastwards and flowed into and terminated in a body of water, designated as the Salt Lake. This lake still exists in the approximate area in which it is depicted on the Treaty map.

4.50 As already stated (para. 4.10, above), the parallel dotted red lines on the Treaty map are clearly intended to mark the boundary and, proceeding, as they do, along each bank, are consistent with the conception of a boundary river. At the eastern end of the Muna, however, the parallel character of the dotted red lines ends. The line along the southern bank of the Muna follows the Muna to the Salt Lake and terminates at the northern apex of the lake. However, the dotted red line on the northern bank of the Muna continues past the apex and the northeast shore of the Salt Lake in a southeasterly direction virtually until the margin of the map.

4.51 The usage adopted in the Treaty map for the overland sector between Tomat and Todluc was also a single dotted line. Despite the use of the double red dotted line in the short overland section joining the Belesa and the Muna, this single red dotted line alongside the Salt Lake may have been intended to indicate the course of an overland boundary continuing generally southeast beyond the point at which the river terminates in the lake. This would have been consistent with the terms of the 1897 *modus vivendi* indicating a *de facto* line which the Parties negotiating the 1900 Treaty could have been expected to have had in mind. Yet the terms of the 1900 Treaty refer only to the Muna watercourse; the depiction of a line in the Treaty map extending alongside the Salt Lake evidently goes beyond the depicted course of the Muna.

4.52 The depiction on the Treaty map shows the final, curved, part of the Muna river system not as a continuous blue line but as a dotted blue line. This is not explained on the Treaty map, but on the underlying de Chaurand map (which also uses a dotted blue line in this area) the legend explains that for rivers a continuous blue line signifies “di tracciato conosciuto” (i.e., known river course) while a dotted blue line signifies “di tracciato dubbio” (i.e., uncertain river courses). Modern mapping also shows that immediately to the north of the Salt Lake the river system breaks into a filigree network of small channels and streams, with no readily identifiable single and regular river bed.

4.53 In these circumstances, delimiting the boundary in this delta area as the line taken by the Ragali would not be helpful, for there is no single stable watercourse in this network of small and changing streams and channels. The Ragali does indeed flow, on a permanent and stable basis, to a location near the northern limit of the curved stretch of the lower reaches of that river system before flowing through what may be called the Ragali delta on its way to the Salt Lake.

4.54 Accordingly, the Commission has decided that, based on the 1900 Treaty and its map, the eastern end of the 1900 Treaty boundary follows the line of the Ragali as far as Point 29. Beyond that point, the boundary would ordinarily continue to follow the Ragali until it reaches its terminus at the Salt Lake. However, having regard to the delta-like extension of the riverbed and the difficulty of identifying with sufficient certainty the line of the Ragali therein, the Commission determines that the boundary in the delta is constituted by straight lines connecting Points 29, 30 and 31.

5) Object and purpose of the Treaty

4.55 The only express indication given in the Treaty of its object and purpose is contained in its short preamble. This states that the two Heads of State had agreed on the Treaty

in the desire to regulate the question of the frontier between the Colony of Eritrea and Ethiopia which has remained open since the conclusion of the Treaty of Peace of Addis Ababa of the 26th October 1896.

Although the Parties placed considerable emphasis on the Mareb-Belesa-Muna line as being intended to give effect to a division between the regions of AccheleGuzai (to stay with Eritrea) and Agame (to stay with Ethiopia), the Commission observes that nothing to that effect is said directly in the 1900 Treaty or in the Peace Treaty to which reference is made.²⁷

4.56 The Commission is, however, aware that the 1896 armistice between Ethiopia and Italy following the Battle of Adwa provided *inter alia* that there would be a peace treaty, and that until that time the border between Ethiopia and Eritrea “will be maintained at the Mareb, Belesa and Muna, which is the border of the Agame and Okologezay,”²⁸ the former being attributed to Ethiopia and the latter to Eritrea. The fact that, in Article IV of the 1896 Peace Treaty, the Parties agreed provisionally to observe the *status quo ante* does not in the Commission’s view import into the terms of the subsequent 1900 Treaty a requirement that that Treaty must itself be interpreted as having as its object and purpose the maintenance of the division between Acchele Guzai and Agame. The Commission is of the view that such considerations are too remote from the 1900 Treaty to affect the conclusions to be drawn from the terms of the Treaty read together with its annexed map.

4.57 The Commission observes that, as a general matter, the southern borders of Acchele Guzai extended south towards the Belesa and Endeli river systems. Its southernmost sub-district was Shimezana, with its capital at Senafe. Agame (in Tigray, the northern part of Ethiopia) extended northwards to the Belesa river system, and had its capital at Adigrat. To the east of the Belesa river system, Agame is said by Ethiopia (but denied by Eritrea) to include the region of Irob, lying within the Endeli river system.

4.58 However, those regions seem only to have been areas generally identified by their respective names, but without specific delimitation of their territorial limits. The Parties have produced conflicting evidence as to the geographical limits of Acchele Guzai and Agame as understood in 1900, in particular as regards the district of Irob, in the area north of the Muna/Berbero Gado and south of the upper reaches of the Endeli, i.e., in the Endeli projection. Ethiopia has contended that in 1890 and thereafter Italian officials were seeking to use the Aghir (which flows into the upper reaches of the Endeli) as the line of division between Acchele Guzai and Agame, and that in referring to a “Belesa-Muna” line Italy’s reference to the “Muna” as the division between Acchele Guzai and Agame was based on ignorance of local geography and was really intended as a reference for what is now known to be a “Belesa-Endeli” line. However, the Commission observes that the

²⁷ Indeed, that Treaty is referred to only as the starting point for the period since which “the question of the frontier . . . has remained open.”

²⁸ Eritrean translation. The translation provided by Ethiopia is that until the peace treaty is concluded “the boundary between the Ethiopian Empire and the Eritrean colony will remain to be the Mareb, Belesa and Muna, which will be the boundary between Agame and Akologuzay.” This difference in translation is, in the Commission’s view, of no substance.

diplomatic exchanges of a decade before the conclusion of the 1900 Treaty were not part of the negotiations for it; moreover, they show that the rivers in question were known at least to Italy in 1890, which suggests that this omission in 1900 was no mere mistake or oversight.

6) Conclusions as to the boundary identified by the 1900 Treaty

4.59 For the reasons set out above, the Commission therefore concludes that the boundary line identified by the 1900 Treaty (as amended by the 1902 Treaty) and subject to the variations that will presently be described, may be defined as a line that, from west to east:

- (1) starts at the confluence of the Mareb and the Mai Ambessa (Point 9);
- (2) then follows the Mareb to its confluence with the Belesa (Point 11);
- (3) then follows the Belesa to the confluence of Belesa A and Belesa B (Point 12);
- (4) then follows Belesa B to its confluence with Belesa C (Point 13);
- (5) then follows Belesa C to the source of one of its headwater streams at Point 19;
- (6) then goes overland for a short distance to the source of a head waterstream of the Muna/Berbero Gado at Point 20;
- (7) then follows the Muna/Berbero Gado, passing the confluence with the Enda Dashim (at Point 21) until it joins the Endeli at Massolae (Point 27);
- (8) then follows the Endeli downstream until it merges with the Ragali at Rendacoma (Point 28);
- (9) then follows the Ragali downstream to Point 29; and
- (10) then follows the straight lines joining Points 29, 30 and 31.

B. SUBSEQUENT CONDUCT

4.60 The Commission will now examine the subsequent conduct of the Parties with a view to determining whether any such conduct requires it to vary or adjust in any way the boundary based on the interpretation of the Treaty as set out above. In view of the Commission's conclusion that only two aspects of such conduct lead to any modification of the Treaty boundary, the Commission has placed in Appendix A to this Decision its examination of much of the material that it has determined does not affect the situation.

4.61 The question of sovereignty over the Endeli projection and the Belesa projection was much discussed by the Parties. Both contended that their conduct after the conclusion of the Treaty showed that their sovereignty over the relevant areas had been established and had been accepted by the other.

4.62 The Parties presented the Commission with voluminous material detailing the conduct which they regard as supporting their respective positions. This practice consists largely of a variety of administrative acts tending to show the exercise of sovereign authority by the Party performing those acts, a range of diplomatic and other similar exchanges and records as evidence of assertions of sovereignty, or of acquiescence in such assertions by the other Party, and maps. The Commission does not find it necessary to set out in detail its review of this evidence, and will only examine it in general terms. Some items, though presented at length by the Parties, have been found by the Commission not to affect the delimitation established by the Commission. Those items, some of which also affect the boundary in the western and eastern sectors, are examined in Appendix A.

4.63 The Commission will first consider the evidence of conduct that demonstrates the exercise of sovereignty in a practical way on the ground. At the outset, the Commission must, however, note that in a number of respects it has been hampered by the inability of the Parties to identify with sufficient particularity the location of the places to which they refer. There is no generally agreed map of the area depicting place names with any degree of reliability. The difficulty is exacerbated by the fact that the spelling of place names is often inconsistent, that some places seem to bear different names in different contexts, that some names of places are shared by the names of regions in which those places are located, and that, at times there has been considerable dispute as to the precise location, or even very existence, of named places. In determining the significance of particular incidents it is of course essential that the Commission be aware of precisely where the incidents are said to have occurred, failing which the Commission will be unable to attribute to them any significant weight. In order to review the material presented by the Parties in a manageable way, it will be convenient to consider it by reference to four relevant regions which are the subject of dispute. From west to east these are: the western part of the Belesa projection; the eastern part of the Belesa projection; the Endeli projection; and the area around the eastern terminus of the 1900 Treaty boundary, known to both Parties as the Bada region.

1) The western part of the Belesa projection

4.64 The area now addressed lies between the Belesa A and Belesa B, forming the western part of the Belesa projection (the area shaded yellow on Map 6, p. 36, above).

(a) *Conduct relevant to the exercise of sovereign authority (effectivités)*

4.65 In this area the Parties have submitted evidence of activities which, they claim, establish or confirm their sovereignty over the localities in question. These activities comprise such matters as the establishment of telephone and telegraph facilities, the holding of elections and the conduct of the independence referendum, the maintenance of local records of such matters as births and deaths, the payment of taxes and financial tribute, the

structure of local administration, the regulation of religious and social institutions, the stationing of military and police posts and the conduct of military and police patrols, the regulation of land use, provincial administration, the administration of educational facilities, public health administration, steps for the eradication of malaria, the grant of a mineral concession, and various local acts carried out by the British Military Administration during the period from 1941 to 1952.

(b) *Diplomatic and other similar exchanges and records*

4.66 The Commission has also taken into consideration a number of items from what may be termed the diplomatic or official record. These include the letter of June 1901 from Martini to Ciccodicola, a memorandum written in 1915 by Checchi, Ethiopian protests at alleged Italian encroachments between 1927-1935, the report of April 1933 by the Italian Regional Commissioner, the reports of April and May 1933 by Governor Astuto, an Italian protest at alleged Ethiopian cross-border incursions in 1933, and the incident which occurred in 1934 involving a burial at Chenneto.

(c) *Maps*

4.67 The map evidence is not uniform and consistent. Much of it supports the existence of a Belesa projection and attributes the territory within it to Eritrea. There are, however, significant maps which do not do so, or do so only in part. Moreover, much of the map evidence is on so small a scale, or so devoid of detail, that it can only be treated as ambiguous in this respect.

(d) *Conclusion regarding the western part of the Belesa projection*

4.68 The Commission has carefully weighed the evidence with which it has been presented. For the most part, it finds the evidence to be of mixed quality and to some extent conflicting as regards its significance for territorial sovereignty. In general, therefore, but subject to two important qualifications, which relate to, respectively, the northern and southern sections of this part of the projection, the Commission does not find that the evidence justifies any departure from the boundary line as found by the Commission to result from the 1900 Treaty.

4.69 The qualification as to the northern section relates to Tserona. In its Reply, Ethiopia stated that a number of specific places mentioned by Eritrea as the location of incidents on which Eritrea was relying were irrelevant, since they were in any event mostly in Eritrea. The words used by Ethiopia were that "Fort Cadorna, Monoxeito, Guna Guna and Tserona" were "mostly . . . undisputed Eritrean places." While Monoxeito and Guna Guna are on the Eritrean side of the Treaty line as determined by the Commission, the Commission finds that, on the basis of the evidence before it, Tserona and Fort Cadorna are not.

4.70 As to Tserona, the Commission cannot fail to give effect to Ethiopia's statement, made formally in a written pleading submitted to the

Commission. It is an admission of which the Commission must take full account. It is necessary, therefore, to adjust the Treaty line so as to ensure that it is placed in Eritrean territory.

4.71 The qualification as to the southern section relates to the Acran region and to Fort Cadorna. The Commission is satisfied that the evidence of Eritrean activity is sufficient, in terms of administrative range, quantity, area and period, to justify treating the Acran region as part of Eritrea. As regards Fort Cardorna, the Commission is bound to apply to that place, in the same way as it does to Tserona, the Ethiopian admission.

4.72 The Commission therefore decides that the boundary line which it has found to result from the 1900 Treaty must be adjusted in the manner set out in Chapter VIII, paragraph 8.1, sub-paragraph B.

2) The eastern part of the Belesa projection

4.73 This area lies to the east of the Belesa B and between the Ethiopian claim line passing to the north of Zalambessa and the Eritrean claim line passing along the Muna/Berbero Gado. It thus forms the central portion of the disputed territory along the Belesa-Muna line (the area shaded pink on Map 6, p. 36, above). Its principal town is Zalambessa, which did not exist in 1900.

(a) *Conduct relevant to the exercise of sovereign authority (effectivités)*

4.74 In this area the Parties have submitted evidence of activities which, they claim, establish or confirm their sovereignty over a number of localities. These activities comprise such matters as the administration of polling stations and the holding of elections and the independence referendum, the appointment and payment of local officials, the conduct of a national census, the structure of local administration, the issue of trading and business licences, the establishment of a customs office at Zalambessa, land distribution and management, the payment of taxes and financial tribute, the administration of justice, law enforcement, the provision of educational facilities, the administration of fuel supplies, the grant of a mineral concession, patrolling by the British Military Administration, the establishment of police posts, the maintenance of a rainfall measuring position and the conduct of border surveys.

(b) *Diplomatic and other similar exchanges and records*

4.75 As far as concerns the diplomatic or official record, the Commission has been presented with little in the way of evidence relating specifically to this part of the Belesa projection, apart from certain exchanges relating to Zalambessa, which has been the location for a considerable number of significant administrative activities by Ethiopian authorities. On a number of occasions, Eritrean officials appear to have acknowledged that Zalambessa is part of Ethiopia. Zalambessa appears to be the seat of Gulomakheda Wereda, a part of Tigray province. Both Parties agree that there is a customs post some 2 km north of Zalambessa – in fact, probably two customs posts,

one belonging to each Party, located close to each other. The location of such a post on one side of the town strongly suggests that the boundary is on the same side of the town, since to have a population centre *between* a boundary and a border customs post would be unusual. Ethiopia has, moreover, submitted evidence showing that the customs authorities of Eritrea regularly had dealings with the nearby Ethiopian customs post in such a way as to accept Zalambessa as part of Ethiopia. An additional exchange in 1996 leads to the same conclusion. In that year, the Ethiopian Ministry of Foreign Affairs requested Eritrea to allow a survey team to enter Eritrean territory. The Eritrean Ministry of Foreign Affairs, in responding positively to this request, referred to it as being incidental to the task of “rechecking border delineating points in Zalambessa [sic] area (Tigray region).”

(c) *Maps*

4.76 The Commission has already addressed in general terms the significance of the map evidence for the western part of the Belesa projection. Similar comments are called for in relation to the eastern part. The ambiguity of the map evidence is the greater in this area, because the eastern part of the Belesa projection does not have the distinctive southward pocket which is so characteristic of the western part.

(d) *Conclusion regarding the eastern part of the Belesa projection*

4.77 The Commission has carefully weighed the evidence with which it has been presented by both Parties. Except to the extent corresponding to paragraphs 4.68-4.72, above, the Commission does not find that the evidence of the Parties’ conduct establishes any departure from the boundary line as found by the Commission to result from the 1900 Treaty, save in respect of Zalambessa. There the evidence supports the conclusion that that town is Ethiopian.

4.78 The Commission has already decided that the boundary line resulting from the 1900 Treaty must be adjusted so as to ensure that Tserona, the Acran region and Fort Cadorna are placed in Eritrean territory (see paras. 4.70-4.72, above). The manner of that adjustment is set out in Chapter VIII, paragraph 8.1, sub-paragraph B, below. The Commission now accordingly decides that the boundary resulting from the 1900 Treaty must be further adjusted, in the manner also set out in Chapter VIII, paragraph 8.1, sub-paragraph B, so as to place Zalambessa in Ethiopian territory.

3) The Endeli projection (Irob)

4.79 The Endeli projection consists of the roughly triangular piece of territory bounded on the south by the Muna/Berbero Gado, on the northeast by the upper reaches of the Endeli going upstream towards Senafe, and on the west by the north-south line of the Ethiopian claim line running down from near Senafe (this area is shaded blue on Map 6, p. 36, above). The principal population centre is Alitena. Although a substantial part of Irob lies to the

north of the Muna/Berbero Gado, and thus within the Endeli projection, part of the region also lies to the south of that river and thus within Ethiopian territory. Geographical specificity is therefore particularly important in relation to incidents or activities occurring in the Irob area.

(a) *Conduct relevant to the exercise of sovereign authority (effectivités)*

4.80 In this area the Parties have submitted evidence of activities which, they claim, establish or confirm their sovereignty over the localities in question. These activities comprise such matters as the regulation of religious and social institutions, civil administration, the management of local officials, the administration of elections and the independence referendum, the conduct of a national census, the structure of local administration, questions of land management and title, payment of taxes and payment of tribute, the administration of justice, law enforcement, administration of educational institutions, administration of public health, and the operation of public works projects.

(b) *Diplomatic and other similar exchanges and records*

4.81 The diplomatic and official record as put before the Commission includes an Italian military report of 1901, Martini's letters of June and July 1901 to Ciccodicola, Checchi's memorandum of 1915, Governor Zoli's report of July 1930, Italian Ministry of Colonies' report of 1930, Governor Astuto's report of May 1933, and Italian protests at cross-border incursions of 1933.

(c) *Maps*

4.82 The map evidence is uneven in relation to the Endeli projection. Very few maps depict an Endeli projection as appertaining to Ethiopia, and there is considerably more map support for a boundary along the Muna/Berbero Gado, at least along its lower reaches. At the same time there are a number of Italian maps spanning several decades after the conclusion of the 1900 Treaty which show no boundary along that part of the Muna/Berbero Gado, even though showing one elsewhere. There are also Italian maps showing, either expressly or implicitly, the upper reaches of the Endeli as the effective limit of Italian occupation.

4.83 The extent of Acchele Guzai and Agame has been of some importance in the context of the Endeli projection. The map evidence is unclear. Most maps do not give any indication of the two regions. Of those that do, some indicate only the one but not the other. Of those that do indicate one or both of the regions, by far the majority mark them in areas which do not impinge upon the Endeli projection, placing them respectively well to the north of Senafe or well to the south of the Muna/Berbero Gado. Relatively few mark the regions in such a way as to suggest which region includes all or part of the Endeli projection. It is in any event of the nature of cartographic indications of general geographic regions that they are unspecific, since the regions being indicated are usually themselves not limited by specific borders.

(d) *Conclusion regarding the Endeli projection*

4.84 The Commission has given careful consideration to the evidence submitted by the Parties. As in the other sectors, the evidence is not wholly consistent and does not lead in one direction only. The Commission does, however, conclude that for the most part the stronger evidence of administrative and resultant activity has been presented by Ethiopia. The Commission has also attached weight to the facts that several Italian maps refrained from indicating a boundary along the southern limits of the Endeli projection, and have marked the upper reaches of the Endeli River as the actual limit of Italian occupation. Moreover, the Commission has noted that in several reports senior Italian officials, and also Italy's formal complaint to the League of Nations, acknowledged that significant parts of the area covered by the Endeli projection had always been Ethiopian and that Italy had never been present there.

4.85 Even so, the Commission is unable to draw from this the conclusion that it should vary the 1900 Treaty line so as to include the whole of the Endeli projection within Ethiopia. The Commission has noted that, in general, the impact of Ethiopian administrative activity has been weaker, and the impact of Eritrean activity stronger, in the northern and western fringes of the Endeli projection, and that therefore Ethiopia has not established its effective sovereignty to the required degree over those areas. The Treaty line should therefore be varied so as to place only the more southerly and easterly parts of the Endeli projection in Ethiopia.

4.86 The Commission therefore decides that the Treaty line must be accordingly adjusted in the manner set out in Chapter VIII, paragraph 8.1, sub-paragraph B, below.

4) The Bada region in the central sector

4.87 The Commission notes at the outset the need for caution in recording and responding to incidents said to have occurred "in Bada," since there is both a region of Bada, primarily consisting of the Bada plain, and a village in that region named Bada. Bada village appears to be located to the northeast of Rendacoma and possibly astride the Ragali. The Bada region is a broad area lying generally to the north of the Salt Lake and straddling the Endeli/Ragali rivers, so that it is partly on the Eritrean side of the boundary determined by the Commission to have been laid down in the 1900 Treaty (i.e., north and east of the Endeli/Ragali) and partly on the Ethiopian side (i.e., south and west of the Endeli/Ragali). Both Eritrea and Ethiopia appear to have local administrative sub-districts named "Bada." It is therefore particularly important to know precisely where particular events are said to have occurred before being able to attribute to them significance as regards the limits of territorial authority. Moreover, given that the Bada region is associated with the Endeli and Ragali, and that there may be settlements which, under a single name, spread over both sides of what may be regarded as boundary rivers, it

will sometimes be particularly important to know precisely where within a settlement a particular incident or activity is said to have occurred.

(a) *Conduct relevant to the exercise of sovereign authority (effectivités)*

4.88 In this area the Parties have submitted evidence of activities which, they claim, establish or confirm their sovereignty over the localities in question. These activities include such matters as the operation of telegraph and telephone communications facilities, the grant of a mineral concession and licences for associated communications facilities, the promotion of irrigation projects, the organisation of elections and the independence referendum, the holding of a national census, the administration of public health services, the administration of educational institutions, the establishment of military and police posts and the carrying out of military patrols, and the structure of local administration.

(b) *Diplomatic and other similar exchanges and records*

4.89 As far as concerns the diplomatic or official record, the Commission has been presented with little in the way of evidence relating specifically to the Bada area, apart from two incidents in 1901 and 1929 involving Tigrayan raids into the Bada area. The exchanges were, however, unspecific as to location and ambiguous as regards their import for questions of territorial sovereignty.

(c) *Maps*

4.90 The only point of disagreement between the Parties is where along the Endeli or Ragali the 1900 Treaty line ends and therefore the 1908 Treaty line begins. The map evidence overwhelmingly supports the Endeli/Ragali as the boundary. As to this, most maps are unspecific. Apart from the map attached to the report of the 1904 Boundary Commission (see Appendix A, below) which in any event is in this respect ambiguous, very few, if any, of the maps submitted in evidence clearly depict a boundary ending at Massolae. Of the rest, those which do depict an eastern terminus are almost equally divided between those which show it at or near Rendacoma and those which show it further to the east, at or near Ragali or, in a few instances, at the Salt Lake.

(d) *Conclusion regarding the Bada region in the central sector*

4.91 The Commission finds that the evidence is relatively sparse, often geographically unspecific, and of ambiguous significance for questions of territorial sovereignty. In particular, the evidence contains little support for terminating the 1900 Treaty boundary at some point (such as Massolae or Rendacoma) west of the Salt Lake. Accordingly, the Commission does not regard the evidence of the Parties' conduct in this area as a basis for departing from the boundary line as found by the Commission to result from the 1900 Treaty.

C. THE COMMISSION'S CONCLUSIONS REGARDING THE 1900 TREATY LINE AS A WHOLE

4.92 The Commission's conclusions regarding the 1900 Treaty line as a whole will be found in Chapter VIII, paragraph 8.1, sub-paragraph B.

CHAPTER V – THE SECTOR COVERED BY THE 1902 TREATY (WESTERN SECTOR)

A. THE TREATY TEXT

5.1 The Commission turns now to the sector covered by the 1902 Treaty, namely, the western sector. The second paragraph of Article I of the Treaty states that the frontier shall begin at the junction of the Khor Um Hagar with the Setit and extend to the junction of the Mareb and the Mai Ambessa.

5.2 The 1902 Treaty was described as being an Annex to the 1900 Treaty. Unlike the 1900 Treaty, which was a bilateral treaty between Ethiopia and Italy, the 1902 Treaty was a trilateral agreement to which Britain was also a party. This was because part of it (Article II) related to the frontier between Sudan (then under British administration) and Eritrea.

5.3 Article I of the English text provides as follows (the three paragraphs of the article were not individually numbered, but for convenience the Commission has inserted the numbers (i), (ii), (iii)):

- (i) The frontier Treaty between Ethiopia and Eritrea, previously determined by the line Tomat-Todluc, is mutually modified in the following manner: –
- (ii) Commencing from the junction of the Khor Um Hagar with the Setit, the new frontier follows this river to its junction with the Maieteb, following the latter's course so as to leave Mount Ala Tacura to Eritrea, and joins the Mareb at its junction with the Mai Ambessa.
- (iii) The line from the junction of the Setit and Maieteb to the junction of the Mareb and Mai Ambessa shall be delimited by Italian and Ethiopian delegates, so that the Canama tribe belong to Eritrea.

An English translation of the Amharic text of paragraphs (ii) and (iii) reads as follows:

The new frontier will start from Khor Um Hagar and Setit River junction and will follow the River Setit to the junction of the Mai Ten and Setit Rivers. From this junction, the frontier will leave Ala Takura in Eritrea and go to the junction of Mereb and Mai Ambessa. The boundary between the junction of the Mai Ten and Setit to the junction of Mereband Mai Ambessa will be decided after representatives of the Italian government and the Ethiopian government look into the question and reach agreement. The representatives entrusted with this decision will decide in such a way that the Negroes of the Cunama tribe are in Eritrean territory.²⁹

²⁹ Translation provided in the Eritrean pleadings.

5.4 Article II of the Treaty provides:

The frontier between Sudan and Eritrea, instead of that delimited by the English and Italian delegates by the Convention of 16th April, 1901 (No. 343), shall be the line which, from Sabderat, is traced via Abu Jamal to the junction of the Khor um Hagar with the Setit.

Article II has limited bearing on the issues presently before the Commission and only brief reference will be made to it in connection with the western terminus of the border (see paras. 5.6-5.12, below). In contrast with the 1900 Treaty, no map was attached to the 1902 Treaty or formed part of it.

5.5 The final paragraph of the 1902 Treaty states that it has been signed “in triplicate, written in the Italian, English and Amharic languages identically, all texts being official.” In contrast with the final paragraph of the 1900 Treaty, the 1902 Treaty does not contain the proviso that “in case of error in writing the Emperor Menelik will rely on the Amharic version.” However, the Commission does not need to consider whether this proviso carries over into the 1902 Treaty by reason of the latter being an “annex” to the 1900 Treaty because in the present case Ethiopia has not sought to invoke the Amharic version, although Eritrea has (see para. 5.15, below).

B. THE WESTERN TERMINUS

5.6 The Commission will begin its consideration of the 1902 Treaty by examining the location of the western terminus of the boundary as expressed in the opening words of Article I, paragraph (ii): “Commencing from the junction of the Khor Um Hagar with the Setit”

5.7 The Secretary of the Commission, in the performance of his function under Article 4, paragraph 9, of the December Agreement, found that there appeared to be no dispute between the Parties with regard to this portion of the border. Nor is the subject one to which the Parties gave any specific attention in the course of their pleadings, though Ethiopia stated that it reserved its position in relation thereto. However, a number of documents and large-scale maps represent or speak of the boundary as commencing not at Khor Um Hagar, but further to the west, at the confluence with the Setit of the Khor Royan, a river flowing into the Setit from the ESE (Point 1). The Commission therefore finds it necessary to consider the location of the western terminus.³⁰

5.8 Article II of the 1902 Agreement amends the frontier between Sudan and Eritrea as delimited initially by a treaty of 16 April 1901.³¹ Another agreement between Sudan and Eritrea of the same date describes the demarcation of this boundary.³² A further agreement of 22 November 1901 provides for the completion of the delimitation between Sudan and Eritrea “as

³⁰ The relevant treaty texts are collected in Professor I. Brownlie’s *African Boundaries* (1979) (hereinafter referred to as “*African Boundaries*”).

³¹ *African Boundaries*, p. 864.

³² *Id.*

far as the junction of the Khor Um Hagar with the River Setit” – “the line to be eventually demarcated by special Delegates.”³³ The Khor Um Hagar is mentioned again as a location on the frontier between Sudan and Ethiopia in Article I of the Treaty of 15 May 1902, which is an agreement distinct from the 1902 Treaty involved in the present proceedings.³⁴

5.9 The 1902 Treaty, it will be recalled, was described as an Annex not only to the 1900 Treaty but also to the separate Treaty of 15 May 1902 regarding the frontier between Sudan and Ethiopia, the agreement mentioned in the preceding paragraph. To implement the changes made in the latter agreement, a further Sudan-Eritrea agreement was made on 18 February 1903³⁵ which ran the line of “the rectified boundary” along a new course from the Jebel Abu Gamal “to the bend of the Setit immediately opposite the mouth of the Khor Royan.” This was later referred to as “the Talbot/Martinelli demarcation.”

5.10 This agreement was confirmed by a further Sudan-Eritrea agreement of 1 February 1916, of which the first article read:

The boundary starts from a point on the right bank of the Setit River, immediately opposite the mouth of the Khor Royan.³⁶

5.11 Ethiopia accepted this amendment by an Exchange of Notes of 18 July 1972 in the following words:

Basic acceptance of Major Gwynne’s demarcation on the basis of the 1902 and 1907 treaties As regards the boundary north of the Setit River, acceptance of the Talbot/Martinelli demarcation of February 1903 (as intensified in February 1916) as the boundary line as far as Abu Gamal.³⁷

Thus, it was the February 1903 demarcation that brought the tripoint to the northbank of the Setit opposite the Khor Royan.

5.12 It is not open to the Commission to change the agreed tripoint between Eritrea, Ethiopia and the Sudan. As the Ethiopian-Eritrean boundary is in this sector a river boundary,³⁸ it must be treated as starting at the tripoint, then running to the centre of the Setit, immediately opposite that point, before turning eastwards and continuing up the Setit until it turns to the northeast to run towards the confluence of Mareb and Mai Ambessa (Point 9).

C. THE SECTOR SETIT-MAREB

5.13 The Commission turns now to consider the most contentious part of the boundary covered by the 1902 Treaty, namely, the point in the Setit where the boundary turns away from this river to follow another named river

³³ *Ibid.*, p. 865.

³⁴ *Ibid.*, p. 866.

³⁵ *Ibid.*, p. 868.

³⁶ *Ibid.*, p. 871.

³⁷ *Ibid.*, p. 877.

³⁸ See Chapter VII, below, for consideration of the boundary within rivers.

towards the confluence of the Mareb and the Mai Ambessa (Point 9). This other river is named the “Maieteb” in the English version of the Treaty and “Maiten” in the Amharic version. The central question in this part of the case is, therefore, to what river the Treaty here refers. Closely associated with this is the question of the course of the link between that river and the Mareb.

5.14 Ethiopia contends that, as used in the Treaty, “Maieteb” refers to the river of that name that reaches the Setit from the northwest at Point 3, from the source of which a straight line is drawn to Point 9 (hereinafter referred to as the “western Maiteb”). As drawn on the maps invoked by Ethiopia, this line runs to Point 9 at an angle varying between 65° and 73° east of true north.

5.15 Eritrea initially maintained that the river designated in the equally authoritative Amharic version of the Treaty is named the Maiten. A river of similar name, the Mai Tenné, joins the Setit at Point 8, some 87 km further east than the western Maiteb. From this confluence, Eritrea contended that a straight line runs northeast to Point 9. Such a line would be at an angle that, depending on the map used, varies between 13° and 16°. Eritrea later submitted that the boundary line subsequently established and maintained by the Parties was a straight line running from the confluence of the Setit and the Tomsa (Point 6) to the Mai Ambessa (Point 9). Such a line runs at an angle varying between 22° and 25° from true north. In its final submissions, however, Eritrea gave as the southern terminus of the straight line connecting to Point 9 what turn out to be two different locations. One, defined by coordinates (14° 05' 45.6" N, 37° 34' 26.4" E), terminates at Point 7A. The other is defined in terms of a claim line drawn on a map which, however, terminates at a different location, namely, Point 7B (14° 06' N, 37° 35' E). Neither of these is at the Tomsa (Point 6). Eritrea also suggested that the original Treaty reference to the “Maiteb” was actually to the Sittona (Point 4).

1) Interpretation of the Treaty

5.16 The resolution of this issue depends initially upon a proper interpretation of the Treaty. That interpretation in turn depends upon the text of Article I, read in the light of its object and purpose, its context and negotiating history, and the subsequent course of conduct of the Parties in its application – all of which are tools for determining “the common will” of the parties.

(a) *The terms of the Treaty*

5.17 The determination of the meaning and effect of a geographical name used in a treaty, whether of a place or of a river, depends upon the contemporary understanding of the location to which that name related at the time of the treaty. If the location can be identified without difference of opinion, interpretation is relatively simple. But when the maps available at the time vary in their placement of the feature, difficulties emerge. That is to some extent the problem in the present case.

5.18 The Commission accepts that at first sight the reference to the Maiteb in Article I (ii) of the Treaty appears to be to the river of that name, as argued by Ethiopia, that joins the Setit at Point 3. One contemporary map in particular, the Sketch Map illustrating Article I of the Treaty between Great Britain and Ethiopia relating to the Sudan border signed on the same day as the 1902 Treaty involved in the present case, shows clearly in its top right corner the northern terminus of that boundary ending at the Setit and then indicates a short eastward-extending stretch of the Setit, which, in its turn, ends at a tributary that the Sketch Map calls the “Maiteb.” The same is shown on a map of the Anglo-Egyptian Sudan of 1901 and even more clearly on the so-called Talbot-Colli map of the same year. These maps extend no further east than the Maiteb as there presented. Nor is there any evidence that the Parties were in possession on 15 May 1902 of any map showing a river Maiten (or Mai-Tenne) (Point 8) even further east. The first map on which a river of that name is shown is the 1904 Italian Carta Dimostrativa, on a scale of 1:500,000. On the basis of these maps, therefore, it is arguable that the river identified by Ethiopia as the Maiteb (the confluence of which with the Setit is shown at Point 3) is the Maiteb to which the Treaty refers.

5.19 As against this, however, there is more convincing evidence that the Maiteb is not the river which the Parties had in mind. The maps just referred to were not the only ones likely to have been familiar to the negotiators who were, on the Ethiopian side, the Emperor Menelik and, on the Italian side, Major Ciccodicola. Nor were these maps used in the negotiations.

5.20 The Emperor Menelik appears to have left no record of the negotiations. On the Italian side, however, there are two reports of Major Ciccodicola, dated 16 May 1902 and 28 June 1902, one immediately after the signature of the Treaty, the other barely five weeks later, which indicate clearly the map that was actually used in the discussions.

5.21 In his first report, dated 16 May 1902, Ciccodicola, cabling from Addis Ababa, informed the Governor of Eritrea, Martini, that the 1902 Agreement had been signed the previous night:

. . . the Cunama remains with us as soon as the ratification takes place. The border line will be delimited on the ground by delegates; it is now fixed by two well defined points, *see Mai Daro demonstrative map 1900 Military Geographical Institute scale 1 to 400,000 that is the course of the Maiteb east of Montala Tacura and Mai Ambessa with the Mareb.*³⁹

The Mai Daro demonstrative map here referred to appears to be the map that was attached to Ciccodicola’s second report as “Sketch No. 7,” which is examined below. A copy of this map appears as Map 8, on page 62. It will be referred to as the “Mai Daro map.”

³⁹ Commission’s emphasis.

5.22 In his second report, of 28 June 1902, Ciccodicola said:

. . . [W]hen negotiating, I have always used the maps sent by the Government. But since the afore-mentioned Maidaro paper is not a sure basis, I had to accept at least in part Menelik's objections, based on the information of the places obtained by him, and make him accept, albeit not without pain and hard work, as the general direction of principle of the boundary between the Cunama and the Adiabo, *the line which appears in the afore-mentioned Maidoro [sic] sheet*⁴⁰ *determined by the mouth of the Maiteb in the Setit, turning east of the Ala Tacura mountains, and then going to the Mareb, at the Mai-Ambessa junction.*

In future, our delegates and Ethiopian delegates will determine the boundary exactly, by surveying with an investigation on the ground. It remains therefore established that the Cunama villages become part of the Colony of Eritrea, as of the day of the sovereign ratification of the convention.⁴¹

5.23 The fact that the Mai Daro map spelled the river as "Meeteb" does not appear to the Commission to affect the situation, for Ciccodicola appears to have equated "Maiteb" with "Meeteb." The intention of the negotiators revealed by the two letters is sufficiently clear.

5.24 The Commission attaches importance to the Mai Daro map because it clearly shows that, contrary to inferences that might otherwise be drawn from the existence of other maps of the area showing the location of the Maiteb as being that of the western Maiteb at Point 3, such maps were not used in the negotiations between Menelik and Ciccodicola. Nor, seemingly, was their detail relating to the location of the western Maiteb taken into account by Menelik or Ciccodicola. As Ciccodicola's report makes plain, the only map that he and Menelik had before them was the Mai Daro map.

5.25 There are no less than four reasons why the river named "Meeteb" and the mountain called "Ala Tacura" shown on this map could not actually have been situated in the proximity of the western Maiteb. The first is that the location of Mai Daro at the top of the map and of the confluence of the Mareb and Mai Ambessa (Point 9) are in reality well to the east of the confluence of the western Maiteb with the Setit (Point 3) – as can be demonstrated by dropping a meridional line from Mai Daro southwards to the Setit. Second, the river marked "Meeteb" on the map joins the Setit at a point that lies on the eastern part of the prominent north-trending bend in that river, whereas the confluence of the western Maiteb and the Setit (Point 3) lies well to the west of that curve. Third, the direction and length of the course attributed to the Meeteb on the map differs markedly from the course and length of the western Maiteb. Fourth, a straight line drawn from any point on the western Maiteb that joins the Setit at Point 3 could only reach Point 9 at the angle of 60°-65°, while the line on Map 8 reaches Point 9 at the markedly different angle of 45°.

5.26 The significance and evidentiary weight of the Mai Daro map is confirmed by its similarity with the de Chaurand map of 1894. An excerpt

⁴⁰ See Map 8.

⁴¹ Commission's emphasis.

from this map appears as Map 9, on page 64. This, it will be recalled, is the map that was expressly stated to have been the basis for the 1900 Treaty map and it must have been familiar to the negotiators. It does not show any Maiteb or Meeteb remotely near the confluence of the western Maiteb and the Setit (Point 3). It does, however, show quite clearly a “Maitebbe-Meeteb” joining the Setit at Point 4 on the east side of the prominent north-pointing bend, running first northeast and then east. It also shows a “Mount Ala Tacura,” just north of the river. In these major respects, it is almost identical with the Mai Daro map. The only respect in which both the Mai Daro map and the de Chaurand map differ significantly from later maps is in the name given to the river. What is called in them “Maitebe” or “Meeteb” was known even at the time by some as Sittona and was so called on other maps soon afterwards.

5.27 The identification of the Maiteb referred to in the 1902 Treaty as the Meeteb of the Mai Daro map or the Maitebbe-Meeteb of the de Chaurand map does not, however, by itself resolve the question. It is necessary to have regard also to a further important element in the interpretation of treaties, namely, the object and purpose of the Treaty.

(b) *The object and purpose of the Treaty*

5.28 The object and purpose of the 1902 Treaty can be considered at two levels: the general and the particular. At the general level, it is obvious that the Treaty was intended to determine a boundary. Such an identification of purpose, however, does not advance matters, since it does not help in the choice between one possible boundary and another.

5.29 More important is the identification of the particular object of the Treaty. Here it is necessary to distinguish between two separate matters dealt with in Article I of the Treaty. The first, in paragraph (i), is the reference to Mount Ala Tacura. The frontier is to follow the course of the Maiteb so as to leave that mountain to Eritrea. The second is the provision in paragraph (ii) that the line from the junction of the Setit and the Maiteb to the junction of the Mareb and Mai Ambessa “shall be delimited by Italian and Ethiopian delegates, so that the Cunama tribe belong to Eritrea.”

(i) The reference to Mount Ala Tacura

5.30 Of these two aspects, the first is of little importance. It says no more than that the boundary following the principal named geographical feature, the Maiteb, will have the effect that it passes to the east of the named mountain, thereby leaving it to Eritrea. That is not a statement of an object of the Treaty.

(ii) The incorporation of the Cunama into Eritrea

5.31 The second aspect, the requirement in paragraph (ii) that the line should be so delimited “that the Cunama tribe belong to Eritrea,” is of a different order of significance. It reflects the growing Italian interest in the Cunama in the preceding years. This interest is evidenced by a report of the

instructions given by the Italian Foreign Ministry to Consul General Nerazzini on 22 March 1897

. . . in order to *add the tribe of the Cunama to the Eritrean Colony*, to keep the trade roads to Gonda and the vast fertile basin of the Tzana free and under our complete control, thus anticipating and satisfying the desires and fair requests of the Commissioner for Eritrea.⁴²

The idea of following tribal boundaries was one which, it appears, was subsequently acknowledged by Menelik in his negotiations with Britain in May 1899 for the settlement of the boundary between Sudan and Ethiopia and was repeated on the British side.

5.32 This particular objective was pursued further in a Confidential Arrangement between Britain and Italy of 22 November 1901, which provided in paragraph 5 that:

The British and Italian Agents in Abyssinia will work together in concert to obtain from Emperor Menelik in return for this extension of the Abyssinian boundary, a zone of territory to the east of the Todluc-Maiteb line, *which will give to Erythrea the whole of the Kunama tribe up to the Mareb*.⁴³

This Declaration did not, of course, bind Ethiopia, but it does demonstrate the existence of the Italian interest in obtaining the territory occupied by the Cunama tribe, as well as the British recognition of that interest.

5.33 Further significant evidence of the importance attached by Italy at that time to the acquisition of the Cunama land is provided by the terms in which Ciccodicola and Martini, the Governor of Eritrea, both commented upon the Treaty soon after its conclusion (see paras. 5.39-5.41, 5.46, below).

5.34 Lastly, the terms of the 1902 Treaty itself attest to the objective of achieving the transfer to Eritrea of the Cunama. Thus, paragraph (iii) of Article I of the 1902 Treaty provided:

The line from the junction of the Setit and Maiteb to the junction of the Mareb and Mai Ambessa shall be delimited by Italian and Ethiopian delegates, *so that the Canama [sic] tribe belong to Eritrea*.⁴⁴

These words indicate that the line described in the Treaty was not completely defined; that a portion of it was still to be delimited by delegates of the two Parties; and that the object of that delimitation was precisely to ensure that the Cunama tribe belonged to Eritrea. This must be a reference to at least the bulk of the Cunama tribal area, if not the whole of it. There appears to be no basis for any suggestion that the intention was to confine it to a significantly truncated part of the Cunama tribe or its tribal area. Thus, the text contemplates that the delegates of the Parties were to perform a two-stage

⁴² This report was referred to in the report of 28 June 1902 from Major Ciccodicola, the Italian negotiator of the 1902 Treaty, to the Italian Ministry of Foreign Affairs, cited in para. 5.22, above.

⁴³ Commission's emphasis.

⁴⁴ Commission's emphasis.

function: first, they would have to ascertain facts, namely, the region regarded as the domain of the Cunama; second, they would have to reflect those facts by the construction of an appropriate line that placed that region in Eritrea not Ethiopia. In fact, no such delimitation by delegates of both Parties ever specifically took place.

5.35 There was an additional objective that Italy had in mind at this time (as indicated in the instructions to Nerazzini quoted in para. 5.31, above), though not expressly referred to in the Treaty, namely, to ensure its control over an important trade route through which much commerce of Eritrea passed to and from Ethiopia, namely, the road or track that connected Ducambia, on the southern bank of the Mareb, with Sittona, on the northern bank of the Setit and which continued southwards to Gondar in Ethiopia. This ran on an approximately north-south curved axis at 37° 24' E longitude. This route was subsequently shown on a map entitled "Strade Commerciali Setit Noggara e Setit – Gondar," circa 1904-1906.

5.36 While the first objective – the assignment of Cunama land to Italy – was an explicit common objective of the Parties, the second objective just mentioned may be regarded as essentially Italian. There is no specific evidence as to Ethiopia's objective with respect to the trade route; nor is there any evidence suggesting Ethiopian opposition to Italy's objectives in this regard.

(c) *The relation between the negotiations of May 1902 and the principal objective of the Treaty*

5.37 The objective of attaching the Cunama to Eritrea having thus been identified, it is now necessary to examine more closely how this was reflected in the manner in which Article I of the Treaty was concluded. As stated, it was negotiated, on the Ethiopian side, by the Emperor Menelik himself and, on the Italian side, by Major Ciccodicola.

5.38 The Emperor Menelik appears not to have left any record of the negotiations. On the Italian side, however, reference has already been made to the two reports of Major Ciccodicola of 16 May 1902 and 28 June 1902. Moreover, there is another document, written in August 1902, that throws light on the intention and understanding of Martini, then Governor of Eritrea (see para. 5.46, below).

5.39 In his first report Ciccodicola stated:

... the Cunama remains with us as soon as the ratification takes place. The border line will be delimited on the ground by delegates

5.40 In the first part of his second report, of 28 June 1902, entitled significantly "Agreement for the Cunama," Ciccodicola noted that:

In future, our delegates and Ethiopian delegates will determine the boundary exactly, by surveying with an investigation on the ground. It remains therefore established that

the Cunama villages become part of the Colony of Eritrea, as of the day of the sovereign ratification of the convention.

5.41 This last observation reflected the uncertainty that both negotiators evidently felt about the exact course that the line from the Setit to the Mareb should follow and which they had deliberately left open by using the words:

[t]he line from the junction of the Setit and Maiteb to the junction of the Mareb and Mai Ambessa shall be delimited by Italian and Ethiopian delegates, so that the Canama tribe belong to Eritrea.⁴⁵

5.42 Thus the legal position at this juncture appears to the Commission to be as follows. Although the Parties used the name “Maiteb” in the Treaty, it is clear that they did not thereby intend to refer to the western Maiteb, since it lies considerably west of the Meeteb (Sittona) which the negotiators evidently contemplated (on the basis of the Mai Daro map) as the southern end of the eastern boundary of Cunama territory, and of the link between the Setit and the Mareb delimiting that territory. The details of the line between the Sittona, the river they actually had in mind, and the Mareb were, however, left for later delimitation. No formal delimitation was ever carried out.

5.43 Although a great deal of evidence was placed before it, mostly from the Italian archives of the period 1902-1932, discussing the location of the Maiteb and the possibility that the intended river was the Maiten, the Commission does not find it necessary, in light of its findings, to enter into any discussion of this material. Nor has the Commission been able to identify any evidence of events in the years following 1902 to suggest that the Parties’ actual intention to select the Meeteb of the Mai Daro map was changed to the western Maiteb.

2) Developments subsequent to the Treaty

5.44 In order to complete its task of interpreting the Treaty in the light of applicable international law, the Commission now turns to an examination of the principal items evidencing subsequent conduct or practice of the Parties that the Commission considers relevant for this purpose.

5.45 In the nature of things, the catalogue that follows cannot be comprehensive. The Commission omits many minor points of detail which appear to it not to affect the main course of developments. The consideration of the material will be more detailed in the first thirty or so years following the Treaty. This is because by the early 1930s the situation had largely crystallized. Events subsequent to 1930, though much discussed by the Parties, merely confirmed the present situation in a variety of ways. That material will, therefore, be presented more briefly.

⁴⁵ See Appendix B, below, for details regarding the extent of contemporary knowledge of the location of the Cunama.

Martini letter, 3 August 1902

5.46 A letter that Martini wrote to Ciccodicola, though reflecting some misunderstanding about the river names,⁴⁶ is clear in its emphasis on the intention of the Treaty to transfer the Cunama to Eritrea:

I have received the note of 21 June No. 80 by H.E. and the enclosed copy of the report that you sent to H.E. the Minister of Foreign Affairs on therecent Convention between Italy, England and Abyssinia.

The purpose of the secret treaty, concluded in Rome on 22 November of last year between England and Italy, was, among other things, the transfer of all Cunamas established between the Gash and the Setit, to our dependency. This is also affirmed in the second paragraph of Article I of the Convention of 15 May 1902 with Menelik.

However, you rightly complain of the lack of reliable date for that area. The map at 1/400,000 is not regarding the course of the Setit, at all precise. The fact that that map had to be used in the negotiations with the Negus had an unfavourable influence on the geographic determination of the boundary as indicated in the first part of the mentioned Article I. This in fact establishes that our boundary follow the Setit from its junction with the Mai Teb, then go up the latter and from there go toward the Mareb, ending the front of the source of the Mai Ambessa [sic].

Now, as I could ascertain myself during my recognition of the Setit, *this boundary would break in two those Cunama which, it has been established, should entirely pass to us.*

In fact, the Cunama towards the east go up to the river Sittona.

It is also true that on the maps at 1/400,000 the course of the Maiteb appears to be confused with that of the Sittona. In fact, the Sittona enters the Setit at the top of the big arc that the Setit does in coming out of Uolcait and Adiabo to enter the Cunama region. Now, on the 1/400,000 map precisely in that point is marked the source of the Mai Teb.

I must also warn that according to the surveys made during my recognition of the area, while the source of the Sittona is distant in a straight line about one hundred and ten kilometers from Ombrega, that of the Maiteb is only forty [kilometres] distant.

The misunderstanding can certainly not be attributed to anyone; so far those regions were too scarcely known and reliable maps did not exist. Only now, with the surveys which I had made and with others carried out some time later it is possible to draw a rather faithful sketch. This sketch is already been made as soon as completed I will transmit a copy to you.

In any event, it must be kept in mind that *the boundary described in Article I of the Convention of 15 May 1902 is in open contradiction with the attribution of the Cunama to Italy which is the basis of that Convention and which is explicitly wanted,* as essential condition for the modifications of the boundary with England, also by the

⁴⁶ The misunderstanding about river names appears to stem from Martini's seeming belief that the Maiteb referred to in the 1902 Treaty was the western (Ethiopian) Maiteb. He rightly saw a boundary based on that river as breaking the Cunama in two. He also seems to have thought that the Meeteb on the Mai Daro map was the western Maiteb. In other words, while he appreciated that there were two distinct rivers at Points 3 and 4, which he called the Maiteb and the Sittona respectively, he appears not to have understood that the river at Point 4 (that he called Sittona) was in fact the Maiteb/Meeteb of the de Chaurand map and that it was that name that the Mai Daro map had given to the Sittona.

secret agreement of 22 November of last year. The designation of the boundary in the May Convention cannot, in my opinion, be considered if not as subordinated to the condition that that boundary be such as to be in harmony with the main stipulation, which is the transfer of the Cunama to Italy, *I have to insist particularly on our right to have all the Cunama up to the Sittona.*⁴⁷

Garasellassie letter, 8 August 1902

5.47 It is significant that Ethiopia evinced no inclination to question the manner prescribed for dealing with the Cunama lands. On 8 August 1902, Garasellassie, the Ethiopian Governor of Tigray, acknowledged a letter from Martini dated 3 August (not produced by either Party in these proceedings) in which Martini had reported on the borders agreed with Menelik, possibly along the lines of his letter to Ciccodicola of the same date. Garasellassie stated that “Cunama is a name that we generally apply to all of the Baria villages” and said that he would therefore “appreciate a clear explanation on which are the villages you mentioned from Mai Ambessa and [going to] the Setit. Please let me know the names of nearby villages so that I can use it as a rule.” The record contains no reply to this letter. It seems quite unlikely that Garasellassie would have written in these terms had he not clearly understood that the Cunama were to be placed in Eritrea.

Prinetti map, 10 December 1902

5.48 One of the earliest maps illustrating the boundary established by the 1902 Treaty is the Carta Dimostrativa presented to the Italian Parliament by the Ministry of Foreign Affairs on 10 December 1902. Drawn on a scale of 1:2,000,000, it is sometimes called the “Prinetti” map. It shows the boundary as following the Setit from the west. The western Maiteb is not shown where it might be expected, namely, to the west of the northward-trending curve of the river at about 36° 55'. Instead, the map shows a river called “Maiteb” to the southeast of that curve, at about the point where the Sittona meets the Setit (Point 4). The line then follows that river some distance before turning northeast to run straight to the Mareb/Mai Ambessa junction (Point 9) at an angle of about 50° from true north. The map thus does not support the Ethiopian claim line. Equally, it does not support the Eritrean line insofar as the latter claims to run northeastwards from the Tomsa (Point 6). In its placement of the Maiteb *vis à vis* Mai Daro to the north and its confluence with the Setit, the map resembles the “Mai Daro” map used by Ciccodicola and Menelik in the negotiations and is subject to the same comments.⁴⁸ As will be seen, the line on this map was not reproduced in later maps. It shows the Cunama as stretching across all the territory between the Setit and the Mareb from the border with the Sudan as far as the Treaty line. If, however, the confluence of the Setit and the Maiteb had been placed at its western location (Point 3), the line to Point 9 would have cut the Cunama territory in half.

⁴⁷ Commission’s emphasis.

⁴⁸ See, e.g., Zoli in 1929, para. 5.68, below.

1903

5.49 The second Italian map showing the boundary, or at any rate, the southern part of it, is the “Ombrega” sheet of the Carta Dimostrativa produced by the Istituto Geografico Militare in 1903. This shows the mouth of the western Maiteb at Point 3 and carries a marking indicative of the boundary line turning northeastwards at that point, but not following the Maiteb, at an angle of approximately 60° from true north. The line is not shown the whole way to Point 9, as it soon reaches the eastern margin of the map. But, at the point where it stops, it says “a Mareb Mai Ambessa.” A detailed map of the Cunama region on a scale of 1:400,000 prepared by Bordoni, dated 18 March 1903 and produced by the Istituto Geografico Militare in that year, evidently for internal use, shows the western Maiteb, and the beginnings of the boundary, also running northeastwards.

Gubernatorial Decree, 1903

5.50 On 25 March 1903, the Governor of Eritrea, Martini, enacted Gubernatorial Decree No. 178, which established a *Residenza* to exercise jurisdiction in the Gash (Mareb) and Setit area over the Baria and Cunama tribes. On 9 May 1903, the Governor published a further decree (No. 202) delimiting the territory of the new Residency. The relevant paragraph provided:

It [the border] first follows the Setit and then goes to the confluence of the Mai Ambessa with the Mareb.

Martini subsequently explained this step in a memorandum entitled “Administrative Districts” (undated, but possibly 1907; see para. 5.62, below).

Pollera report, 17 May 1904

5.51 On 17 May 1904, the Resident of the Government Seat of Gasc, Pollera, reported on the eastern border of the Cunama region and the territory between the Gasc and the Setit, between meridians 37° 30' and 37° 55'. The report merits extensive quotation and the pertinent parts are reproduced in Appendix B, below, para. B9.

5.52 The names and places mentioned in the Pollera report all appear in the accompanying “Demonstrative Sketch of the Region of Afra” on a scale of 1:400,000. This map is not dated but is stated in the list of maps in the Eritrean Atlas as being “1904.” It carries two lines of particular interest. One relates to “the territorial limits according to the Cunama tradition.” This leaves the Setit at a point near a mountain called “Ab Omi,” slightly southeast of the confluence of the Mai Tenné (Point 8). It then runs northeastwards until it meets the Mai Tenné, whereupon it turns northwest, crossing the Tomsa, until it reaches “M. Tabi” where it turns to the northeast again and runs to “Collina Gugula.” There it turns NNE until it reaches the Mareb at the confluence of the Gongoma, some distance upstream (i.e., southeast) of Point 9.

5.53 The other line of interest on this map is labelled “Confine che si propose” and seems to be the line which Pollera thought it would be appropriate to advocate in the negotiations that had yet to take place for the boundary in this sector. This line starts further upstream the Setit at the confluence of the Tomsa (Point 6), runs up that river in a northeasterly direction, follows a tributary of that river, the Gual Sohei, until it reaches the line marking the traditional limits of the Cunama possession at Collina Gugula. There, but without specific marking, it presumably joins the latter line. The general inclination of this line from Point 6 to Point 9 is 33° from true north.

5.54 This sketch is also one of the rare maps that mark a village called “Aifori,” just south of the Setit, approximately halfway between the confluences of the Sittona and the Tomsa with the Setit. Aifori is of interest because it was referred to in an Italian file note (with no stated author) dated January 1904, called “Pro Memoria.” This recorded that Ciccodicola had mentioned the opportunity of delimiting the border east of the Ducambia-Sittona road. Ciccodicola was also reported as stating that the village of Aifori south of the Setit would remain in Ethiopia, but the upper part (presumably the part north of the Setit) would remain with Italy. Also, the *baraca* (the plain) was to be divided in half between Eritrea and Ethiopia. Thus, if the Ethiopian contention is correct, the “upper part” of Aifori would, contrary to Menelik’s own request, have been part of Ethiopia.

Comando del Corpe di Stato Maggiore map, 1904

5.55 In 1904 there appeared the Comando del Corpe di Stato Maggiore map, on a scale of 1:500,000, of the whole of Eritrea. This, the first large scale map of the whole country, shows very clearly the boundary following the Setit from the west, passing a river called the “Mai Teb” at approximately 36° 52', then passing the mouth of the Sittona at approximately 37° 25', until at a river called “Tomsa” at approximately 37° 38' (Point 6) it turns sharply to the northeast at an angle of 23° to run in an unbroken straight line until it meets the Mareb at Point 9.

5.56 The line thus marked, with its two termini and general direction, is the line that has since then (with the exception of the 1905 Italian map about to be referred to and the Ethiopian map of 1923; see para. 5.65, below) constantly been adhered to on the maps produced by both Eritrea and Ethiopia. Having regard to the circumstances in which it was drawn, as described in a 1907 memorandum by Martini (see para. 5.62, below), the Commission is unable to accept the characterisation of the line as reflecting Italian cartographic expansionism or as having been drawn in any way other than in good faith. There is no evidence before the Commission to support such a characterisation which has merely taken the form of unsupported assertion.

Checchi map, 1904

5.57 In addition, there is an Italian map of the “Subdivisioni Territoriali d’Oltre Mareb,” completed by Checchi on a scale of 1:750,000, drawing the

boundary northeastwards from the mouth of the Tomsa at an angle of 24° from true north.

Miani map, 1905

5.58 In contrast with the 1904 map just mentioned, there appeared in 1905 another Istituto Geografico Militare map over the name of Captain Miani, also on a scale of 1:500,000, which in its geographical detail is very similar to the 1904 map. The principal relevant difference, however, is that it carries the boundary along the Ethiopian claim line direct from the mouth of the western Maiteb (Point 3), though not following that river, in a straight line to the Mareb/Mai Ambessa confluence (Point 9). In so doing, it cuts across the name “Cunama,” thus leaving part of that territory to Ethiopia.

5.59 In the same year, there appeared a further map from the Comando del Corpo di Stato Maggiore, on a scale of 1:800,000, showing much the same information as the Miani map of the same year. Again, the name “Cunama” is cut by the Ethiopian claim line, which runs at an angle of 63° from true north.

Martini reports, 1906

5.60 On 10 January 1906, the Governor of Eritrea, Martini, reported to the Italian Ministry of Foreign Affairs that

the border towards Adiabo is still to be defined on the ground following Article 1 of the 19 [sic] May 1902. Following the intention of the last sentences of the mentioned article and following the present de facto possession, the border can be marked with the line that goes from the confluence Mareb-Mai Ambessa and meets the Setit at the confluence with the torrent Tomsa, which is about thirty kilometres [upstream] to the confluence of the torrent Sittona, erroneously called Maiteb in the Dechaurand [sic] used as the basis for the treaty, I enclose the existing sketch with this courier.

5.61 It is difficult to be sure which sketch is here referred to as “the existing sketch.” But this may not matter, since three days later Martini sent a further message to Rome, on 13 January 1906, transmitting a “Copy of the sketch of the Afra region territory to the East of the previous one, that includes the zone where the border between Eritrean [sic] and Adiabo should be marked.” This sketch could have been the one prepared by Pollera two years previously because it bears the heading “Schizzo Administrativo Della Regione di Afra” and is the only one in the record that so specifically mentions Afra (see para. 5.52, above).

Martini report, 1907

5.62 In 1907, Martini filed a further Administrative Report in which he said:

With the acquisition of the Cunama by Eritrea, it was necessary to institute the residence of the Gash and Setit, which was established in 1903.

Considering that I had given a stable administrative organisation to the Colony, which followed the needs of the population and of the government, I had some studies done so that we could precisely define the territory and the people assigned to every regional office, and dependent on it. I therefore provided for the publication of the

Gubernatorial Decree no. 202 (attach. No. 1)⁴⁹ of May 9, 1903, in which that delimitation was determined.

To clarify the situation further, I also requested the publication of some special maps that represented geographically the territory and the people assigned to the different regional offices.

...

With the appropriate arrangements with the Negus, I provided for the constructions of two big roads: one that from Agordat Eimasa Elaghin reaches our border on the Setit and then continues within Ethiopia as far as Nogarra; the other also departing from Agordat, for Barentu, Ducambia on the Gash, *reaches the confluence of the Sittona on the Setit, after which it continues beyond our border into Birgutam and Cabta toend in Gondar.*

...

As I mentioned before, the construction of these two roads, *in the areas located inside our territory*, was also necessary for political reasons, in that they also *served the purpose of demonstrating to the lesser and greater chiefs our occupation of the new territories given to us by the Negus.*⁵⁰

Italian maps, 1907

5.63 It is not possible to identify with confidence the maps to which Martini was referring. There were, however, in that year, three further Italian maps. One, on a scale of 1:500,000 over the names of M. Checchi, G. Giardi and A. Mori, showed the same line as the 1904 map, leaving the Setit at the confluence of the Tomsa at an angle of 23°. This map carries the legend “Pubblicata a cura della Direzione Centrale degli Affari Coloniali.” The same Checchi map of 1907 was used in the same year, and on the same scale, under the title “Distribuzione del Bestiame nelle varie regioni della Colonia Eritrea.” The same line appears on a smaller scale Checchi map (1:4,000,000), showing lines of communication between Eritrea and Ethiopia and again in two further Checchi, Giardi and Mori maps of 1907, one on a scale of 1:800,000 specifically naming the Tomsa and the other showing roads and distances on a scale of 1:1,500,000, both published by the Directorate of Colonial Affairs.

Concessions map, 1909

5.64 An Italian map of the Principal Concessions for Minerals in Ethiopia, undated, by Carol Rosetti, who also produced a general map of the area in 1909 for the Istituto Geografico de Agostini shows the Eritrean line with the name “Cunama” covering the whole area between that line and the border with Sudan.

Ethiopian map, 1923

5.65 The only direct assertion in evidence before the Commission by Ethiopia of its claim line is to be found in the so-called “Haile Selassie map”

⁴⁹ See para. 5.50, above.

⁵⁰ Commission’s emphasis.

of 1923, by Kh. B. Papazian. This shows the Setit-Mareb link as running from what appears to be the western Maiteb to Point 9 at an angle of approximately 70° from true north.⁵¹

Ethiopian note, 1927

5.66 On 13 August 1927, Tafari Mekonnen, in a note to the Italian Minister in Addis Ababa, recalled that he had agreed with Mussolini in 1924/1925 that it would be appropriate promptly to demarcate the border, and he asked to be notified immediately of Italian concurrence “in order promptly to accomplish this effort.” This request was repeated on 6 March 1929.

Pizzolato report, 1929

5.67 A report dated 25 January 1929 by Commissioner Pizzolato and entitled “Recognition of a line of small posts at the border with the Adi Abo” starts by saying that he gathered soldiers at Biaghela, at Sittona and at Acqua Morchiti – all of which lie southeast of the Ethiopian claim line. He wrote of being able “to show the soldiers that all our march was taking place in Italian territory.” He mentioned arriving at Acqua Odas where there still existed a small fort that had been garrisoned until 1917. He told of his meeting with a local tribal chief whose “country lies deep within Italian territory” and asked him to explain to other chiefs that Italy had “in the past had small posts at Acqua Odas, Acqua Bar and Acqua Morchiti. Subsequently, given the good relations with the Ethiopian Government, the small posts had been closed.” Pizzolato indicated to the same chief that because of the cattle raids in the area, “the old small posts would be put back again.” He concluded by saying:

If we only want to be content with a certain surveillance over the very vast zone the small posts would have to be put back where they were in the past and staffed with some fifty men each.

The map dated the same day and described in paragraph 5.71, below, illustrates and bears out Pizzolato’s remarks.

Zoli report, 1929

5.68 By a letter dated the same day as Pizzolato’s report, 25 January 1929, Zoli, the Governor of Eritrea, reported to the Minister of Colonies on the current border situation between Ethiopia and Eritrea. He referred to doubts as to whether “Maiteb,” 30 km east of Ombrega, or the “Meeteb,” a further 100 km east, should be regarded as the river mentioned in the 1902 Treaty, which he called “the Additional Note.” Zoli said:

But the condition – clearly expressed in the Additional Note – that the border between the Setit and the Gasc must be traced on the site “so that the Cunama tribe will remain with the Eritrean Colony” does not leave any doubts regarding the negotiators’ intention and regarding the fact that the “Maiteb” of the Additional Note must be

⁵¹ The Italian understanding of what was believed to be the Ethiopian claim line in 1931 is illustrated on a map accompanying Governor Zoli’s report of 25 January 1929; see para. 5.68, below.

identified with the second stream “Meeteb” indicated on our maps; because the Cunama tribe extended – and still extends – territorially east of the Ambessa-Mareb-Meeteb confluence line, and considerably south of the Ambessa-Mareb-Mai Teb confluence line.

It appears that the lack of precision and the unfortunate wording of the Additional Note are derived from the fact that (to prepare it) the negotiators naturally used the border region maps existing at that time and [illegible]

In those maps the course of the Setit and the oro-hydrographic system of the surrounding region are represented in a completely erroneous manner.

5.69 Zoli then went on to identify the elements of the 1902 Treaty that might be useful in identifying the borders of the area. He observed

. . . that it certainly was Menelik’s intention to cede the entire Cunama territory to Italy, which at that time also included the village of Aifori (later raided and destroyed . . .), which was located precisely in the small hollow directly west of the above mentioned q. 636 (approximately 7 kilometres northwest of the confluence of the second “Meeteb” with the Setit) , as well as the entire Afrà region (approximately thirty kilometres in a straight northeast line from said confluence) used by the Cunama for the rubber harvest.

5.70 Zoli also said

[F]inally, the memory of former officials of this Government shows that the Emperor Menelik – in addition to the text of the Rider of May 15, 1902 – also set his seal on one map which showed the border between the Gasc and the Setit more or less in the position in which it is marked in the IGM 400,000 scale map – 1910 edition.

5.71 Zoli’s report was accompanied by a map of the region between the Setit and the Mareb which is of interest in a number of details:

(i) It marks the name “Cunama” across the whole of the region, extending as far east as the river “Gongoma,” a tributary of the Mareb joining that river upstream of the Mai Ambessa (Point 10). The “Adi Abo” region, by contrast, lying to the east of the Cunama, is clearly marked as lying east of the Gongoma in the north and of the Tomsa (Point 6) in the south.

(ii) The map shows a river “Mai Teb” corresponding to the western Maiteb, joining the Setit at approximately Point 3. It also shows a river called “Meeteb” flowing into the Setit further east (at about Point 5) between the Sittona (Point 4) and the Tomsa (Point 6).

(iii) Three lines are drawn on this map:

- One runs from a point some distance up the western Maiteb to the Mareb/Mai Ambessa confluence (Point 9) at an angle of approximately 62°-64° from true north. This is labelled “Confine secondo l’interpretazione abissinia.” (This appears to be only the second document in evidence that indicates the Ethiopian claim line, the other being the 1923 “Haile Selassie” map; see above, para. 5.65). This line cuts right across the middle of the name “Cunama.”

- A second line runs southwestwards from the Mai Ambessa/Mareb confluence (Point 9) straight towards the confluence of the Tomsa and the Setit (Point 6). Shortly after crossing the Sittona (Point 4), it reaches the “Meeteb” which it follows to Point 5. If at the point where the straight line joins the Meeteb it had been extended in a straight line, it would have reached the Setit exactly at the confluence of the Tomsa (Point 6). This line is described as “Confine secondo la nostra interpretazione.” Its angle from true north is about 25°.
- The third line runs in a very shallow “S,” sloping from near Point 9 initially towards the west and then southwest, crossing the Abyssinian claim line to reach the Setit a short distance southeast of the confluence of the Sittona (Point 4). This line is marked “Limite attuale della nostra occupazione effettiva.” The whole of the area between the Abyssinian and Italian claim line is shaded as “territorio contestato.”

(iv) The map also indicates the location of a number of military posts that lie to the southeast of the Abyssinian claim line. Three of these, lying between the Abyssinian claim line (to the west) and the line of present Italian occupation (to the east) are marked as being presently occupied by Italy. Another three, lying between the line of Italian occupation (to the west) and the boundary according to the Italian interpretation (to the east), are marked as having been recently unoccupied.

(v) A place marked “Reg. Aifori” lies just south of the Setit to the west, a short distance downstream from the Meeteb confluence (Point 5).

Ethiopian note, 1929

5.72 Some weeks later, on 6 March 1929, twenty-seven years after the Treaty, the Ethiopian Government informed the Italian Government that it had selected engineers and experts “who are delegated on our part to demarcate the boundary” and calling on the Italian Government to do the same. There is no evidence of any Italian response.

Zoli’s second report and map, 1929

5.73 A further report of Governor Zoli of 25 April 1929 was accompanied by an “Assetto del Confine tra Gasc e Setit” which carries the following features:

- (a) It draws the boundary as a straight line from the Mareb/Mai Ambessa confluence at Point 9, southwestwards at an angle of approximately 23° from true north until, after crossing the Sittona, it reaches the “Meeteb,” and then follows its course to its confluence with the Setit at Point 5 (if the straight line had been continued beyond the Meeteb, it would have reached the Setit at or near the mouth of the Tomsa (Point 6).

(b) It marks a number of Italian military posts in the area between the Ethiopian claim line and the boundary as represented by Zoli: just south of the Mareb, opposite Boscioca (15 men); at M. Gongoma (10 men); at Acqua Odas (20 men); at Acqua Morchiti (25 men); at Foce Sittona (10 men); and at Biaghela (10 men).

Ethiopian protest, 1931

5.74 On 2 May 1931, the Ethiopian Minister of Foreign Affairs complained that Eritrean soldiers had crossed “through Adiabo and killed Ethiopian citizens at Mai Tani” and asked that Eritrean soldiers “be forbidden in the future from crossing the frontier and repeating similar acts.”

Denti di Pirjano report, 1932

5.75 In May 1932, the Regional Commissioner of the Western Lowland, Denti di Pirjano, reported to the Governor of Eritrea on an excursion that he had made into Adiabo. This report is accompanied by a sketch map which shows the Sittona, the Tomsa and the boundary running from the northeast to join the Setit at Point 6. The Mai Ten is described in the text in some detail and a corresponding watercourse appears on the sketch but is not named. It is clear, however, that this watercourse is some 15 km southeast of Point 6 and is in Ethiopian territory. Though the text of the report does not contain any description of Cunama territory as such, it does refer to the Cunama near the Meeteb, and reports finding the ruins of a destroyed Cunama village at a point which would appear to lie east of the Eritrean claim line. While clearly evidencing the absence there of Cunama at that time, it does suggest that Cunama had lived there earlier.

Incidents, 1932

5.76 In 1931-1932, there appear to have been various incidents in the area of Mochiti and Gongoma that generated oral exchanges in which Ethiopia sought Eritrean withdrawal from Mochiti. Eritrea declined to do this and requested Ethiopia to order its men to abstain from further movements.

5.77 On 11 January 1932, the Eritrean Governor, Queirolo, restated in relation to an incursion by Ethiopian tribesmen in the region of “Acque Etana,” which was near the Mai Ten, that the line of the Eritrean border in the region

starts from the junction of the Tomsa with the Tacazzé and passing at about three kilometres from Acque Etana, proceeds until it passes between Acque Odas and Mount Garantta, at about three kilometres from the latter, and through altitude 1137 of Mount Erenni reaches the junction of the Gasc with Mount Bosioca. (Point 9).

5.78 The same report concluded by noting that the Ethiopian “chiefs of council” had requested a meeting with the Italian Agent at Adme to propose mutual withdrawal of troops from the locality of Acqua Morchiti, to leave it unoccupied pending the decision of a possible boundary commission delimitation. The Italian Agent answered that “the Italian Government cannot

abandon locality that according to Treaty is left in Eritrean territory.” Again, this report indicates that this dispute was about the most eastern area of the Eritrean claim and that the Ethiopian claim was being made further to the west in the direction of the Ethiopian claim line.

5.79 The next day, 12 January 1932, the Ethiopian Ministry of Foreign Affairs complained of the entry of Italian soldiers into the Adi Hagerai and proposed that both sides retreat to their former positions. The Ethiopian note, as translated in the annexes to the Ethiopian Counter-Memorial, notified Italy that the relevant “section of the boundary starts on the southwestern side, from where the river Maiteb flows into the Setit, up to the place where Mai Ambessi flows into the Mareb.” However, this note was stated by Moreno on 18 March 1932 actually to be referring to the Maiten, not the Maiteb. The Ethiopian Foreign Ministry rejected the reference by Italy to a treaty of 1917/1918, saying that it had no knowledge of such a treaty.

5.80 Again, three days later, on 15 January 1932, the Ethiopian Ministry of Foreign Affairs referred to unexpected clashes in the area of “Moketti” (Mochiti) and reasserted the need for the boundary to be marked on the ground. The note concluded:

With regard to this section of the border, what has already been done until today, until the land is marked, we cannot accept as final.

As indicated in a telegram of 23 January 1932, from the Italian Ministry of Foreign Affairs to the Italian Ministry of Colonies, the reservation by Ethiopia of its position was clearly understood.

Italian protests, 1935

5.81 In May 1935, Italy protested to Ethiopia about the killing of one of its soldiers who was taking water from the Sittona, near Gogula. Ethiopia replied that it would make enquiries, but did not question that the location was in Eritrea.

3) Assessment of the situation as at 1935

5.82 Having regard to the history of the relations between Italy (Eritrea) and Ethiopia in and after 1935 and to the nature of the evidence available both before and after that date, the Commission considers that an assessment of the legal position should properly be made as it stood on the eve of the Italian invasion of Ethiopia in 1935.

5.83 On the basis of its consideration of the evidence recalled above, the Commission has reached the following findings:

- (i) Although Article I of the 1902 Treaty refers to a river called the Maiteb, the explicit object and purpose of the Treaty, namely, the assignment to Eritrea of the Cunama tribe, clearly indicates the intention and “common will” of the Parties that the boundary river should not be the western Maiteb.

(ii) The evidence, though inexact, indicates that the territory of the Cunama extended far to the east and southeast of the Ethiopian claim line, which runs from Point 3 to Point 9.

(iii) The negotiators had sufficient knowledge to identify the general limits on the sole map that the evidence indicates was before them during their discussions, the so-called “Mai Daro” map. This map, showing the area between approximately $37^{\circ} 17'$ in the west and $37^{\circ} 59'$ in the east, identified by name certain features, the names of which were then used in the Treaty. In the south they were the Tacazzé-Setit; one of its tributaries, named “Meeteb”; and a mountain named “Ala Tacura” lying to the north west of that river. In the north, the relevant features were the Mareb, joined by its tributary, the Mai Ambessa. In addition, giving its name to the map, was marked a locality called “Mai Daro” inside, and just to the south of, a distinctive broad inverted U-shape bend in the Mareb, northwest of the Mareb/Mai Ambessa confluence.

(iv) Thus, the river named “Meeteb” on the “Mai Daro” map is not the western Maiteb, used by Ethiopia as the southern end of its claim line. The misnaming of the river on the map is demonstrated by the following features:

(a) The stretch of Setit shown on the map lies between approximately $37^{\circ} 17'$ and $37^{\circ} 41'$. The map shows the eastern sector of a major bend in the river that lies a significant distance east of the junction of the Setit and the western Maiteb at Point 3.

(b) The river named as the Meeteb has a different and longer east-west course than the western Maiteb.

(c) The relative location of the place named Mai Daro, its bend in the Mareb, and the confluence to the southwest of the named “Meeteb” with the Setit do not correspond with the relative location of Mai Daro and the western Maiteb as drawn on other maps available in 1902.

(d) The angle of the pecked line joining the “Meeteb” and the Mareb is approximately 45° from true north, whereas the angle of the Ethiopian claim line is 68° .

(e) There was in existence in 1902 a map, the de Chaurand map of 1894, which was used as the basis for the map annexed to the 1900 Treaty. That shows a river similarly located and shaped like the “Meeteb” but does not show any other Maiteb to the west.

5.84 The Commission is satisfied that the negotiators did not have in mind as the boundary the Ethiopian claim line running from Point 3 to Point 9.

5.85 The Commission considers that the river named “Meeteb” in the Mai Daro map is really the Sittona, which flows into the Setit from the

northeast at Point 4 along a primarily east-west course and that the name “Meeteb” was wrongly attached to it. The Commission therefore interprets the name “Maiteb” in the 1902 Treaty as being the present-day “Sittona.”

5.86 The line running from the river “Meeteb” on the Mai Daro map northeast to the Mareb/Mai Ambessa confluence is a pecked line that reflects the indication in the Treaty that the line from the Setit to the Mareb was yet to be delimited, thus evidencing the uncertainty of the negotiators regarding the limits to be attributed to the Cunama.

5.87 That delimitation was not effected. Reading together the provisions of the 1902 Treaty and Article 4, paragraph 2, of the December Agreement, the Commission considers that it must produce a final delimitation of the whole border between Ethiopia and Eritrea. In carrying out this task, the Commission has had regard to the colonial treaties and factors that are relevant according to applicable international law.

5.88 The Commission has taken into account the many maps presented to it in evidence, but has only given weight in relation to this sector to maps produced by the Parties themselves in the period prior to 1935. It has noted that three early Italian maps show the Ethiopian claim line, as does one Ethiopian map of 1923. However, all the other relevant maps show the Eritrean claim line in accordance with what has, in the present proceedings, come to be called the “classical” or “traditional” signature characterized by a straight line from the confluence of the Tomsa with the Setit (Point 6) to Point 9 at an angle of about 28° from true north. There is no record of any timely Ethiopian objection to these maps and there is, moreover, a consistent record of Ethiopian maps showing the same boundary. These maps amount to subsequent conduct or practice of the Parties evidencing their mutual acceptance of a boundary corresponding to the Eritrean claim line.

5.89 Another way of viewing the line so consistently shown on these maps is that it also serves to evidence the acceptance by the Parties of that line as the eastern limit of Cunama territory transferred to Eritrea by the 1902 Treaty. Though some of the evidence suggests that the classical line accords more territory to Eritrea than the Cunama actually occupied, some of it also indicates that the classical line leaves part of the Cunama territory in Ethiopia. This being so, the Commission determines that the eastern border of Cunama territory between the Setit and the Mareb coincides with the classical signature of the border as marked on the maps. There is no evidence sufficiently clear or cogent to lead the Commission to a different conclusion.

5.90 In short, the Commission concludes that as at 1935 the boundary between the Setit and the Mareb had crystallized and was binding on the Parties along the line from Point 6 to Point 9. The question that remains for consideration is whether any developments since that date affect the above conclusion.

4) The Position after 1935

5.91 The Commission has examined the major elements in the course of events since 1935: the Italian invasion of Ethiopia; the outbreak of the Second World War; the British military occupation of Eritrea; the post-war developments including the treatment of the political future of Eritrea; the creation of the federation between Ethiopia and Eritrea; and the eventual termination of that federation. However, the Commission can perceive nothing in that chain of developments that has had the effect of altering the boundary between the Parties. The boundary of 1935 remains the boundary of today.

5.92 However, there is one specific body of material to which the Commission has given careful consideration, namely, the Ethiopian evidence of its activities in the area west of Eritrea's claim line. The Commission notes that no evidence of such activities was introduced in the Ethiopian Memorial. The evidence to be examined appeared only in the Ethiopian Counter-Memorial. It was not added to or developed in the Ethiopian Reply.

5.93 The places in which Ethiopia claimed to have exercised authority west of the Eritrean claim line are all, with two exceptions, clustered in the northeast corner of the disputed triangle of territory. The most westerly location is Shelalo. The Commission observes that the area of claimed Ethiopian administrative activity comprises, at the most, one-fifth of the disputed area. The area of claimed administration does not extend in any significant way towards the Ethiopian claim line.

5.94 The Commission observes, secondly, that the dates of Ethiopian conduct relate to only a small part of the period that has elapsed since the 1902 Treaty. There are some references to sporadic friction in 1929-1932 at Acqua Morchiti. Apart from those, the material introduced by Ethiopia dates no further back than, at the earliest, 1951 – a grant of a local chieftaincy to an Ethiopian general. Even this grant, in specifying the places sought by the general, namely, Afra, Sheshebit, Shelalo, from Jerba up to Tokomlia, Dembe Dina and Dembe Guangul, described them as “uninhabited places” which the general wanted to develop. The evidence of collection of taxes is limited to 1958 and 1968. In 1969 there is a reference to a table of statistics about the Adiabo area, but of the places mentioned in the table only two appear to be marked on the Ethiopian illustrative figure of the claimed region. One item dating from 1970 refers to the destruction of incense trees. There is some evidence of policing activities in the Badme Wereda in 1972-1973 and of the evaluation of an elementary school at Badme town. There are, in addition, a few items dating from 1991 and 1994.

5.95 These references represent the bulk of the items adduced by Ethiopia in support of its claim to have exercised administrative authority west of the Eritrean claim line. The Commission does not find in them evidence of administration of the area sufficiently clear in location, substantial

in scope or extensive in time to displace the title of Eritrea that had crystallized as of 1935.

5.96 The Commission's conclusions regarding the 1902 Treaty line as a whole will be found in Chapter VIII, paragraph 8.1, sub-paragraph A.

CHAPTER VI – THE SECTOR COVERED BY THE 1908 TREATY (EASTERN SECTOR)

6.1 The third of the “pertinent colonial treaties” specified in Article 4, paragraph 2, of the December Agreement is the 1908 Treaty. According to the penultimate paragraph of Article VII of this Treaty, it was “done in duplicate and in identic terms” in Italian and Amharic.⁵² Each Party was satisfied that the English translation accurately stated the content of that Treaty. Accordingly, the Commission has used the English translation.

A. THE TEXT OF THE 1908 TREATY

6.2 The six substantive provisions of the 1908 Treaty divide into two distinct though related subjects. With respect to the boundary delimitation, Article I of the 1908 Treaty states:

From the most easterly point of the frontier established between the Colony of Eritrea and the Tigre by the Treaty of the 10th July, 1900, the boundary continues south-east, parallel to and at a distance of 60 kilometers from the coast, until it joins the frontier of the French possessions of Somalia.

The effect of Article I is thus to establish a geometric method of delimitation.

6.3 Article II of the 1908 Treaty states:

The two Governments undertake to fix the above-mentioned frontier-line on the ground by common accord and as soon as possible, adapting it to the nature and variation of the terrain.

6.4 With respect to the management regime for the resulting boundary, Article III of the 1908 Treaty states:

The two Governments undertake to establish by common accord and as soon as possible the respective dependence of the tribes bordering the frontier on the basis of their traditional and usual residence.

⁵² Both Parties produced copies of the Treaty in the original languages as well as in the English translation that had been published in successive editions of Hertslet's *Map of Africa by Treaty* (E. Hertslet, *The Map of Africa by Treaty*, Vol. 3 (3d ed., 1967)). However, all of the Parties' respective written and oral submissions were made only with reference to the English translation. In marked contrast to the considerable discussion of the meaning and legal significance of the differences between the Amharic and English and Italian texts of the 1902 Treaty, neither Party alleged discrepancies between the Amharic and Italian versions of the 1908 Treaty.

6.5 Article IV of the 1908 Treaty states:

The two Governments undertake to recognise reciprocally the ancient rights and prerogatives of the tribes bordering the frontier without regard to their political dependence, especially as regards the working of the salt plain, which shall, however, be subject to the existing taxes and pasturage dues.

The primacy of the geometric method of delimitation is reinforced in this provision. Prior *effectivités*, which might have been adduced to determine the location of the boundary, are recognised prospectively only as the basis for transboundary rights, but are not to play a role in the calculation as to where the boundary is located. This intention of the Parties in 1908 was based on the assumption that there would be an expeditious demarcation in accordance with Article II “as soon as possible.” No demarcation ever took place.

6.6 Article V of the 1908 Treaty states:

The two Governments formally undertake to exercise no interference beyond the frontier-line, and not to allow their dependent tribes to cross the frontier in order to commit acts of violence to the detriment of the tribes on the other side; but should questions or incidents arise between or on account of the tribes bordering the frontier the two Governments shall settle them by common accord.

6.7 Article VI of the 1908 Treaty states:

The two Governments mutually undertake not to take any action, nor to allow their dependent tribes to take any action, which may give rise to questions or incidents or disturb the tranquillity of the frontier tribes.

B. THE PHYSICAL GEOGRAPHY

6.8 The area covered by this part of the decision was described by Ethiopia as the “most sparsely populated portion of the present-day Ethio-Eritrean boundary” whose “inhospitable terrain is largely inhabited by itinerant peoples, the geographical center of whose social relations are not villages, as in the other portions of the boundary, but instead watering holes, the use of which is shared.”

C. HISTORICAL BACKGROUND OF THE 1908 TREATY

6.9 The Parties agree that the origin of the “sixty kilometers from the coast” formula was a recommendation by Emperor Menelik in 1897 to Major Nerazzini, the Italian negotiator. Eritrea adduced material to sustain its contention that from 1897 until the conclusion of the 1908 Treaty, the “60 kilometres-from-the-coast” formula served as a *modus vivendi*. Some map evidence, which is examined below, supports this contention. Ethiopia did not contest the existence of the *modus vivendi* prior to 1908.

D. THE COMMISSION’S DECISION

6.10 The 1908 Treaty presents the Commission with four issues for decision:

- first, the nature of the exercise under the 1908 Treaty;

- second, the point from which the boundary is to commence;
- third, the point where the boundary is to terminate; and
- fourth, the method by which the boundary is to be drawn.

6.11 Once the Treaty boundary has been determined by application of Article I, two additional issues must be addressed:

- the consequences, if any, of *effectivités* that occurred after 1908 upon the boundary determined by application of Article I; and
- the materiality and weight to be attributed to map evidence insofar as it indicates a departure from the boundary as determined by application of Article I.

6.12 The Commission will take up each of these issues *seriatim*.

1) The nature of the exercise under the 1908 Treaty

6.13 Eritrea has contended that the 1908 Treaty “effected a delimitation” and that “all that remains to be done is to apply the Article I delimitation formula to a map of the area.” Ethiopia contested this assertion.

6.14 The Commission considers that Eritrea’s contention is not well-founded. Article 4, paragraph 2, of the December Agreement prescribes a general mandate “to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law.” This applies to all three treaties and does not introduce any qualification with respect to any one of them. Moreover, the boundary which was purportedly “delimited” in 1908 was not a natural boundary, such as an identifiable river or watershed, but was only a formula, the application of which required a series of subsidiary decisions on other critical matters, e.g., the meaning to be attributed to the word “coast” in Article I, and the point at which the boundary was to commence. The answers to those questions, which would necessarily affect the location of the boundary, make the implementation of Article I of the 1908 Treaty one of both delimitation and demarcation.

2) The commencement of the boundary

6.15 With respect to the question of where the boundary is to commence, Article I of the 1908 Treaty prescribes “the most easterly point of the frontier established between the Colony of Eritrea and the Tigre by the Treaty of the 10th July, 1900.” The Commission has determined “the most easterly point” to be Point 31, where the Muna reaches its terminus in the Salt Lake. Accordingly, the boundary of the 1908 Treaty commences at that point.

3) The termination of the boundary

6.16 Article I of the 1908 Treaty provides that the boundary, running southeast and at a distance of 60 km from the coast, continues until it joins

“the frontier of the French possessions of Somalia.” The reference to “the French possessions of Somalia” is understood by the Parties to refer to the State of Djibouti, which has succeeded to “the French possessions of Somalia.” The 1908 Treaty does not establish a particular place on the frontier with Djibouti which would become a tripoint by virtue of the Treaty of 1908, but relies upon the 60 km formula to establish the location of the tripoint. The termination of the boundary of the 1908 Treaty at its easternmost extremity is the point, 60 km from the coast, where the boundary line meets the frontier of Djibouti. The exact location of this point (Point 41) will be specified in the demarcation phase, taking account of the nature and variation of the terrain as well as the precision made possible by large-scale survey maps.

4) The method by which the boundary is to be drawn

(a) *The geometric character of the delimitation*

6.17 With respect to the question of the method by which the boundary is to be delimited and demarcated, Article I, as explained above, prescribes a geometric method, with no reference to possible adjustment of the geometrically produced boundary because of prior *effectivités* that might be demonstrated by one party or the other. While Article II contemplates departures from the geometric method of Article I in the course of demarcation, those departures are only permissible to take account of “the nature and variation of the terrain.” This directive is reinforced by Articles III and IV, respectively. Article III establishes that, rather than establishing the boundary by reference to “the dependence of the tribes bordering the frontier on the basis of their traditional and usual residence,” the respective dependence of the tribes will be established *after* the boundary has been established. Similarly, Article IV establishes that “the ancient rights and prerogatives of the tribes bordering the frontier,” rather than influencing the location of the boundary, will continue to be recognized reciprocally by the parties to the 1908 Treaty. Nor will the location of the boundary, as determined by the prescribed treaty procedure, affect existing taxes and pasturage dues with reference to the working of the salt plain. In sum, the Commission concludes that the mode of delimitation prescribed by Article I of the 1908 Treaty is geometric, excluding *effectivités* prior to 1908, with adjustments to the geometric line to be made only to take account of the nature and variation of the terrain.

(b) *The delimitative character of the Commission’s task*

6.18 Eritrea has contended that the boundary has already been delimited by the arcs of circles method, as evidenced by many maps produced since 1908, while Ethiopia contended that the boundary has not been delimited and that the mandate of the Commission was to delimit *de novo* based upon the 1908 Treaty. In fact, the differences between the Parties on this point proved illusory, as Eritrea also proposed a *de novo* delimitation, and the method it proposed – the arcs of circles – does not produce a result that is wholly congruent with many of the maps that it entered into evidence. In view of the

mandate in Article 4, paragraph 2, of the December Agreement, the Commission views its task at this stage as being one of delimitation.

(c) *The meaning of the “coast”*

6.19 The first question that arises in the application of Article I of the Treaty is the definition of the coast. Ethiopia abandoned its conception of the coast as including islands and submitted in its concluding argument that “the coastline” should be understood as “adhering continuously to the continent itself, and not any coastlines of islands as such.” This was also the position presented by Eritrea. As the Parties are in agreement on this point, the Commission will take as the coastline the line adhering to the continent itself, and not any coastlines of islands.

(d) *The Commission’s delimitation method*

6.20 The respective methods which Eritrea and Ethiopia proposed for implementation of Article I of the 1908 Treaty are striking in that in many sectors of the proposed boundary they produce congruent or nearly congruent results. As will be recalled, Article I provides, in relevant part, that “the boundary proceeds . . . parallel to and at a distance of 60 km from the coast.” Ethiopia’s method is to create a construct of the coast, at the coastline, and then move this construct inland 60 km, where it still has to be readjusted to take account of certain problems inherent in the method itself, even before it has to be adjusted, once again, in the demarcation phase under Article II in order to adapt it “to the nature and variation of the ground.” Eritrea’s method also produces a simplified representation of the coast, in this instance by application of the arcs of circles method. Eritrea then moves the result inland for the prescribed 60 km. Even the software programs that Eritrea proposes, which allow a large number of arcs of circles to be drawn, produce nonetheless a construct rather than a facsimile of the coast. Both methods, which purport to be objective, actually import a measure of subjective choice.

6.21 In the opinion of the Commission, the optimum means for implementation of Article I of the 1908 Treaty is to take a satellite image of the coastline of Eritrea in the area covered by the 1908 boundary and to move it inland for a distance of 60 km - “coast” being understood here as set out in paragraph 6.19, above. To move the line inland in a rational manner, a straight line, running from the Eritrean-Djibouti boundary at the point at which it intersects with the coast in the southeast to the appropriate point in the northwest on the coast opposite the eastern terminus of the 1900 Treaty, will produce a line describing the general direction of the coast in this sector. In order to determine the appropriate point on the coast at the eastern terminus of the 1900 Treaty, an arc with a radius of 60 km is drawn from the terminus point where the Muna meets the Salt Lake (Point 31). The point where this radius intersects with the coast provides the northernmost point for determining the general direction of the coast. Two lines, each 60 km in length, projected perpendicularly from each end of this line provide the points inland upon which the satellite image of the coast may be set. The result will

be a line every point of which is exactly 60 km inland from the nearest point on the coast. Each sinuosity of the coast will be reproduced exactly on this inland line and each will be precisely 60 km inland from the corresponding sinuosity on the coast.

6.22 While the result of the first step of the delimitation exercise produces a line that is faithful to the language of Article I of the 1908 Treaty, the replication of the sinuosities of the coast on the inland line does not produce a manageable boundary. The Parties before the Commission indicated that each expected the Commission to make such adjustments in the boundary as would be necessary to render it manageable and rational.⁵³ To this end, the Commission has designated nine points, Points 32-39 and Point 41, of which the coordinates are set out in Chapter VIII, paragraph 8.3, and are illustrated on Map 12 (see below, p. 100). As explained in paragraphs 6.30-6.32, below, an adjustment of the Treaty line is required to meet the situation at Bure. Accordingly an additional point will need to be added there, which will be Point 40.

5) Effect of subsequent conduct

6.23 Having determined the boundary by the geometric method prescribed by the Treaty, the Commission now turns to consider whether any subsequent conduct adduced by the Parties requires the Commission to vary the boundary.

6.24 The Commission will not address the *effectivités* adduced by the Parties with respect to activities prior to the conclusion of the 1908 Treaty, as the terms of the Treaty make it clear that the Parties intended that the effect of such activities should not be taken into account.

6.25 As to the *effectivités* adduced for the period since 1908, these essentially reinforced the geometric line, in the sense that they established that activities conducted by Ethiopia and Italy (or Eritrea, after the latter's independence), *à titre de souverain*, did not take place anywhere that would have required an adjustment of the boundary determined by the geometric method. Thus, Eritrea contended in its Memorial that Ethiopian customs posts at Maglalla, Fiscio, Barale and Dildi were located to the west of the Treaty boundary and, moreover, collected import taxes on the salt from the Dankalia salt mines. Eritrea also contended that Ethiopia never objected to the placement of Italian guardposts "on the border line at Km. 60." Eritrea also contended, and provided extensive tax lists in support of its contention that residents of the Bada and northern Dankalia region paid taxes to it. But Eritrea also stated that these residents were found "in Bada, an area in northern Dankalia approximately 50 km from the coast."

⁵³ In this regard, it may be noted that all the maps adduced to show the boundary in this sector from the time of the 1897 *modus vivendi* simplified the line in a variety of ways to achieve a manageable and rational boundary.

6.26 Eritrea adduced evidence to show that it built roads and railroads as well as telegraph and telephone lines as far as the border. But an examination of the maps adduced in support of this shows that the railroads and telegraph lines were on the coastal side of the geometric boundary. Similarly, the evidence of guard posts established by Italy to protect the people of southern Dankalia within Italian jurisdiction shows that all of those posts were also on the coastal side of the 1908 Treaty boundary as determined geometrically.

6.27 With respect to the Bada region, both Parties adduced as *effectivités* evidence of administration of elections in the Bada region. The Commission encountered difficulties in assessing the weight to be assigned to such claims. As Ethiopia observed, the Bada region is large and its extent is not clearly defined. Some parts of Bada are plainly Eritrean and some plainly Ethiopian. Insofar as any particular evidence of activities in this region does not specify precisely where the activities took place, it is of no probative value.

6.28 Eritrea contended that the administrative divisions of Ethiopia set the boundary between Tigray and Afar at the eastern edge of the escarpment, again to the west of the boundary as determined by application of Article I. Eritrea also maintained that a British Military Administration memorandum of 2 January 1943 recorded that rumors of an Ethiopian presence in Bada were investigated but found to be untrue. Without regard to the weight to be assigned to these *effectivités*, the Commission considers that they confirm the geometric boundary rather than require an adjustment to it.

6.29 Ethiopia submitted evidence of a potash concession to an Italian mining engineer named Pastori in 1912 in the Dalul area. But the British documents which Ethiopia adduced locate the deposits 70 km from the Red Sea, which places it on the Ethiopian side of the 1908 Treaty boundary as geometrically determined. Moreover, Ethiopia observed that when the concessionaire was obliged to construct a railway from the Red Sea port, Marsa Fatima, to within 16 km of the mine, the railway stopped on the Italian side of the geometric boundary. Similarly, Ethiopia's claims to salt mines do not appear to relate to the seaward side of the geometrically determined 60 km line. Other activities in Dalul that Ethiopia claimed to have occurred would appear to lie well to the west of the Treaty line.

6.30 A special situation appears to have arisen with regard to Bure, the historic checkpoint for road traffic between the port of Assab and points in Ethiopia. Bure is located on the Ethiopian side of the 60 kilometre line. Eritrea adduced evidence of an express agreement between the Parties, with corresponding performance, by which after Eritrea's independence they appear to have placed their common boundary at Bure. This agreement took the form of a "report of the study team on opening passenger transport services along the Addis-Assab Corridor" of 7 November 1994 (incorporating a report of 12 July 1994), which was signed by representatives of Eritrea and Ethiopia. Agenda item No. 2 was expressed thus:

Observe and report working procedures at check point stations and along the route.

The report then continued:

The main check points along the route are mainly: –

1. . . .
2. . . .
3. . . .
4. Bure Ethiopian border.
5. Bure Eritrean border.

The study team observed the practices and conducted interviews with several officials of both countries on respective procedures towards checking interstate [illegible]. Explained the cooperation need from them for smooth [inter-?] state operation.

An internal Eritrean memorandum of 30 April 1994 (copied to the Ethiopian Embassy in Asmara) referred to “Ethiopian trucks entering Eritrea through the checkpoints both in Zalambessa and Burre.” An undated “Directive issued to control automobiles using the roads between Eritrea and Ethiopia” also confirms the existence of the Eritrean checkpoint at Bure.

6.31 It is not unknown for States to agree to locate a checkpoint or customs facility of one State within the territory of a neighbouring State. Such agreements, which reflect a common interest in efficiency and economy, do not necessarily involve a change of the boundary. That, however, was not the situation at Bure after Eritrean independence. The evidence indicates that both Parties assumed the boundary between them occurred at Bure and that their respective checkpoints were manifestations of the limits of their respective territorial sovereignty. The 1994 bilateral Report, quoted above (para. 6.30), expressly designates Bure as the border point. Accordingly, the boundary at Bure passes equidistantly the checkpoints of the two Parties.

6.32 In the view of the Commission, with the exception of the boundary checkpoints at Bure reflecting a common agreement that the boundary passes between them at that town, none of the other *effectivités* adduced by the Parties was of such weight as to cause the Commission to vary the geometric boundary determined by the Commission in application of Article I of the 1908 Treaty. In relation to Bure, the adjustment is relatively small, requiring only a slight variation of the border reflected in the insertion of Point 40 between Points 39 and 41.

6) The map evidence

6.33 The Commission has carefully reviewed the maps of the eastern sector presented by the Parties. They vary as regards the northwestern starting point of the Treaty line. Many commence at Rendacoma, and some cross through the Salt Lake. Some of the maps designate the boundary by a straight line while others attempt a figurative but highly stylized and impressionistic approximation of the coastline, 60 km inland, leaving it impossible to infer the

method, if any, which the map makers were using. While the Commission accepts that maps of boundaries are admissible as evidence (although of varying evidential weight), the diverse boundary delineation in the maps adduced by the Parties, the small scale of many of the maps, and the evident failure on the part of their makers to follow the language of the 1908 Treaty, leads the Commission to the conclusion that they indicate no more than a general awareness and acceptance of the 1908 Treaty and the approximate location of its line. In a negative sense (the evidence of acceptance of an approximate Treaty line notwithstanding), all the maps confirm the absence of a delimitation and demarcation as contemplated by the Treaty. As a result, none of them would lead the Commission to change its conclusion regarding Article I of the 1908 Convention as varied in relation to Bure.

6.34 Hence, other than as stated above with respect to Bure, the line of delimitation which the Commission has determined by application of Article I of the 1908 Treaty will serve as the basis for the demarcation, leaving open the possibility at that stage of “adapting it to the nature and variation of the terrain,” as contemplated in Article II of that Treaty.

CHAPTER VII – THE BOUNDARY LINE WITHIN RIVERS

7.1 The 1900 and 1902 Treaties designated rivers as key components of the boundaries they established: from west to east, as named in the Treaties, the Setit, the Mareb, the Belesa and the Muna. The Treaties do not, however, specify where in each river the boundary should be placed.

7.2 The question is one which, during the hearings, the Commission specifically asked the Parties to address. The views expressed by both Parties were similar. Both favoured the adoption in principle of the main channel as the line of division. Neither referred to the line of the deepest channel. Neither favoured the fixing of a permanent line in rivers determined by reference to coordinates. Both favoured the deferment to the demarcation stage of the decision regarding the line within rivers and considered that the Parties should be consulted further on the matter at that stage, bearing in mind, amongst other factors, that different considerations might apply to different parts of the rivers.

7.3 In these circumstances, the Commission holds that the determination of the boundary within rivers must be deferred until the demarcation stage. In the meantime, there will be no change in the *status quo*. The boundary in rivers should be determined by reference to the location of the main channel; and this should be identified during the dry season. Regard should be paid to the customary rights of the local people to have access to the river.

CHAPTER VIII – DISPOSITIF**DECISION**

8.1 For the reasons set out above, the Commission unanimously decides that the line of the boundary between Eritrea and Ethiopia is as follows:

A. In the Western Sector

- (i) The boundary begins at the tripoint between Eritrea, Ethiopia and the Sudan and then runs into the centre of the Setit opposite that point (Point 1).
- (ii) The boundary then follows the Setit eastwards to its confluence with the Tomsa (Point 6).
- (iii) At that point, the boundary turns to the northeast and runs in a straight line to the confluence of the Mareb and the Mai Ambessa (Point 9).

B. In the Central Sector

- (i) The boundary begins at the confluence of the Mareb and the Mai Ambessa (Point 9).
- (ii) It follows the Mareb eastwards to its confluence with the Belesa (Point 11).
- (iii) Thence it runs upstream the Belesa to the point where the Belesa is joined by the Belesa A and the Belesa B (Point 12).
- (iv) To the east and southeast of Point 12, the boundary ascends the Belesa B, diverging from that river so as to leave Tserona and its environs to Eritrea. The boundary runs round Tserona at a distance of approximately one kilometre from its current outer edge, in a manner to be determined more precisely during the demarcation.
- (v) Thereafter, upon rejoining the Belesa B, the boundary continues southwards up that river to Point 14, where it turns to the southwest to pass up the unnamed tributary flowing from that direction, to the source of that tributary at Point 15. From that point it crosses the watershed by a straight line to the source of a tributary of the Belesa A at Point 16 and passes down that tributary to its confluence with the Belesa A at Point 17. It then continues up the Belesa A to follow the Eritrean claim line to Point 18 so as to leave Fort Cadorna and its environs within Eritrea. The Eritrean claim line is more precisely depicted on the 1:100,000 Soviet map referred to by Eritrea in its final submission on 20 December 2001. Point 18 lies 100 metres west of the centre of the road running from Adigrat to Zalambessa.

- (vi) From Point 18, the boundary runs parallel to the road at a distance of 100 metres from its centre along its western side and in the direction of Zalambessa until about one kilometre south of the current outer edge of the town. In order to leave that town and its environs to Ethiopia, the boundary turns to the northwest to pass round Zalambessa at a distance of approximately one kilometre from its current outer edge until the boundary rejoins the Treaty line at approximately Point 20, but leaving the location of the former Eritrean customs post within Eritrea. The current outer edge of Zalambessa will be determined more precisely during the demarcation.
- (vii) From Point 20 the boundary passes down the Muna until it meets the Enda Dashim at Point 21.
- (viii) At Point 21 the boundary turns to the northwest to follow the Enda Dashim upstream to Point 22. There the boundary leaves that river to pass northwards along one of its tributaries to Point 23. There the boundary turns northeastwards to follow a higher tributary to its source at Point 24.
- (ix) At Point 24 the boundary passes in a straight line overland to Point 25, the source of one of the headwaters of a tributary of the Endeli, whence it continues along that tributary to Point 26, where it joins the Endeli.
- (x) From Point 26, the boundary descends the Endeli to its confluence with the Muna at Point 27.
- (xi) From Point 27, the boundary follows the Muna/Endeli downstream. Near Rendacoma, at approximately Point 28, the river begins also to be called the Ragali.
- (xii) From Point 28, the line continues down the Muna/Endeli/Ragali to Point 29, northwest of the Salt Lake, and thence by straight lines to Points 30 and 31, at which last point this sector of the boundary terminates.

C. In the Eastern Sector

The boundary begins at Point 31 and then continues by a series of straight lines connecting ten points, Points 32 to 41. Point 41 will be at the boundary with Djibouti. Point 40, lies equidistantly between the two checkpoints at Bure.

MAPS ILLUSTRATING THE DELIMITATION LINE

8.2 The boundary as described above is illustrated on the following maps:

- (i) Map 10 – The Western Sector on a scale of 1:1,000,000.

- (ii) Map 11 – The Central Sector on a scale of 1:360,000. In addition, the line in this Sector is illustrated on a map in a scale of 1:50,000, provided in two sheets (Map 14 showing the Belesa Projection and Map 15 showing the Endeli Projection) inside the back cover of this Decision.
- (iii) Map 12 – The Eastern Sector on a scale of 1:1,000,000.
- (iv) Map 13 – A single map illustrating the whole boundary on a scale of 1:2,000,000.

A *definitive* map of the whole boundary on a scale of 1:25,000 will be produced on a sector-by-sector basis as each sector is finally demarcated and the exact coordinates of the locations of the boundary markers have been determined.

REFERENCE POINTS

8.3 The coordinates of all reference points mentioned in this Decision, including even those not used in paragraph 8.1, above, are specified in the following table. Apart from Point 7A, of which the coordinates were submitted by Eritrea, coordinates of all the points have been measured from the SPOT satellite imagery of 10-metre resolution based on the WGS-84 datum. Except as otherwise indicated, all coordinates have been computed to the nearest one tenth of a minute, which corresponds to approximately 0.18 kilometre on the ground. The principal reason for using this specification is because of the limited availability at the present stage of information on the maps available to the Commission. All coordinates will be recalculated and made more precise during the demarcation as the Commission acquires the additional necessary information.

Point	Latitude (N)	Longitude (E)	Description
1	14° 15.4'	36° 33.6'	Western terminus – centre of Setit opposite the tripoint between Eritrea, Ethiopia and Sudan.
2	14° 18.7'	36° 38.3'	Confluence of Setit and one of its tributaries by passing Om Hajer, approximate location of Khor Um Hagar.
3	14° 19.1'	36° 49.7'	Confluence of Setit and Maiteb as claimed by Ethiopia.

Point	Latitude (N)	Longitude (E)	Description
4	14° 24.8'	37° 21.1'	Confluence of Setit and Sittona, which is called "Maetebbe/Maeeteb" on the 1894 de Chaurand map and on some later maps.
5	14° 15'	37° 28'	Confluence of Setit and another Meeteb as depicted on some maps after 1902.
6	14° 11.0'	37° 31.7'	Confluence of Setit and Tomsa.
7A	14° 05' 45.6"	37° 34' 26.4"	Turning point from Setit to Mareb as claimed (in coordinates) by Eritrea. See paragraph 5.15, above.
7B	14° 05.8'	37° 34.7'	Turning point from Setit to Mareb as drawn by Eritrea. See paragraph 5.15, above.
8	14° 04.0'	37° 35.8'	Confluence of Setit and Maiten.
9	14° 53.6'	37° 54.8'	Confluence of Mareb and Mai Ambessa.
10	*14° 48'	37° 58'	Confluence of Mareb and Gongoma stream as depicted on the 1904 Afra map.
11	14° 38.0'	39° 01.3'	Confluence of Mareb and Belesa.
12	14° 38.3'	39° 06.2'	Confluence of Belesa A (Belesa/Ruba Dairo) and Belesa B (Tserona/Mestai Mes).
12A	14° 24.6'	39° 15.2'	Confluence of Belesa A and an unnamed tributary at which the Eritrean claim line turns to the northeast and leaves Belesa A.

* Coordinates have been computed to the nearest minutes because the point location is only an approximate location based on historical maps submitted by the Parties.

Point	Latitude (N)	Longitude (E)	Description
13	14° 35.0'	39° 14.2'	Confluence of Belesa B and Belesa C (Sur).
14	14° 29.1'	39° 16.0'	Confluence of Belesa B and an unnamed tributary.
15	14° 28.3'	39° 14.9'	Source of the above-mentioned tributary.
16	14° 28.0'	39° 14.8'	Source of an unnamed tributary of Belesa A.
17	14° 27.1'	39° 13.7'	Confluence of the above-mentioned tributary and Belesa A.
18	14° 27.8'	39° 21.6'	Point lying 100 metres west of the centre of the road running from Adigrat to Zalambessa.
19	14° 31.1'	39° 22.2'	Source of one of the headwaters of Belesa C.
20	14° 31.1'	39° 23.0'	Source of one of the headwaters of Muna (Berbero Gado).
21	14° 30.1'	39° 32.3'	Confluence of Muna and Enda Dashim.
22	14° 31.3'	39° 30.4'	Confluence of Enda Dashim and one of its tributaries flowing from the north.
23	14° 32.9'	39° 30.5'	Confluence of the above tributary and a higher tributary flowing from the northeast.
24	14° 34.3'	39° 31.7'	Source of one of the headwaters of the higher tributary.
25	14° 34.8'	39° 31.9'	Source of one of the headwaters of a tributary flowing towards Endeli from the west.

Point	Latitude (N)	Longitude (E)	Description
26	14° 36.2'	39° 38.3'	Confluence of the above tributary and Endeli.
27	14° 30.7'	39° 47.4'	Confluence of Muna and Endeli near Massolae.
28	**14° 27'	39° 59'	Approximate point near Rendacoma where Muna/Endeli continues as Ragali.
29	14° 32.9'	40° 05.6'	Point where Ragali Delta starts.
30	14° 33.1'	40° 08.5'	Turning point in Ragali Delta.
31	14° 23.2'	40° 12.8'	Point at which the boundary under the 1900 Treaty reaches the Salt Lake and where the boundary under the 1908 Treaty starts.
32	14° 24.1'	40° 14.9'	Turning point designated in Eastern Sector.
33	14° 08.5'	40° 52.7'	Turning point designated in Eastern Sector.
34	13° 32.9'	41° 19.4'	Turning point designated in Eastern Sector.
35	13° 24.8'	41° 34.9'	Turning point designated in Eastern Sector.
36	13° 20.3'	41° 39.7'	Turning point designated in Eastern Sector.
37	13° 05.5'	41° 53.8'	Turning point designated in Eastern Sector.
38	12° 48.2'	42° 02.3'	Turning point designated in Eastern Sector.
39	12° 45.9'	42° 13.1'	Turning point designated in Eastern Sector.

** Coordinates have been computed to the nearest minutes because the location where Muna/Endeli continues as Ragali is not well-defined.

Point	Latitude (N)	Longitude (E)	Description
40	To be determined during demarcation.		Between the two checkpoints of Eritrea and Ethiopia at Bure.
41	12° 28.3'	42° 24.1'	Eastern terminus at the border of Djibouti.

Done at The Hague, this 13th day of April 2002,

(Signed) Professor Sir Elihu Lauterpacht
President

(Signed) Prince Bola Adesumbo
Ajibola

(Signed) Professor W. Michael
Reisman

(Signed) Judge Stephen M. Schwebel

(Signed) Sir Arthur Watts

(Signed) Bette E. Shifman
Registrar

(Signed) Dr. Hiroshi Murakami
Secretary

APPENDIX A

The Subsequent Conduct of the Parties in the Sector Covered by the 1900 Treaty

This Appendix examines some items which, though presented at length by the Parties, have been found by the Commission not to affect the delimitation established by the interpretation of the 1900 Treaty.

THE 1904 BOUNDARY COMMISSION

A1. In 1904 Italy appointed a Commission of four officers to examine part of the Belesa-Muna boundary. Its operation had been discussed with Ethiopia. Ethiopia, while not formally a member of the Commission, despatched a delegate to it, Degiasmac Garasellassie, chief of the Northern Tigray. The Commission thus appears not to have been formally a joint body, although much of its work was conducted by the Italian Commissioners and the Ethiopian delegate working together. They did not, however, agree on all matters, and in particular did not reach agreement on the product of the Commission's work. The report of the Commission was a unilateral, internal Italian document, signed only by the Italian Commissioners. It was addressed to the Italian Government alone rather than to both Governments jointly.

A2. The Commission did not have agreed terms of reference, each Party apparently having given its personnel their separate – and seemingly differing – instructions. The task of the Italian members was to “determine in the field the actual and legal border of the colony between Belesa and Muna, as resulting from the treaty between Italy and Ethiopia of 10 July 1900, Art. 1 and, more specifically, from the sketch appended to the above treaty.” The Ethiopian delegate's mandate was somewhat different, namely, “to identify non-controversial points concerning the border . . . and to find out points in which his opinion may be difficult to reconcile with that of the Italians.” Any “points of contention” were to be left for the Emperor to negotiate with the Italian Government – a power in effect to deal with matters *ad referendum*. Unspecific though these references may be, it is clear that the Emperor instructed Garasellassie at least to accompany the Italian Commission and to participate to some extent in its work. Indeed, delegates of both sides were involved in the reconnaissance:

. . . the delegates of the two parties carried out reconnaissance along all the course of the frontier, thus giving the Italian delegates the opportunity of indicating in situ to the representatives of HM the Emperor of Ethiopia, the entireties of the territories that the Treaty above mentioned placed in our possession.

A3. The Commissioners started their journey at Mai Anqual on the Belesa identified in the present Decision as the Belesa A. They walked upstream to the headwaters and across to the headwaters of the river they identified as the Muna, and then down towards the confluence of that river and the Endeli at Massolae. The Commission's report was accompanied by a detailed map of the region prepared by one of its members, Checchi. The report's recommendations were in part as to positions which Italy might adopt in future regarding the boundary alignment. The report and map appear to be undated (other than by “April 1904” on the title page of the report); they were not published until 1912.

A4. The Commission followed the route which took the boundary around the perimeter of what the present Commission calls the Belesa projection. The map annexed to the Commission's report depicts a simplified

course of the Belesa A as flowing directly into the Mareb and without showing the junction with the Belesa A of either the Belesa B (although upper reaches of the Mestai Mes, which is what the Commission refers to as Belesa B, are shown) or the other tributary flowing into the Belesa from the northeast near its junction with the Mareb and known as the Tserona. The Italian Commission's terminal point at Massolae was apparently chosen because it was the end of the Muna, where it joins and becomes part of the Endeli.

A5. The Commission's report stated that in reaching Massolae it had completed its task, "i.e. it followed the geographical border that the Treaty of 1900 intended to establish for the Eritrean colony" The present Commission observes that this view of the Italian 1904 Commission does not necessarily imply that the Treaty boundary ended at Massolae. The Treaty boundary was delimited in terms not just of the "Muna" but also of the depiction of the river so named on the Treaty map. The Italian Commission's remit was to consider the Treaty boundary "between Belesa and Muna," which, particularly since the boundary eastwards of Massolae followed clearly identified rivers, was consistent with an internal requirement to go to the end of the geographical Muna, rather than the end of the Treaty "Muna" which was, by the Treaty and its map, given a more extended meaning.

A6. The report contains a number of features that must be noted.

A7. First, note must be taken of the absence of any agreed terms of reference for the Commission's work (para. A2, above). Despite the task of the Italian Commission being described in terms relating to the border resulting from the 1900 Treaty, its report carried as its principal title "The Border between the Scimezana, which forms the southern part of Acchele Guzai, and the Agame." As appears from a map produced by Ethiopia, published in or around 1902 by the Italian Directorate of Colonial Affairs (the same department which published the 1904 Commission report) and prepared by Checchi, Giardi and Mori ("the 1902 Checchi map") the "Residenza dello Scimezana" is a substantial district in the southern part of Eritrea extending from the Residenza del Mareb in the west to the Missione Dancali in the east. Its southern limits as marked on this map follow, from the west, the Belesa and, via its southern channel (Belesa A), wind round, across land, eventually to join a river that clearly bears the name "Mai Muna." This in turn flows into the "F. Endeli," flowing from the northwest, and thence onto Rendacoma. Though not marked on this map, the area to the south is Agame.

A8. Secondly, the report repeatedly refers⁵⁴ to the Muna and at no point expresses any doubt as to its existence or identity and location. Indeed, at more than one point the report is so worded as to indicate that specific reference was made to the Muna in the instructions given to Garasallesie as well as the Italian Commissioners.

⁵⁴ In its paras. 7, 8, 11, 12.

A9. Third, various places that would, on the Ethiopian approach to the matter fall, within Agame (Ethiopia) are clearly recognised as falling within Acchele Guzai (Eritrea), e.g., Alitena, which lies a short distance north of the Muna.

A10. Fourth, the report records that certain places in the Belesa projection which, on the Eritrean approach, would be in Eritrea were in fact under the control of Ethiopia.

A11. Fifth, in referring to the territories of Sebao and Kelloberda as being “located on the right hand side of that section of the River Belesa which according to the Treaty of 1900 was part of the border line between Ethiopia and Eritrea,” the 1904 Commission was referring to places located on the map just to the east of the Belesa A and to the west of the Belesa B. It is clear from the passage just quoted that the 1904 Commission took the view that the Belesa A was the river that bore the name “Belesa” on the maps.

A12. Sixth, while the 1904 Commission considered that the “question of the Belesa territories is much less complex and susceptible to discussion,” it clearly found the question of identifying the “Muna” referred to in the 1900 Treaty more uncertain and open to argument.

A13. Seventh, the map annexed to the Commission’s report and illustrating the route taken by the Commission depicts three different border lines, designated as “limite dell’attuale occupazione nei tratti da modificare” (“outer limit of current occupation to be modified”), “limite di confine che non subisce modificazioni” (“limit of the border that is not to be modified”) and “confine secondo il trattato del 1900” (“border according to the Treaty of 1900”). It is noteworthy that, even in 1904 (and as reprinted in 1912), this map delineates as the limits of actual occupation a line very close to that which is claimed by Ethiopia to the north of the Endeli projection. As a further observation, the Commission notes that on two maps published in January and February 1904, two members of the Italian Commission, Checchi and Garelli, show very similar “limits of actual occupation,” while the second of these maps (dated after the conclusion of the 1904 Commission’s work) shows the line encompassing the Belesa projection as only a claim line (“confine da rivendicare”).

A14. Eighth, the Commission clearly followed the course of the Belesa A, apparently without any suggestion from the Ethiopian delegate that that was the wrong river or that it lay wholly within Ethiopia, as would have been the case if the Belesa B were the boundary.

A15. Ninth, it must be observed that the 1904 Commission’s view, like that of Eritrea, as to both the initial sector along Belesa A and across to the Muna, is inconsistent with the depiction of the boundary line on the Treaty map. Moreover, the Commission’s report noted that at least some locations within the Belesa projection were under the control of Ethiopia, particularly Kelloberda and Sebao.

A16. Taking all these elements into account, the present Commission is not satisfied that it may treat the activities and report of the 1904 Commission as an agreed interpretation or variation of the 1900 Treaty, or as evidencing Ethiopian acquiescence in any interpretation or variation such as to attribute the Belesa projection to Eritrea. Nonetheless, the present Commission accepts that in tracing the Muna upstream from its confluence with the Endeli towards its headwaters south of Barachit, the 1904 Commission's report fairly represented that part of the boundary established by the 1900 Treaty. It is the line followed and described in its report by the 1904 Commission, that extends westwards beyond the longitude of Barachit so as to encompass the Belesa projection, as well as the alleged termination of the boundary at Massolae in the east, which the present Commission finds unsupported by the 1900 Treaty and its annexed map.

THE LEAGUE OF NATIONS

Ethiopia's admission to the League of Nations, 1922

A17. Eritrea asserts that "Ethiopia's first affirmation of respect for the established boundary occurred in 1922, when it applied for admission to the League," that admission being conditional upon a determination by the League that Ethiopia had well established borders. Ethiopia notes that its request for admission contained no reference to the question of boundaries, that the League's documentation was essentially of a "standard form" variety with no singular conditionality being insisted upon, and that some measure of uncertainty regarding frontiers was an accepted part of the League's practice.

A18. The Commission observes that Ethiopia's admission to the League of Nations in 1922 was conditional upon a determination by the League that Ethiopia had well established boundaries. Such a requirement was, following precedent established by the first three League Assemblies, covered in a questionnaire used for the admission of new Members. That questionnaire included, as the third question: "Does the country possess a stable government and well-defined frontiers?" The Sub-Committee appointed to consider Ethiopia's admission simply stated that "[t]he reply to the third question is in the affirmative." The Commission cannot draw from that terse statement any particular conclusion as to the agreed line of the Eritrea-Ethiopia frontier.

Events in 1935

– The WalWal incident

A19. In connection with the WalWal incident in the Ethiopia-Italian Somaliland region, there were proceedings before the Council of the League of Nations in 1935. Both Ethiopia and Italy presented maps which, according to Eritrea, depicted the colonial boundary in its "classical" contour. Ethiopia notes that the League's concern with the WalWal incident was irrelevant to Ethiopia's northern boundary, with Eritrea.

A20. So far as concerns the boundary in the Belesa-Muna sector, the Commission observes that this Italian map is drawn on a scale of 1:4,000,000. At this scale, and with a virtually complete lack of detail of the surrounding areas and, despite a broad southward sweep in the line which might (or might not) be intended to represent the Belesa projection, no useful or detailed conclusions can be drawn about the course which Italy (or Ethiopia) understood was followed by the Belesa-Muna line.

A21. Eritrea refers also to four maps supplied by Ethiopia, but admits that two of them “are vague” and that the third did not deal with the Eritrea-Ethiopia frontier. The fourth map was that published in 1909, in Carlo Rosetti’s “Storia Diplomatica dell’Etiopia”, 3rd edition. Although Eritrea asserts that this map shows the “classic signature of the colonial treaty boundary,” the Commission notes that at least in the Belesa-Muna sector it too, at a scale of 1:5,000,000 and with virtually no surrounding detail, cannot support any useful or detailed conclusions about the route which Italy (or Ethiopia) understood was taken by the Belesa-Muna line.

– Tigrayan incursions, 1935

A22. As part of its response to Ethiopia’s complaint about the WalWal incident, Italy in 1935 drew attention to incursions by Tigrayan elements across the Belesa-Muna line into Eritrean territory.

A23. The Commission notes that although Italy did indeed make such a complaint, and although Ethiopia’s response did not expressly deny Italy’s assertions as to the location of the frontier, Ethiopia’s principal concern with this incident was to deny responsibility for the actions of what it portrayed as local Tigrayan warlords and bandits. Moreover, these exchanges in 1935 took place immediately before Italy’s invasion of Ethiopia on 3 October 1935. It is in the Commission’s view also significant that the Italian complaint in effect admitted as a fact that 35 years after the 1900 Treaty Ethiopia was still in occupation of certain territories “including” (and therefore not limited to) those specifically mentioned, which on the Italian view had become part of Eritrea.

– Italy’s complaint to the League of Nations, 1935

A24. Relations between Italy and Ethiopia became increasingly strained. In a memorandum dated 11 September 1935, less than a month before its invasion of Ethiopia, Italy stated that, given the 1900 Treaty, even by 1935 Ethiopia “had taken no steps to evacuate certain territories, including two posts on the right bank of the Belesa⁵⁵ (Kolo Burdo and Addi Gulti), one on the north bank of the Muna (Alitiena), which are quite indisputably in Italian territory.” While Italy presented this as demonstrating Ethiopian intransigence, it is also evidence of Ethiopia’s continued presence in those areas 35 years after the conclusion of the 1900 Treaty. Apart from that clear admission that

⁵⁵ What the Commission is calling Belesa A.

Ethiopia had a continuing presence in the places mentioned (which was in line with other Italian statements to a similar effect), the Commission is unable to draw from Italy's statement in 1935 any conclusion as to the disputed question of title.

A25. In its 1935 Memorandum to the League of Nations Italy also cited Ethiopian attacks at Rendacoma, Cabuia and Colulli. These three alleged attacks do not seem to be directly in point in relation to the course of the disputed boundary, other than by constituting evidence that Italy considered the boundary to lie somewhere to the south of those three locations.

THE UNITED NATIONS

Consideration of Eritrea, 1950

A26. The Parties also devoted considerable attention to developments in the United Nations during the period in 1950 in which the United Nations was considering the future of the former Italian colony of Eritrea. Eritrea noted that United Nations reports all treated the Muna as the boundary, and placed it in its historic location (i.e., as the Muna/Berbero Gado). Thus Eritrea drew attention to the work of the United Nations Commission for Eritrea (UNCE), and in particular to maps produced by UNCE to illustrate its work. Eritrea also attached particular weight to the United Nations Secretariat memorandum prepared in 1950 in the context of consideration at the United Nations of Eritrea's colonial boundaries. The memorandum, with its accompanying illustrative map, identified the Belesa and Muna as the boundary deriving from the 1900 Treaty. Eritrea notes that during the various United Nations debates on the question of Eritrea's future, Ethiopia knew of all these United Nations materials, but raised no objection.

A27. Ethiopia points out that United Nations organs in the period 1948-1952 were never specifically addressing the interpretation of the boundary treaties or their application, while the Secretariat memorandum was purely advisory, and identified no boundary dispute and proposed no settlement. Ethiopia adds that the United Nations discussions were concerned essentially with the future status of Eritrea rather than its boundaries, and that the United Nations memorandum implicitly acknowledged that questions or claims had arisen with regard to the Eritrea-Ethiopia boundary, including the Belesa-Muna sector. Ethiopia also notes that since the ultimate result, which was the outcome Ethiopia sought, was a form of union of Eritrea with Ethiopia, the question of boundaries was irrelevant and there was no need for Ethiopia to pay close regard to boundary depictions, particularly those of a very general nature. Eritrea responded that at the time such an outcome was not assured, and that in any event the territorial division was still important within the federation.

A28. The Commission observes that the UNCE maps referred to all appear to have used the same base-graphic, and were produced at a small (but unstated) scale and contained only limited detail of the boundary area. No

relevant location to the south of Senafe is identified, nor are any rivers named. The depiction of the boundary, nevertheless, appears to show the Belesa projection as appertaining to Eritrea (and may even indicate a small northward variation in the boundary intended to represent the Endeli projection), but is otherwise too unclear to allow for the drawing of specific conclusions as to the course of the boundary. In particular, even if (which is unclear) the course of the Belesa A is suggested as the boundary, the UNCE maps are wholly indistinct as to the way in which this comes about or as to the route by which a Belesa boundary joins up with the Muna and Endeli (neither of which is depicted). Moreover, the maps differ slightly from each other in the outline of the boundary they depict in this sector. It is also clear from the UNCE map depicting the places visited by UNCE, that that body did not visit any part of the now-disputed area in the Belesa-Muna region.

A29. As for the Secretariat memorandum, it simply made the incontrovertible statement that this part of the boundary was fixed by the 1900 Treaty, without going into details beyond stating that it provided for the boundary to run “eastward along the Mareb River to the Belesa River, eastward along the Belesa to the Muna River, and again eastward along the Muna.” The map annexed to the Secretariat memorandum, although indicating by name the Mareb, Belesa and Muna, was at too small a scale (unstated) to support for that area any specific conclusions as to the details which are missing from the memorandum itself. While the various United Nations reports treated the border as fixed by the earlier treaties, none of them appears to have involved any serious investigation into what specifically had been agreed and what the Parties’ attitudes were. In comparison with other boundaries where there had been no earlier treaty fixing them, it was understandable for the United Nations to have regarded them as ‘settled’ without enquiring into possible differences which might exist regarding their interpretation or application. In relation to the Belesa-Muna sector of the boundary the Commission has not been made aware of any specific aspect of the various United Nations materials which clearly and reasonably called for some objection by Ethiopia.

General Assembly Resolution 390(V)A, 1950 and the Federal Constitution, 1952

A30. The outcome of this United Nations activity in 1950 was the adoption by the General Assembly of Res. 390(V)A(1950), which led to a federation between Ethiopia and Eritrea. Article 2 of the 1952 Eritrean Constitution provided that “The territory of Eritrea, including the islands, is that of the former Italian colony of Eritrea.” Ethiopia ratified this Constitution in August 1952, and in September the Emperor issued an Order providing for the federation of Ethiopia and Eritrea. As a federation, the territorial division of authority between the constituent units continued to be important. Eritrea contends that these constitutional arrangements, which were based on various UN decisions which in turn followed numerous UN reports accompanied by UN maps depicting, *inter alia*, the boundaries of Eritrea with Ethiopia,

showed that “Ethiopia . . . accepted the boundaries of Eritrea as they were defined in the Eritrean Constitution and depicted by the United Nations.”

A31. Ethiopia considers that, in accordance with the applicable principles of general international law, the change in Eritrea’s status to that of federation with Ethiopia could have no effect on the original colonial boundaries of Eritrea: the entity known as Eritrea remained within the same boundaries after the change as it had had before the change.

A32. The Commission observes that the definition of Eritrea in Article 2 of the Eritrean Constitution is neutral as to what were the boundaries of the former Italian colony of Eritrea. As for the United Nations maps to which Eritrea refers, they were not made part of the constitutional arrangements. In any event, in so far as they depict the Belesa-Muna sector of the boundary they were, as already noted, drawn at such small scales and were so devoid of accompanying detail that they cannot safely be used as a basis for drawing clear conclusions as to what Ethiopia must be taken to have acknowledged the boundary in that sector to be. The Commission thus finds it impossible to find in Ethiopia’s omission to comment on these maps any acquiescence in any specific United Nations-depicted boundary in the Belesa-Muna sector.

MAPS

General

A33. The map evidence has been invoked in two different contexts. The first concerns the extent to which maps established a boundary outline that can be regarded as so clear and distinctive that its reproduction on later maps can be taken to represent a particular boundary line, even if the details of that line are not apparent on the later maps. The second concerns the impact of the map evidence, by reference to the individual merits of the maps as maps. The Commission will consider at this point the question of the boundary outlines. The more specific impact of the map evidence on the various boundary sections has already been considered in Chapters IV and V of the Decision.

A34. Eritrea maintains, generally, that with the conclusion of the 1908 Treaty, the colonial boundary was completed, and that it gave rise to a distinctive cartographic outline (which it refers to *inter alia* as “the classical signature of the boundary”). Eritrea maintains that that “classical” outline was consistently recognised by all concerned from 1908 onwards.

A35. So far as that “classical” outline relates to the 1902 and 1908 Treaties, the Commission has addressed the matter in the context of those Treaties. Here the Commission will only concern itself with the outline of the boundary in the stretch covered by the reference to the Mareb-Belesa-Muna line. In practice, since there is no dispute about the Mareb-Belesa section, the relevant section in the present context is the Belesa-Muna section. In that context Ethiopia denies the existence of any such generally recognised “classical outline.”

A36. There are four elements to a possibly distinctive general outline for this section of the boundary:

- (i) The Treaty outline is that created by the map annexed to the 1900 Treaty. The Commission has already examined the Treaty map in detail.
- (ii) The Belesa projection outline is the outline created, in the western part of the Belesa-Muna line, by its extension southwards so as to encompass the Belesa projection, i.e., principally the land between Belesa A and Belesa B together with an area of land running eastwards along the northern bank of the Muna/Berbero Gado. This is the outline established by the boundary claimed by Eritrea. The Commission notes that the distinctive silhouette of the Belesa projection has two elements: first, a broad curve in the north as the river flows up from the south and swings round to flow in a westerly direction towards the Mareb; and, second, a southward prolongation of the boundary as it follows the Belesa A into its southernmost reaches before swinging back up to the northeast to join the Muna/Berbero Gado. The claim lines of both Parties share a curve in the north, and a southward line which at some point turns to the east. At the level of general silhouette the difference between them is essentially one of degree, particularly as to the extent of the southward projection. This broad similarity of silhouettes makes it difficult on small scale maps to be sure which, if either, claim line is being depicted.
- (iii) The Endeli projection outline is the outline created, in the central sector of the Treaty line, by extending the area of the Ethiopian claim northwards so as to encompass the Endeli projection, i.e., principally the land bounded on the northeast by the Endeli, on the south by the Muna/Berbero Gado, and on the west by a line dropping down southwards from the neighbourhood of Senafe and then curving round to the west until it joins the Belesa C headwaters near Zalambessa. This is the outline established by the boundary claimed by Ethiopia.
- (iv) The “eastern terminus” outline is the outline created by the choice of the eastern terminus for the boundary established by the 1900 Treaty, in particular whether that terminus is at the Salt Lake (as indicated on the Treaty map), at Ragali (as claimed by Ethiopia), or at Massolae (as claimed by Eritrea, which has also suggested Rendacoma as in practice an alternative).

A37. In reviewing the voluminous map evidence presented to it relating to the Belesa-Muna sector of the boundary, the Commission notes that a number of the maps submitted are on such a small scale, or at a such a minimal level of detail, as to make it impossible to attribute to them a clear

depiction of one outline or the other. These maps do little more than show a more or less wavy line joining the northern curve of what is clearly intended to be the Belesa system to a point somewhere in the vicinity of the Salt Lake. It is difficult to attribute to these maps any clear and consistent depiction of a distinctive boundary outline in the Belesa-Muna sector.

A38. Those maps which are at a scale and level of detail allowing conclusions to be drawn from their depictions of the boundary enable the Commission to make the following observations:

- (i) The outlines created by the Belesa projection and by the Endeli projection are recognisable departures from the Treaty line.
- (ii) Those outlines as shown on many maps are often precise enough to allow specific conclusions to be drawn as regards the placement of the boundary along the Belesa A or Belesa B, or the upper reaches of the Endeli, or the Muna/Berbero Gado.
- (iii) Those outlines, however, are often not precise enough to enable specific conclusions to be drawn as to the course being followed by the link between whichever of the Belesas is in question and the Muna/Berbero Gado, or of linking the Belesa B with the upper reaches of the Endeli.
- (iv) A number of maps depict a boundary which may be classified as depicting the 1900 Treaty line, in particular the Italian “Carta Dimostrativa” of 1902, prepared by the Ministry of Foreign Affairs (the “Prinetti map”). This map was submitted to the Italian Parliament, apparently as part of the procedures for the ratification of the 1902 Treaty. That Treaty amended the boundary prescribed by the 1900 Treaty. The map accordingly indicated the original course of the boundary as in the 1900 Treaty, and the course of the new boundary being prescribed by the 1902 Treaty. The 1900 Treaty boundary which it depicts is in essence the boundary which the Commission has determined was the boundary laid down by that Treaty. It follows a generally sloping line from the northern shoulder or curve of the Belesa in the west, along the Muna/Berbero Gado, and down to the Salt Lake. It gives no indication of either the Belesa projection or the Endeli projection. Given the map’s provenance, its apparent purpose (specifically to illustrate boundaries, as part of the State’s ratification procedure), and its contemporaneity, the Commission considers this map to have considerable weight.
- (v) While many of the maps produced in evidence show quite clearly a boundary outline which is equivalent to that of the Belesa projection, it cannot be said that that outline has been adopted with clearly preponderant consistency. There are a

significant number of maps, of a provenance which requires that they be given weight, which do not depict a Belesa projection.

- (vi) Few of the maps produced in evidence depict the outline of the Endeli projection as a boundary, and none emanating from Ethiopian sources (apart from the recent 1998 Atlas of Tigray) do so. Particularly noteworthy is the absence of any Endeli projection from Ethiopia's map of 1923 (the 'Haile Selassie map'). This map, produced for the Emperor Haile Selassie in 1923, appears to have been prepared as a single presentation map and not to have been intended for publication. It is now in the Library of Congress. It shows the boundary in the Belesa-Muna sector as a line closely following that of the 1900 Treaty map: it identifies the boundary by (in Amharic) "Mai Muna" and depicts the boundary as following a course to the south of Barachit. In particular the map appears to show no trace of either a Belesa projection or an Endeli projection. The map is not a model of clarity and is on a fairly small scale (1:1,000,000). Moreover, it appears to depict the boundary beyond each end of the Belesa-Muna sector in a manner which differs from its depiction in that sector, namely by a dash-dotted line in the former case but without that marking in the Belesa-Muna sector. The map is of some significance because it is invoked by Ethiopia in other contexts, particularly in relation to the 1902 Treaty, as being an "official map" of "official Ethiopian government provenance." This map's apparent original purpose was more in the nature of a private production destined for presentation to the Head of State of Ethiopia.
- (vii) There are however, maps, especially from Italian sources, which depict something very close to the Endeli projection as an express or implicit limit of actual Italian possession both in the early years after the conclusion of the 1900 Treaty and some decades later and which appear to indicate (by an absence of boundary marking) a degree of doubt as to any boundary cutting Irob off from Ethiopia.
- (viii) As regards the eastern terminus of the 1900 Treaty boundary, the Commission has been unable to determine a consistency of practice in the depiction of the boundary on maps sufficient to constitute a generally accepted outline or silhouette for the boundary in that area.

A39. The Commission thus concludes that it has not been established in the Mareb-Belesa-Muna sector that there is a generally accepted outline or silhouette for the boundary which can serve as evidence of the Parties' agreement as to the course of the boundary. This is not, of course, to deny to maps which depict the boundary following one or other of the distinctive

shapes, or any other boundary line, a significance on their own particular merits. This is a matter which the Commission has considered in Chapter IV, above.

APPENDIX B

The Location of the Cunama

CONTEMPORARY KNOWLEDGE

B1. At the time of the negotiation of the 1902 Treaty, there was little publicly available information regarding the location of the Cunama and few pertinent maps. Although there is no evidence of whether Menelik and Ciccodicola were aware of this material, the Commission refers to it here to indicate its limited value:

B2. One of the earliest investigations resulted in a "Report of the German Expedition to East Africa, 1861 and 1862" (published in 1864) which contains statements by Munzinger identifying the eastern extension of the Cunama, e.g., that "the Bazen around the Takeze are rather exposed to attacks coming from the Wolkait" (the names "Baze" and "Basé" were also used for the Cunama at that time). As shown on the map illustrating the expedition's travels, the Wolkait is an area lying to the south of the Setit and east of the confluence with it of the western Maiteb. Therefore, if the Bazen were being attacked by the Wolkait, they must have been present at least in the area just north of the Setit. In that location, they would have been living in Ethiopian territory, southeast of the line that Ethiopia has subsequently come to claim as the boundary – a position which is not in accord with the principle that the Cunama are to be enfolded in Eritrean territory. Their extension further to the north and east is evidenced by the statement in the German report that their easternmost locality along the Mareb is the Mai Mai-Daro.

B3. The British explorer, Sir Samuel Baker, writing in 1867 of "The Nile Tributaries of Abyssinia", mentioned "the hostile Basé, through which country the River Gash or Mareb descends I was anxious to procure all the information possible concerning the Basé, as it would be necessary to traverse the greater portion in exploring the Settite river." This is of little help beyond indicating that the Cunama inhabited the area between the Mareb and the Setit and that for purposes of exploring the Setit it would be necessary "to traverse the greater portion" of their country.

B4. A few years later Munzinger⁵⁶ again described the eastern border of the Cunama by reference to the hills around the Godgodo Torrent (east of the Ethiopian claim line) but within the area embraced as Eritrea within the Eritrean line. His description even extends south of the Setit, in an area which

⁵⁶ Studies on Eastern Africa (circa 1875).

is not disputed as being in Ethiopia, but is still east of the southern starting point of the Ethiopian claim line; and it seems improbable that the tribe would have been east of that point south of the river, but not east of it north of the river. At that time, Munzinger estimated the Cunama population as being approximately between one and two hundred thousand inhabitants.⁵⁷ (By 1913, however, an Italian scholar, Alberto Pollera, reported a 1905 census estimating a population of 19,000 and stated that many Cunama villages had been destroyed.⁵⁸) Renisch, who wrote “Die Kunama-Sprache in Nordost-Afrika” in 1881 indicated that the “Kunama” people lived between 36° and 38° E and between 14° and 15° 30' N – an eastwards extension that would have taken them well east of the Ethiopian claim line.

B5. As to the available maps, though not identical they generally so place the name “Cunama” that the region thus indicated stretches over the whole or most of the area that falls within Eritrea as delimited by the Eritrean line. In other words, the Cunama area would be cut in two by the recognition of the Ethiopian line, thus contradicting the principal object of the 1902 Treaty.

B6. In the map that illustrates the “German Expedition in East Africa”, Munzinger placed the name “Bazen” across that area so that it appears clearly related to a stretch of country that extends eastward as far as the hills that mark the western limits of Adiabo. Having mentioned the extension of the Cunama to the hills around the Godgodo Torrent and, it seems, Tsada Mudri, he marked those places on his map as being at 38° E and 38° 10' E respectively. De Chaurand’s map extends the name “Cunama” as far east as 37° 50' and marks the general area of their occupation by a line of dashes which, according to the legend on the map, indicates a tribal division.

B7. A map of the Catholic Missions of North-East Africa published in 1899 shows the Baza as occupying a wide swathe of territory between the Setit and the Mareb extending, on the Mareb, considerably to the east of Mai Daro and, on the Setit, as far as a river called “Manatape” which appears to approximate to the Sittona.

B8. A map of the region given by the Italian Ambassador in London to the British Foreign Secretary in July 1900 carries the names “Baza o Cunana” extending in large print over the area between the Mareb and the Setit. Assuming that the names were placed central to the area to which they were meant to apply, it would appear that the area thus indicated by them extended in the east as far as 38° of longitude E, thus covering the whole of the area subsequently claimed by Eritrea as falling within its line.

⁵⁷ *Ibid.*, at pp. 341 and 373.

⁵⁸ *I Baria e I Cunama*, p. 76 (1913).

POLLERA REPORT

B9. On 17 May 1904, the Resident of the Government Seat of Gasc, Pollera, reported on the eastern border of the Cunama region as follows:

Under the 1902 Italian-Abyssinian Convention for the cessation of the territory between the Gasc and the Setit, it was established that the border between these two rivers would be the Mai Teb, from its source, then continuing a little to the east of Hai Derg.

Your Excellency's visit to the region made it clear that the contracting parties had been misled by the erroneous graphic representation of the maps, and that everything that referred to the Mai Teb Hovevasi actually must be attributed to the Sittona stream. In any case, since the course of said river was not recognised by anyone, the border could not be considered established in a final and binding manner, at least under the treaty in question, leaving it, at the time, up to the special delegates to make this delimitation, with the purpose, established in the treaty, of leaving the entire region of the Kunama in Italian territory.

Consequently, we decided to consider for now that the borderline between the Gasc and the Setit is the Ducambia Mittona [*sic*] road, which was quickly built in order to affirm the possession of that region.

But, from what I learned later, the Kunama country is much more to the east, and therefore I believe it is appropriate to visit this vast area, never before explored by any European, in order to find out its structure and obtain the data necessary for the subsequent delimitation of the border, if considered necessary.

In the enclosed sketch, I marked the line which, according to Kunama tradition, would constitute the border with the Adiabo. It includes the entire territory still roamed by the Kunama, and which was originally inhabited by them, used to harvest honey and rubber from the banks of the Setit and of the Gasc.

However, since there was never any pact between Kunama and Adiabo, the border is not acknowledged by the latter, who have always considered the region of Afrà as their own hunting territory. Moreover, it is marked by the particularity of the land distant from it, and is often not clearly marked, and therefore there is the need for a line which will be difficult to make well known. The official acknowledgment of that line, in any manner, is of little advantage. The regions established at the time on the bank of Setit from the Sittone mountain to the Ab Onú mountain have been destroyed, and for the few remaining inhabitants, now living on the Gasc, there is no advantage to returning to their original places, because this would require distant supervision, difficult and of little interest.

The left bank of the Gasc, however, will be gradually repopulated, and the Kunama groups currently living east of the Gongomà stream, in Abyssinian territory, will be attracted again to their old place, namely in the region ranging between the concave part of the arc formed by the Gasc and Hai itself.

Although there is, therefore, an interest in acknowledging their the right to the entire left bank of the Gasc up to the Gongomà stream, this interest wanes as they go towards the south, where perhaps it would be sufficient if the tribes under our supervision would recognise their right to seek honey and rubber.

Consequently, in my opinion, I do not think that it is possible to make a true and suitable delimitation of the border. However, by an additional convention besides that of 1902, it would be possible to establish:

1. That, in accordance with the preceding agreement, I will ask that all Kunama tribes be left in Eritrean territory, under the administration and command of the

Italian Government, including all those groups which are still in Abyssinian territory; except in the case of evacuation of this territory and return within Eritrean borders within a period of two years;

2. That the entire valley of the Gasc, and its tributaries downstream from the juncture of the Gongomà stream, is considered Italian territory.
3. That the zone west of the Mesegà, which covers the western slopes of the Adiabo mountains, delimited by the juncture of the Gongomà stream to the north and the source of the Tonsa stream to the south, down to the Sittona Ducambia road, is considered neutral zone, with prohibition of hunting for each of the contracting parties, and under the supervision of the Italian government, except for the rights to seek honey and rubber, granted to the Baza tribes.

Since the convention can be discussed and signed between the two Governments, it would avoid the biased influence of Tigrai chiefs and especially Adiabo, who would certainly obstruct as much as they could the tracing of a border that takes away their freedom to hunt in a territory they consider their own by occupancy rights, and the last Kunama villages which they consider slaves, and therefore, almost private property.

If, later, there is an absolute intention to establish a de facto border, the only one that offers better advantages is that which I have indicated in the sketch, and which, starting from the source of the Tonsa stream in Setit, goes up its course and, through its tributaries Nebi Ualà and Gual Sohei reaches Roccia Cassona: then, passing through M. Aiculità, the hill of Guzulà and the baobab known by the Kunama by the name of Bedumà Asà and by the Abyssinians by the name of Ababà [illegible], crosses the great Mezzegà and reaches the Gongomà stream, whose source is in fact the Mezzegà.

However, the region of Ulcutta will remain beyond the border, for which it will be desirable to obtain what I proposed above, since it does not seem appropriate to me to include it within the new border because it is located in territory that is actually and incontestably Abyssinian

APPENDIX C

Technical Note Relating to Maps

C1. Because it was agreed with the Parties at an early stage in the Commission's work that the fieldwork necessary to prepare a large scale map for demarcation, on a scale of 1:25,000, should not commence until after the delimitation Decision, the Commission has for the time being been obliged to use other sources of maps and images. These sources include:

- (i) 1:100,000 Soviet Union Topographic Mapping Series.
- (ii) 1:1,000,000 Vector Map Level 0.
- (iii) SPOT 10-metre resolution, panchromatic, ortho-rectified imagery.
- (iv) ASTER/TERRA 15-metre resolution, multi-spectral, ortho-rectified imagery.
- (i) The 1:100,000 Topographic Mapping series was produced by the Soviet Union in the 1970s, has been the largest scale set of maps

available to the Commission. Both Parties used these maps in their pleadings and submissions.

- (ii) The 1:1,000,000 Vector Map Level 0 (VMAPO), produced by the United States National and Imagery and Mapping Agency in the early 1990s, has been used to generate the small-scale illustrative maps attached to the Decision. River tributaries that may be relevant to the Decision, but are omitted from the VMAPO data, have been copied to the small-scale maps in the Decision from the Soviet 1:100,000 series or from the satellite imagery. Both Parties used VMAPO to generate their small-scale maps in their pleadings and submissions.
- (iii) Satellite imagery acquired from the French SPOT satellite, which has a resolution of 10 metres per pixel and is panchromatic, has been ortho-rectified using ground control points collected by the Field Offices of the Secretary of the Commission to produce a series of satellite maps on the scale of 1:50,000. These maps have been used to verify so far as possible the existence of towns and natural features on the ground, including rivers and their tributaries. These maps also serve as the base for illustrating the Decision in the Central Sector. Measurements in the Decision have been based on this series.
- (iv) Satellite imagery acquired from the Japanese ASTER/TERRA satellite, which has a resolution of 15 metres per pixel and multi-spectral bands, has been ortho-rectified to provide images for the interpretation of terrain features.

C2. Towns shown in this Decision have been compiled from the 1:100,000 series and verified against the satellite imagery of SPOT and ASTER/TERRA. If a town is not shown on the Soviet maps, its approximate location has been determined on the basis of the submissions of the Parties.

C3. The reference system of the measurements and maps used in this Decision is the World Geodetic System 1984 (WGS-84). For all practical purposes related to this Decision, the WGS-84 datum is the same as the Eritrea Ethiopia Boundary Datum 2002 (EEBD-2002) that is being developed for the demarcation of the boundary. In the *Dispositif*, Chapter VIII, all coordinates have been computed in latitude (N) and longitude (E) to the nearest one-tenth of a minute in terms of the WGS-84 datum except as otherwise indicated. This produces a resolution of approximately 0.18 km on the ground. The coordinates will be made more precise by the new mapping to be made during the demarcation phase.

DECISION REGARDING THE "REQUEST FOR INTERPRETATION,
CORRECTION AND CONSULTATION", DECISION OF 24 JUNE 2002

DÉCISION CONCERNANT LA « DEMANDE D'INTERPRÉTATION, DE
CORRECTION ET DE CONSULTATION », DÉCISION DU 24 JUIN
2002

Interpretation of the Decision may only be invoked where the meaning of a specific statement in the Decision is unclear and requires clarification for the proper application of the Decision—the concept of interpretation does not include the possibility of appeal against a decision or the reopening of matters clearly settled by a decision.

Une demande en interprétation de la décision ne peut être introduite que lorsque le sens d'un énoncé spécifique n'est pas clair et que des éclaircissements doivent être apportés à cet énoncé dans l'intérêt d'une bonne exécution de la décision – La notion d'interprétation n'inclut pas la possibilité de faire appel d'une décision ou de rouvrir l'instance sur des questions que la décision a manifestement réglées.

**DECISION REGARDING THE "REQUEST FOR INTERPRETATION,
CORRECTION AND CONSULTATION" SUBMITTED BY THE
FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA
ON 13 MAY 2002**

1. On 13 May 2002 the Commission received from the Government of Ethiopia a submission entitled "Request for Interpretation, Correction and Consultation". On May 21 2002, the request was sent to the Government of Eritrea for its observations. These were received on 14 June 2002.

2. Section II of the submission is headed "Issues for Interpretation, Correction or Consultation". The Section refers specifically to the following matters: "Towns and Villages along the Boundary"; "River Confluence Points"; "Identification of Geographical Features"; "Fort Cadorna"; "Area between Point 17 and Point 18"; "Headwaters of Rivers"; "Tserona and Zalambessa"; "The Endeli Projection"; "River Boundaries"; "Nature and Variation of the Terrain"; and "Bure".

3. In the case of "*Towns and Villages along the Boundary*", Ethiopia requests "that the Commission be consistent in applying its analysis of the conduct of the Parties to accommodate areas lying along the boundary".

4. With respect to "*River Confluence Points*", Ethiopia observes, without giving particulars, that "the location of the confluence of the Setit and Mai Tomsa and the co-ordinates provided for that point in the Decision do not agree and "requests that the Commission address during the demarcation phase the question of confluence points and identify the specific principles applicable to the determination of the precise location of such points". Ethiopia further requests "that careful field work be undertaken during the

demarcation phase so as to ensure that relevant rivers and streams are properly identified".

5. As to "*Identification of Geographical Features*", Ethiopia states that "during demarcation, the Commission, working with their experts and the Parties, will conduct careful field surveys to locate geographical features relevant to the determination".

6. As to "*Fort Cadorna*", Ethiopia contends that the Commission's references to this location are based on a geographical error and requests the Commission to correct the location and make the necessary adjustments to the boundary during the demarcation phase.

7. As to the "*Area between Points 17 and 18*", Ethiopia concludes that it "anticipates that the location of the Acran region will be more precisely defined during the demarcation phase".

8. As to the "*Headwaters of Rivers*", Ethiopia requests that the Commission addresses during the demarcation the definition of the source of watercourses.

9. As regards "*Tserona and Zalambessa*", Ethiopia requests the Commission to "identify the relevant criteria for the definition of a town's 'outer edge', in consultation with its experts and the Parties during the demarcation phase".

10. As to the "*Endeli Projection*", Ethiopia anticipates that during the demarcation phase the Commission will describe with greater precision the boundary between Points 22 and 26 in the light of the description in paragraph 4.85 of its Decision.

11. As to "*River Boundaries*", Ethiopia understands that during the demarcation phase the Commission will address, in consultation with the Parties, the principles applicable to the determination of river boundaries, including the factors that will determine the main channel of a river.

12. As to "*Nature and Variation of the Terrain*", Ethiopia requests the Commission to develop during the demarcation phase the criteria that it will observe in making any adjustment to the boundary on the basis of the nature and variation of the terrain.

13. As to "*Bure*", Ethiopia requests that the Commission consult with the Parties in determining the proper placement of Point 40.

14. Section III of the Ethiopian Submission is headed "Consultation with the Parties" and contains a statement of "Ethiopia's views regarding the conduct of the demarcation phase".

15. Section IV of the Ethiopian Submission is headed "Transfer of Territorial Control and Governmental Authority". Its opening sentence states that "As questions have arisen since April 13 regarding the effect of the

Commission's Decision with respect to transfer of territorial control and governmental authority Ethiopia wishes to set out its views for the Commission's consideration".

16. The Ethiopian request appears to be founded on a misapprehension regarding the scope and effect of Articles 28 and 29 of the Commission's Rules of Procedure. The facility accorded to the Parties in Article 28(1) to request the Commission to give an interpretation of the Decision may only be invoked where the meaning of some specific statement in the Decision is unclear and requires clarification in order that the Decision should be properly applied. The concept of interpretation does not open up the possibility of appeal against a decision or the reopening of matters clearly settled by a decision. The Commission, through its President, has already stated "that the provisions of Articles 28 and 29 of the Rules of Procedure neither allow substantive amendment nor affect the binding quality of the Decision as rendered on 13 April 2002. Re-argument of the case is not permitted." In this respect, the Commission is adhering to the authoritative views on the limits of interpretation expressed by the Permanent Court of International Justice in the *Chorzow Factory Case*, (1927, *PCIJ, Series A No. 13*, at p. 21) and the Arbitration Tribunal in the *Arbitration on the Delimitation of the Continental Shelf (France-UK)*, *Interpretation Decision of 14 March 1978* (Vol. 54, *International Law Reports*, 1979, at p. 161). "Interpretation is a process that is merely auxiliary, and may serve to explain, but may not change, what the Court already settled with binding force as *res judicata*."

17. The Commission does not find, in any of the items that appear in Section II of the Ethiopian request, anything that identifies an uncertainty in the Decision that could be resolved by interpretation at this time. The same is true of Sections III and IV. Nor is any case made out for revision. Further, the Conclusions of the Request are not so expressed as to invite the Commission to interpret or revise the Decision in any specific respect by reference to applicable considerations of international law or the actual terms of Articles 28 and 29 of the Rules of Procedure.

18. Accordingly, the Commission concludes that the Ethiopian request is inadmissible and no further action will be taken upon it. It will, however, remain on the record of the Commission as a statement of Ethiopia's views on the matters therein mentioned; and the Response of Eritrea of 14 June 2002 will also remain on the record as a statement of Eritrea's views on the matters raised in the Ethiopian request. To the extent that the Commission may deem appropriate, some of these matters may be considered further during the demarcation, pursuant to the Decision of 13 April 2002.

24 June 2002

(Signed) Sir Elihu Lauterpacht
President of the Eritrea-Ethiopia Boundary Commission

**ORDER OF THE COMMISSION (MADE PURSUANT TO ARTICLE 20 AND ARTICLE 27(1) OF THE COMMISSION'S RULES OF PROCEDURE),
DECISION OF 17 JULY 2002**

ORDONNANCE DE LA COMMISSION (ADOPTÉE CONFORMÉMENT AUX ARTICLES 20 ET 27 (1) DU RÈGLEMENT INTÉRIEUR DE LA COMMISSION), DÉCISION DU 17 JUILLET 2002

Neither Party should do anything to prevent or hinder the demarcation process or act in a manner contrary to the rights of the other, or otherwise aggravate the dispute—population resettlement across the delimitation line established by the Decision of 13 April 2002.

Aucune des deux parties ne devrait prendre des mesures pour empêcher ou entraver le processus de démarcation ou agir d'une manière contraire aux droits de l'autre partie, ou causer d'une autre manière une aggravation du différend – réinstallation de la population de l'autre côté de la ligne de délimitation établie par la décision du 13 avril 2002.

**ORDER OF THE COMMISSION
(MADE PURSUANT TO ARTICLE 20 AND ARTICLE 27(1) OF THE
COMMISSION'S RULES OF PROCEDURE)**

WHEREAS,

1. By a letter dated 7 June 2002 Eritrea requested “that the Commission adopt an interim order instructing Ethiopia that it must immediately cease the settlement of its nationals into territory that has been determined by the 13 April 2002 Decision to fall within Eritrean sovereignty”.

2. The locations within which Eritrea asserted that Ethiopia was settling its nationals not indigenous to the region were described by Eritrea as “the Badme area of Eritrea”. An attached excerpt from a Tigrayan news broadcast referred to settlements “in Hadish Adi and Dembe Gedamu, villages around Badme” and to a welcome accorded to the settlers by “the people of Badme and its environs”.

3. On 14 June 2002 Ethiopia filed a Response to Eritrea's letter of 7 June 2002. The Ethiopian Response referred to “resettlement activities in the Badme region”. The Response also stated [*footnote omitted*]:

“The radio translation to which Eritrea refers says that Ethiopia is settling people in the environs of Badme and specifically in two villages, Dembe Gedamu and Hadish Adi. As indicated by the label “BADME” on the map at attachments 2 and 3 of Eritrea's letter, Badme is shown as a kebele as well as a town, and the map shows the kebele of Badme as lying on both sides of the delimitation line as depicted on the map, and, thus, the settlement of people in the environs of Badme is unremarkable.

The specific villages in which people were settled according to the radio transcript provided by Eritrea are Dembe Gedamu and Hadish Adi. The label for Dembe

Gedamu depicted on the map at attachments 2 and 3 of Eritrea's letter refers to the former kebele of Dembe Gedamu, which the map shows as being on both sides of the Commission's lines depicted on the map. Conspicuously absent from Eritrea's letter is a map depicting the location of Hadish Adi. However, Eritrea did provide a map depicting the location of Hadish Adi in her judges' folders during oral argument in December, 2001. This map, which is attached at Attachment C, shows unmistakably that the village of Hadish Adi is to the east of Eritrea's claim line, lying in territory that was never in dispute. Thus, there is no basis for Eritrea's allegation that Ethiopia has been settling people in areas awarded to Eritrea in the Commission's Decision, let alone that such settlement is a scheme to affect the demarcation."

Two attachments to the Ethiopian Response referred respectively to the "Badme Sub-District" of the North Western Zone, "the disputed border area near Badme" and "the Badme sub-region". The Response further referred to Dembe Gedamu as "the former kebele of Dembe Gedamu" lying on both sides of the line delimited on 13 April 2002, and to Hadish Adi as being a village east of Eritrea's claim line.

4. On 24 June 2002 Eritrea filed a Memorandum in support of its Request in which it observed that there are several places with the name of Hadish Adi in the locality in question and stated that Eritrea cannot identify with certainty the one to which the Ethiopian radio broadcast alludes.

5. On 1 July 2002 Ethiopia filed a "Further Response to Eritrea's Request for Interim Measures", in which reference is made to a place called "Dembe Bengul".

6. Both Parties have filed copies of maps said by them to be supportive of their respective positions.

7. Eritrea has invoked Article 20 of the Commission's Rules of Procedure as justifying the issue by the Commission of an interim protective order. Ethiopia has denied the applicability of this Article.

8. In its Interlocutory Order of 7 July 2002, the Commission recalled that Article 27, paragraph 1, of the Rules of Procedure provided that "the Commission shall be entitled to make any necessary interim, interlocutory or partial decisions".

9. On its first consideration of the matter, the Commission took the view that it could not, at this stage, reach any final conclusions on the Eritrean request of 7 June 2002 without further information as to the exact location of the settlements to which that Request related.

10. Accordingly, the Commission decided in its Interlocutory Order of 7 July 2002 to send a team ("the Team") to determine by examination on the ground and from the air the exact location of the various places mentioned in the exchanges between the Parties and referred to in the recitals to that Order and, so far as possible, the extent to which there had been movements of population in or around them since 13 April 2002. These places were:

- Badme and its environs (including "Badme sub-region" or kebele of Badme);
- Dembe Gedamu (including the kebele of Dembe Gedamu);
- Hadish Adi; and
- Dembe Bengul.

11. The Team, after visiting the places in question on 12 and 13 July 2002, submitted a report of its findings to the Commission on 15 July 2002 and the Commission immediately communicated these findings to the Parties.

12. The Team's findings included the following:

- As to Badme, there was no observable sign of recent population settlement or evidence of makeshift housing such as tents.
- As to Dembe Gedamu, there was no evidence of civilian settlement at the village of that name, which appeared to be abandoned. However, on maps submitted by both Parties, "Dembe Gedamu" appears as the name of an area as well, within which the Team did find evidence of a recent tent settlement housing some 90 persons, at a place called "Dembe Mengul". Dembe Mengul is located 0.4 km to the west of the delimitation line established by the Commission's Decision of 13 April 2002. The one inhabitant whom the Team was able to interview claimed to be a displaced person who had recently returned to his home there. He stated that he had received assistance from the Government in the form of tents, seeds and money. Aerial photography established that this location was settled after 13 April 2002.
- As to Hadish Adi, there is evidence of a recent settlement consisting of fresh tents which appear to house some 100 persons. Hadish Adi is 3.5 km to the east of the delimitation line established by the Commission's Decision of 13 April 2002.
- As to Dembe Bengul, the Team was unable to identify a place of that name at the location indicated on the maps submitted by the Parties.

13. At a hearing held in The Hague on 16 July 2002, the Parties addressed the findings of the Team and presented oral arguments on the questions raised by Eritrea's Request of 7 June 2002.

14. During the hearing on 16 July 2002, the Parties did not contradict the findings of the Team.

15. At the end of the oral hearings, the Parties made the following final submissions:

For Eritrea —

- “1) that Ethiopia cease its illegal program of transfer of Ethiopian civilians into Eritrean territory and otherwise bring its conduct into compliance with the delimitation Decision of 13 April 2002;
- 2) that all land grants purported to have been made by Ethiopia throughout its military occupation of Eritrean territory are declared void and of no effect; and
- 3) that Ethiopia immediately remove all Ethiopian settlers installed in Eritrean territory since the announcement of the 13 April delimitation Decision”.

For Ethiopia —

“that the Commission should reject Eritrea’s request for interim measures.”

16. The Commission finds that there is no evidence of new settlement in Badme and Dembe Gedamu. There is evidence of new settlers at Hadish Adi, but that location is within Ethiopia. The only location in Eritrean territory at which there is evidence of new settlement is Dembe Mengul.

17. The Commission has received no evidence of any land grants made by Ethiopia as referred to in Eritrea’s Memorandum.

18. The Commission finds it appropriate to observe that it would not be in accordance with the obligations of the Parties for either of them to take, or permit to be taken, any actions that prejudice, or might prejudice, the fulfilment of the Commission’s Decision of 13 April 2002. By a letter addressed to both Parties on 21 June 2002, the Commission has already reminded them that it would not be in accordance with the obligations of either of them to take, or permit to be taken, any actions that prejudice, or might prejudice, the fulfilment of the Commission’s Decision of 13 April 2002. It followed that both Parties should assist the Commission in the performance of its task and that neither Party should do anything to prevent or hinder the demarcation process or act in a manner contrary to the rights of the other. The Commission was also mindful of the duty of the Parties to do nothing that would aggravate the dispute. Neither Party should do anything to prevent or hinder the demarcation process or act in a manner contrary to the rights of the other, or otherwise aggravate the dispute.

ACCORDINGLY, THE COMMISSION,

in the exercise of its powers under Articles 20 and 27 of its Rules of Procedure,

DECIDES THAT

A. Eritrea’s Request for the Commission to prescribe interim measures under Article 20 of the Rules of Procedure is rejected;

B. Any Ethiopian government-sponsored resettlement of Ethiopian nationals in Dembe Mengul after 13 April 2002 should not have taken place;

C. Ethiopia shall:

- (i) forthwith arrange for the return to Ethiopian territory of those persons in Dembe Mengul who have gone there from Ethiopia pursuant to an Ethiopian resettlement program since 13 April 2002; and
- (ii) report to the Commission on the implementation of sub-paragraph (i) above no later than 30 September 2002.

D. Each Party shall ensure that no further population resettlement takes place across the delimitation line established by the Decision of 13 April 2002.

The Hague, 17 July 2002

Signed by the Commission:

(Signed) Professor Sir Elihu Lauterpacht, President

(Signed) Prince Bola Adesumbo
Ajibola

(Signed) Professor W. Michael
Reisman

(Signed) Judge Stephen M. Schwebel

(Signed) Sir Arthur Watts

(Signed) Dr. Hiroshi Murakami,
Secretary

(Signed) Bette E. Shifman,
Registrar

DETERMINATIONS, DECISION OF 7 NOVEMBER 2002

CONCLUSIONS, DÉCISION DU 7 NOVEMBRE 2002

Jurisdiction and powers of the Commission extend to taking cognizance of and making appropriate decisions on any matter necessary for the performance of its mandate to delimit and demarcate the boundary.

Il entre dans la compétence et les pouvoirs de la Commission de connaître de toute question qu'elle juge nécessaire à l'accomplissement de son mandat concernant le tracé et l'abornement de la frontière et, le cas échéant, de statuer sur ladite question.

DETERMINATIONS **7 November 2002**

WHEREAS,

1. Questions have arisen as to the scope of the Commission's jurisdiction and powers,

2. Article 4(2) of the December 2000 Agreement mandates the Commission "to delimit and demarcate" the border between the Parties,

3. Article 4(15) of the same Agreement provides that "the delimitation and demarcation determinations of the Commission shall be final and binding" and that "[e]ach party shall respect the border so determined, as well as the territorial integrity and sovereignty of the other party",

4. Article 14(A) of the Demarcation Directions provides: "The Commission has no authority to vary the boundary line. If it runs through and divides a town or village, the line may be varied only on the basis of an express request agreed between and made by both Parties",

5. The Security Council of the United Nations in Resolution 1430 of 14 August 2002 called upon the parties "to cooperate fully and promptly with the Boundary Commission, including by implementing without conditions its binding Demarcation Directions, by abiding promptly by all its orders, including the two issued on 17 July 2002",

6. The Delimitation Decision of 13 April 2002 is final and binding in respect of the whole of the boundary between the Parties with the exception of Tserona, Zalambessa, Bure, the Eastern Sector, and the rivers, to the limited extent therein stated,

7. The Commission on 13 April 2002 stated that it "considers that the fact that it must now proceed to demarcate the boundary in accordance with the December 2000 Agreement does not qualify the immediate effect of the

determination of the boundary between the Parties and the limits of their respective sovereignties",

8. Both Parties have stated that they accept the Delimitation Decision as final and binding,

9. The Commission is bound, in implementation of the December 2000 Agreement, to proceed expeditiously to complete the delimitation in the above-mentioned localities and to demarcate the whole of the boundary,

10. The Commission believes that it would be helpful to the Parties in discharging their duties to each other and to the Commission for the Commission to determine the legal position in respect of certain matters,

The Commission, having considered the views of the Parties, now determines as follows:

1. The jurisdiction and powers of the Commission extend to its taking cognizance of, and where necessary making appropriate decisions on, any matter it finds necessary for the performance of its mandate to delimit and demarcate the boundary;

2. The Commission is accordingly entitled to take cognizance of any population movement across the boundary as determined in the Delimitation Decision and to make such orders as it finds necessary in relation to any such population movements, insofar as such movement may affect the process and implementation of demarcation;

3. Having regard to the Commission's Order of 17 July 2002, Ethiopia, in failing to remove from Eritrean territory persons of Ethiopian origin who have moved into that territory subsequent to the date of the Delimitation Decision, has not complied with its obligations;

4. Any decision by the Commission to inspect, whether by land or air, any location in the boundary area, and in particular Tserona or Zalambessa or their environs in implementation of paragraph 8.1.B iv and vi of the Delimitation Decision, is a decision foreseen in operative paragraph 1 above, and must be complied with.

The Commission expects the Parties to act in accordance with these determinations.

London, 7 November 2002

Signed by the Commission:

(Signed) Professor Sir Elihu Lauterpacht, President

(Signed) Prince Bola Adesumbo
Ajibola

(Signed) Professor W. Michael
Reisman

(Signed) Judge Stephen M. Schwebel

(Signed) Sir Arthur Watts

(Signed) Dr. Hiroshi Murakami
Secretary

(Signed) Bette E. Shifman
Registrar

DEMARCATIION OF THE ERITREA/ETHIOPIA BOUNDARY DIRECTIONS, 8 JULY 2002 (AS REVISED NOVEMBER 2002, MARCH AND JULY 2003)

DIRECTIVES POUR LA DÉMARCATIION DE LA FRONTIÈRE ENTRE L'ÉRYTHRÉE ET L'ÉTHIOPIE DU 8 JUILLET 2002 (TELLES QUE MODIFIÉES EN NOVEMBRE 2002, MARS 2003 ET JUILLET 2003)

Demarcation will determine more precisely the delimitation line at those points specified in the Delimitation Decision—Commission has no authority to vary the boundary line—special directions for specific locations or problems, including (1) division of towns and villages, (2) river boundaries and (3) Tserona, Zalambessa and Bure.

Note: “UNMEE” refers to the United Nations Mission in Ethiopia and Eritrea.

La démarcation permettra de déterminer d'une manière plus précise la ligne de délimitation aux points spécifiés dans la décision relative à la délimitation – la Commission n'a pas le pouvoir de modifier la frontière – directives spéciales concernant certains sites ou problèmes spécifiques, notamment 1) la division de villes et de villages, 2) les frontières fluviales, et 3) Tserona, Zalambessa et Bure.

Note : Le sigle « MINUEE » se réfère à la Mission des Nations Unies en Éthiopie et en Érythrée.

**DEMARCATIION OF THE ERITREA/ETHIOPIA
BOUNDARY DIRECTIONS**

**(“The Demarcation Directions”), 8 July 2002
(as revised November 2002, March and July 2003)**

I. Introduction

1. Article 4 (13) of the December 2000 Agreement requires the Commission to arrange for expeditious demarcation of the border as delimited. Article 4 (14) provides that “the Parties agree to cooperate with the Commission, its experts and other staff in all respects during the process of delimitation and demarcation, including the facilitation of access to territory they control”.

2. The Rules of Procedure of the Commission provide in Article 30:

“1. In consultation with, and with the co-operation of, the Secretary-General of the United Nations, the Commission shall arrange for the expeditious demarcation of the border as delimited. Without prejudice to paragraph 2 hereof, the procedure relating thereto shall be adopted by the Commission at an appropriate moment after consultation with the Parties. If the circumstances so permit, the border may be demarcated in such stages as the Commission may from time to time determine.

2. The Commission may, at any time, take, or direct the taking of, such preparatory steps as it considers desirable to expedite completion of its task and the prompt demarcation of the border . . . The Parties shall, to such extent as the Commission may direct, co-operate fully with the Secretary or any other personnel involved in such preparatory steps.”

3. The steps that need to be taken in connection with the demarcation have been reported to the Secretary-General of the United Nations for transmission to the Security Council on a number of occasions, namely, in the Second (27 April 2001), Third (22 November 2001) and Fourth (4 August 2002) Reports of the Commission. They have also been the subject of correspondence between the Commission and the Parties.

4. In its Fourth Report the Commission expressed the hope that the Security Council, in its next resolution relating to the operation of UNMEE, would be able to extend the scope of the Mission’s mandate expressly to enable it to assist the Commission in the demarcation stage of its activity and, in that connection, to accelerate the process of mine clearance. In response, the Security Council, in resolution 1398, invited the Secretary-General to submit recommendations to the Council on UNMEE’s role in the border demarcation process, including with regard to the provision of demining support. The Secretary-General, in S/2002/245, indicated his readiness to make such recommendations.

5. In the Opening Statement made by the President of the Commission on 13 April 2002, on the occasion of the delivery of the Decision on Delimitation, he said, *inter alia*:

“The Commission expects that the Parties will co-operate fully with the Commission in moving expeditiously to the demarcation phase. During that phase the demarcation staff assisting the Commission will examine the border region at first hand. On the basis of the information which they will then gather, the Commission will make any further determinations that may prove necessary.”

6. In the light of the foregoing, the Commission has adopted the Demarcation Directions set out below. In accordance with Article 30 of the Commission’s Rules of Procedure, the Parties have been consulted in the course of the preparation of these Directions.

II. Demarcation Directions

1. Objective of the Demarcation

A The general purpose of the demarcation is to set on the ground pillars identifying the course of the line decided in the Commission’s Delimitation Decision of 13 April 2002.

B The demarcation will also determine more precisely the delimitation line at those points specified in paragraphs 8.1.B. (iv), (vi) and C of the Dispositif of the Delimitation Decision.

2. Organization of the Demarcation

B The Demarcation Process will be carried out by, or under the responsibility of, the Boundary Commission. The work will be done by the Secretary and his representatives who are members of the United Nations Cartographic Unit (see Article 4, para. 7 of the Peace Agreement), the Special Consultant of the Commission (“the Special Consultant”), the Chief Surveyor and any other persons appointed or employed for this purpose by or under the authority of the Commission. The Terms of Reference of the Special Consultant are annexed hereto.

3. Field Offices

The work in the region will be carried out through two or more Field Offices of equal status, at least one in the territory of each Party. At present there are field offices in Addis Ababa and Asmara. Work shall be divided between these offices in the most efficient and economical manner as the circumstances may require, as determined by the Commission. In addition, the opening of an additional field office at Adigrat is foreseen when the stage is reached of actual placement of the boundary markers.

4. Relations with UNMEE

As provided by Security Council Resolution 1344, UNMEE will provide assistance to the Commission in accordance with the terms of the MOU between the United Nations and Commission signed on 2 April 2002 (with the deletion, as agreed with the United Nations, of the last item in ‘Part D’ of the Annex thereto, relating to identification cards, which is superseded by the last sentence of paragraph 7, below).

5. Information regarding operations

The Special Consultant, assisted by the Chief Surveyor and in consultation with the Secretary, shall, as requested by the President:

A Prepare for the Commission and the Parties a statement of operations that have already been performed and that remain to be performed, with an estimate of the dates at which the various steps will be taken. The schedule of operations still to be carried out will be updated at monthly intervals. Any comments that the Parties may wish to make shall be made within 48 hours of receipt of the statement of operations.

B File progress reports with the Commission, the Parties and UNMEE at monthly intervals.

C Maintain personal contact, at regular intervals of not more than six weeks, with the central and regional authorities in Eritrea and Ethiopia in order to keep the most senior authorities informed of developments.

6. Liaison

A Each Party shall nominate at a high level a Liaison Representative and a Deputy Liaison Representative, at least one of which shall be stationed at their respective capitals, who shall have authority to receive information and requests for assistance, etc. and shall be able to arrange for these to be speedily processed. Any communications that the Parties may wish to make to the Field Offices of the Commission or the Commission shall be made through their respective Agents or Liaison Representatives and shall be copied to the Agent and the Liaison Representative of the other Party. The names and contact details of the Liaison and Deputy Liaison Representatives shall be forwarded without delay to the Secretary, the Special Consultant and the Chief Surveyor.

B (i) Each Party shall also nominate not more than two Field Liaison Officers to accompany the Field Offices staff of the Commission as observers during their movements in connection with their field work, for example, the emplacement of boundary markers and the “as-built” survey. However, if a Party does not make such nominations, or its nominees are not available at an appointed time and place, the Field Offices staff shall be free to continue their operations.

(ii) *Field Liaison Officers shall be persons who have not served in that role, otherwise than in an ad hoc capacity, prior to 7 July 2003, and who are not currently serving as military personnel. Notice of each Party’s selections as Field Liaison Officers shall be forwarded for information to the other Party and to the Registrar of the Commission and shall be accompanied by the following information in respect of each Field Liaison Officer:*

(a) *an up-to-date curriculum vitae, including full name, professional qualifications, current position and occupational responsibilities;*

(b) *a record of any military service or responsibilities since 1989.*

(iii) *A person’s nomination as a Field Liaison Officer becomes effective upon that person’s selection by the nominating Party as a Field Liaison Officer and the required accompanying information being forwarded to the Commission and the other Party. Should any disagreement arise with regard to a person’s nomination as a Field Liaison Officer, that disagreement shall be resolved by the Commission, whose decision shall be final.*

*(iv) In the event of replacement of a Field Liaison Officer, the Party making the replacement shall follow the procedure set forth in subparagraph (ii) above.**

C Each Party shall be responsible for providing, at its own expense, for the travel of its Field Liaison Officers to the proposed point of work. Parties shall also be responsible for all other expenses of their Field Liaison Officers. The Field Office staff shall not be responsible for any transport or logistical support required by the Field Liaison Officers at the work sites.

D Field Liaison Officers shall not interfere with or hinder the work of Field Offices staff on the ground. In case of unresolved disagreement, the procedure set out in paragraph 15 shall be followed. Field Liaison Officers may not be involved in mine-clearance activity.

E The Field Liaison Officers of each Party shall enjoy freedom of movement within the territory under control of the other Party in order to travel to meet with representatives of the Boundary Commission at the proposed point of work. The right of each Party to have its own Field Liaison Officers present while work proceeds is conditioned upon its compliance with its obligation to facilitate the attendance of the other Party's Field Liaison Officer.

7. Registration of Field Office staff

The Commission, through its Secretary and his Field Officers, shall communicate to the Parties the names and official designations of all persons employed in the service of the Field Offices or carrying out activities on their behalf, including contractors. Identification cards will be issued in the name of the Boundary Commission to such persons and shall be carried at all times.

8. Freedom of movement

A The staff of the Field Offices of the Commission and other persons performing functions for the Commission require free and unrestricted movement, and shall be allowed such movement, within the territories of the Parties for purposes connected with the demarcation. Any transport used by the staff of the Field Offices or by the Field Liaison Officers shall fly a flag or bear readily visible insignia clearly marked with the letters "EEBC".

B Notice of intended movements by air in the border region shall be given to the Liaison Representatives of the Parties not less than 72 hours in advance. The Parties shall provide the necessary authority within the ensuing 48 hours.

C Visas shall be given to Field Offices staff and other persons performing functions for the Commission for multiple entry and extended stay.

* Italicized text indicates revision of July 2003, set forth in the Commission's "Decision pursuant to Article 15B of the Commission's Demarcation Directions."

D Each Party shall within the area under its control be solely and completely responsible for ensuring the safety of all Field Offices staff and all personnel employed or used by the contractors for the placement and verification of boundary markers (“demarcation personnel”). Without prejudice to the generality of this responsibility, each Party shall ensure that in any area in which the Field Offices staff and demarcation personnel are working the local government officers and population are informed in advance so that they do not place any obstacle in the way of the performance by such personnel of their tasks. The security personnel of each Party providing protection to Field Offices staff and other demarcation personnel shall at all times carry appropriate communication equipment to enable them to communicate instantly with their respective capitals and those senior administrative officers with authority to resolve immediately any difficulties that may arise.*

9. The demarcation

A The demarcation shall take place on the basis of the 1:25,000 scale map presently being prepared by the Secretary of the Commission. As soon as completed, copies of this map bearing some place names and other basic geographic features for ease of reference, but otherwise unmarked, shall be handed to the Agents and the Liaison Representative of each Party for comment. Such comments shall be made to the Secretary within 15 days of receipt of the maps by each Party.

B Having considered any such comments, the Special Consultant with the assistance of the Chief Surveyor and in consultation with the Secretary, shall then prepare the factual report referred to in paragraph 14 E, below.

C Once the decision of the Commission on the places referred to in paragraph 14, below, has been made, the Commission shall mark on this map the line prescribed in the Delimitation Decision and the proposed sites of the boundary pillars, taking into account where appropriate the need for intervisibility. The map so marked will be sent to the Parties through their Agents and Liaison Representatives for their comments, to be made within 15 days.

D Pillars shall be placed within 50 metres of the coordinates of the pillars marked on the 1:25,000 scale map. If any pillar cannot be so placed, the question of its location shall be referred back to the Commission.

E *Pillar emplacement shall begin in the Eastern Sector, without prejudice to the continuance of preparatory steps for pillar emplacement in the Western and Central Sectors. The precise order of the emplacement of*

* Bold text indicates revision of November 2002.

*individual pillars will be determined by the Commission in the light of conditions prevailing from time to time.***

10. Mine clearance

A The preparation of each pillar site and the construction of each pillar shall not begin until the site and access roads are certified to be clear of mines and unexploded ordinance (“UXO”) by the UNMEE MACC.

B Mine-clearance activity shall be conducted as heretofore, under the control and command of UNMEE MACC, by UNMEE personnel, UNMEE-employed personnel and international commercial contractors.

C All such personnel shall have freedom of movement to and around mine-clearance sites as provided in paragraph 8 A, above.

D Verification and quality assessment of mine-clearance work is the responsibility solely of UNMEE MACC.

11. Construction of pillars

A Pillars will be constructed in the manner and to the specification proposed in the Chief Surveyor’s memorandum on Demarcation dated 16 May 2002. These details may be modified by the Commission after consultation with the Parties.

B Construction shall be done by contractors hired by the United Nations on behalf of the Commission in accordance with the MOU. The contractors may use UNMEE assistance as required, in accordance with the MOU.

C Materials for the construction of boundary markers and witness marks shall be procured by the United Nations on behalf of the Commission in accordance with the MOU.

12. “As-built” survey of boundary markers

Immediately after construction, the final location of each boundary marker shall be accurately surveyed from the adjacent witness marks. The witness marks and boundary markers will be connected by survey to the Primary and Secondary datum stations previously established. This survey work will be undertaken by contractors employed under paragraph 11 B, above.

13. Sectoral map

A register shall be kept, recording the final location of each pillar. The completion of the demarcation in each sector shall be promulgated by the

** Italicized text indicates revision of March 2003, pursuant to paragraph 4 of the Commission’s Order of 9 February 2003.

Commission by means of the issue to the Parties of the final map of the relevant sector and a copy of the relevant pages of the register.

14. Special directions for specific locations or problems

Division of towns and villages

A The Commission has no authority to vary the boundary line. If it runs through and divides a town or village, the line may be varied only on the basis of an express request agreed between and made by both Parties.

River boundaries

B Unless the Commission should decide otherwise after receiving a request from a Party that the boundary in a river requires demarcation, the Commission considers that the identification of a river as a boundary should normally suffice without actual demarcation therein, save as regards the identification of confluences, turning points that may give rise to doubts, and headwaters or sources.

C Where the boundary turns at a river confluence, the turning point of the boundary is at the point of the meeting of the main channel of each river or stream. Where topography permits, the turning point shall be identified by three pillars, one on each bank of the river that meets the other and the third on the bank of the latter opposite the confluence, with the distances of each pillar from the point of meeting being marked thereon.

D References to the headwaters or sources of rivers or streams mean the highest point at which the flow of water can be identified or, if the stream bed has become permanently dry, then the highest point at which the stream bed can be identified.

Tserona, Zalambessa and Bure

E The Commission cannot demarcate the precise boundary at each of these towns without fuller knowledge of their layout and of the character and location of the buildings within them. The Field Offices shall therefore prepare a factual report thereon, on which the comments of the Parties will be requested, whereupon the Commission shall provide appropriate instructions to the Field Offices.

15. Disagreements

A Any disagreement by a Party with the location of the emplacement of a pillar on the ground, and the reasons thereafter, shall be notified by its Liaison Representative in writing to the Special Consultant and the Chief Surveyor, with a copy to the other Party's Liaison Representative, within 24 hours of being informed of the intended specific location. Such information shall be conveyed to the Field Liaison Officers if they are present at the location or, if they are not present, to the Liaison Representatives of the Parties. The other Party shall respond within 48 hours, and the Special

Consultant, in consultation with the Secretary and the Chief Surveyor, shall then decide the matter. Either Party may then request (giving its reasons) the Special Consultant to refer the matter to the Commission for final decision. The fact that a question relating to a particular pillar is under consideration shall not prevent the Field Offices staff from continuing work on other pillars.

B Any other matter of disagreement shall, after notice by the Liaison Representative or Liaison Officer of the Parties to the Special Consultant or Chief Surveyor, be discussed between them. If the disagreement cannot thus be resolved, it shall be referred to the Commission for decision. The Special Consultant or the Chief Surveyor shall prepare and transmit a report thereon to the Commission and the Parties. The Parties may communicate any comments on this report to the Commission within 15 days of receipt of the report.

OBSERVATIONS OF THE ERITREA-ETHIOPIA BOUNDARY COMMISSION, 21 MARCH 2003

OBSERVATIONS DE LA COMMISSION DU TRACÉ DE LA FRONTIÈRE ENTRE L'ÉRYTHRÉE ET L'ÉTHIOPIE, 21 MARS 2003

Commission's approach to the demarcation phase of its work—latitude of demarcators in demarcating the line delimited by an arbitral or judicial award or by a boundary treaty—practice normally based on the agreement of the parties concerned—no implied power under customary international law—limited margin of appreciation in order to enable the demarcator to take account of any flexibility in the terms of the delimitation itself or of the scale and accuracy of maps used in the delimitation process, and to avoid establishing a boundary which is manifestly impracticable.

Approche suivie par la Commission pendant la phase de démarcation de ses travaux – latitude d'appréciation dans la démarcation de la ligne délimitée par une sentence arbitrale ou un jugement ou par un traité relatif à la frontière – la pratique est normalement fondée sur l'assentiment des parties concernées – aucun pouvoir implicite n'existe en vertu du droit international coutumier – les responsables de la démarcation d'une liberté bénéficient d'appréciation limitée afin de tenir compte de la flexibilité qui caractériserait la délimitation elle-même, ou de l'échelle ou de la précision des cartes utilisées dans le processus de délimitation, et d'éviter d'établir une frontière qui est manifestement impraticable.

OBSERVATIONS OF THE ERITREA-ETHIOPIA BOUNDARY COMMISSION

Introduction

1. At the time of issuing to the demarcation team its first set of Demarcation Instructions, the Commission considers it opportune to offer the Parties certain Observations on the Commission's approach to the demarcation phase of its work in the light in particular of certain considerations advanced by the Parties in their comments of 24 January 2003. In doing so the Commission is mindful of the fact that it is not the practice of international tribunals to respond to comments upon, or criticisms of, their decisions. However, the unusual features of the present situation, in which the Boundary Commission is required to continue its work by demarcating the boundary but without provision for formal pleadings by the Parties or full oral hearings, make it desirable that the Commission's work in this respect be more fully explained. This will, the Commission believes, also be helpful in avoiding certain misunderstandings regarding the content and effect of the Commission's Delimitation Decision of 13 April 2002 ("Delimitation Decision") and regarding its tasks during the demarcation process.

2. In the Delimitation Decision, the Commission delimited the colonial treaty border between Eritrea and Ethiopia as prescribed by the mandate given to it by the Parties, namely, in accordance with the pertinent colonial treaties and applicable international law. Under the December 2000 Agreement "[t]he parties agree that the delimitation ... determination [...] of the Commission shall be final and binding." Both Parties have affirmed their acceptance of the Delimitation Decision.

The Demarcation Phase

3. The Commission has now turned to the second phase of its work, the demarcation of the boundary. Since, as the Parties have expressly agreed, the Commission's Delimitation determination is "final", the demarcation has to be the demarcation on the ground *of the boundary as delimited in the Delimitation Decision*, not a variation of that boundary or the elaboration of some new boundary. This conclusion is reflected in paragraph 14A of the Commission's Demarcation Directions of 8 July 2002, which reads as follows:

"Division of towns and villages

A. The Commission has no authority to vary the boundary line. If it runs through and divides a town or village, the line may be varied only on the basis of an express request agreed between and made by both Parties."

Although Ethiopia had, in its written comments on the draft of this provision, expressed the hope that it could be made more flexible so that demarcations could be more practical and mitigate hardships, the Commission felt unable to accede to that suggestion, given both the finality which the Parties were agreed was attached to its Delimitation Decision and the role given by the Parties to the United Nations in facilitating the resolution of such problems.

4. The position as set out in paragraph 14A thus follows from the mandate given to the Commission by the Parties in the December 2000 Agreement. The Commission cannot by its own actions expand the authority conferred upon it. If, however, the Parties were to agree that the Commission's authority should be expanded, they would be free to do so.

Flexibility in demarcation

5. At this point the Commission must address the question of the flexibility which is said to inhere in a demarcation process and which, it is suggested, enables the Commission to depart from the strict application of the boundary line which it prescribed in order to take into account the human and physical geography of certain areas better known now than at the time the Delimitation Decision was handed down.

6. The Commission is, as already noted, constrained by the terms of the December 2000 Agreement. The Commission is unable to read into that treaty language, either taken by itself or read in the light of the context provided by other associated agreements concluded between the Parties, any authority for it to add to or subtract from the terms of the colonial treaties or to include

within the applicable international law elements of flexibility which it does not already contain.

7. In this latter respect the Commission notes that there is a practice whereby demarcators may be given some latitude, on various grounds, in demarcating the line which has been delimited by some arbitral or judicial award or by a boundary treaty. But the Commission notes that this is a practice which is normally based on the agreement of the parties concerned, as expressed in some relevant instrument. Moreover, that practice often involves the demarcation of a boundary by joint demarcation teams composed of representatives of the two States concerned, who can thus act for their States in agreeing to such flexibility as the demarcation team may think appropriate in the course of its work. The Commission is not of the view that there is to be derived from that practice a settled rule of customary international law to the effect that demarcators not so expressly empowered nonetheless possess such power.

8. Hence, consistent with the Parties' prescription that the delimitation be final, the scope for any clarification of or deviation from the boundary which the Boundary Commission has laid down is very limited. In the Commission's view a demarcator must demarcate the boundary as it has been laid down in the delimitation instrument, but with a limited margin of appreciation enabling it to take account of any flexibility in the terms of the delimitation itself or of the scale and accuracy of maps used in the delimitation process, and to avoid establishing a boundary which is manifestly impracticable.

9. In the present case this conclusion is the more compelling in the light of three considerations in particular to which the Parties had agreed in advance:

(a) first, they knew in advance, and agreed, that the result of the Commission's delimitation of the boundary might not be identical with previous areas of territorial administration and might follow a course which resulted in populations ending up on the "wrong" side of the boundary, and that where such a situation arose the ensuing problems were for resolution by the UN rather than by the Commission (Article 4.16 of the December 2000 Agreement);

(b) second, the Parties knew in advance, and agreed, that it was not open to the Commission to make its decisions on the basis of *ex aequo et bono* considerations (Article 4.2);

(c) third, the Parties knew in advance, and agreed, that the boundary as delimited by the Commission's Delimitation Decision would be final (Article 4.15), i.e., not subject to amendment, including therefore amendment during the process devoted to and limited to demarcation of the boundary delimited.

Flexibility Within the Terms of the Delimitation Decision

10. In respect of certain matters - Tserona, Zalambessa, Bure, the Eastern Sector as a whole, rivers, the recalculation of coordinates, and the eventual need to replace the Commission's "illustrative" map with a final and definitive map - the Commission envisaged that further work was required but it specified in its Delimitation Decision what that work would entail. It would be wrong to read into those exact references some readiness or authority on the part of the Commission to go beyond the limits set, let alone to look again at other sections of the boundary in the light of such further representations as might be made to it.

(a) The recalculation of coordinates

11. This is particularly the case with the Commission's specification in the Delimitation Decision of the coordinates of the points between which the boundary was to run. The Commission explained that this particular specification was used because of the limited availability at that stage of information on the maps before the Commission. The Commission therefore added that "[a]ll coordinates will be recalculated and made more precise during the demarcation as the Commission acquires the additional necessary information." As is evident from the words used and from their context the recalculation of the coordinates was to be solely for the purpose of ensuring, on the basis of aerial photography, which the Commission had previously been precluded from initiating, that the coordinates of the locations listed in the Decision were accurate. Nothing in the language used could reasonably be read as suggesting that the Commission intended that the locations themselves would be varied during the demarcation. It was to be a technical exercise not involving any substantive alteration in the boundary. Nothing was said in the Decision to suggest that the line was provisional other than in relation to the locations specifically identified in paragraph 10 above.

12. The Commission is therefore obliged to reject the assertion that it must adjust the coordinates to take into account the human and physical geography in the border region. Moreover, the Commission firmly rejects the contention that if such adjustments are not made the Commission's work would be devoid of adequate legal basis.

(b) The Parties' subsequent conduct

13. Similarly, the fact that the Commission, in its Delimitation Decision, made an assessment of the effect of subsequent conduct on the boundaries established by the three colonial treaties cannot be read as enabling the Commission now to reopen the Delimitation Decision. In considering such conduct, the Commission relied on the evidence placed before it by the Parties during the written and oral pleadings before the Commission, and concluded that in some respects a departure from the treaty boundary was called for while in others it was not. The Commission's readiness to consider in that way the Parties' subsequent conduct was not intended to mean, and cannot be taken

to mean, that the Commission would now be receptive to additional evidence of that conduct or would itself seek to gather it. To do so would mean that the boundary determined by the Commission would have been subject to further variation and would thus have been indeterminate. It would also be inconsistent with the stipulation in the December 2000 Agreement that the Commission's Delimitation Decision is "final." The boundary laid down in the Delimitation Decision reflects the Commission's assessment of the evidence of conduct presented by the Parties. The boundary line drawn, for example, in the area of the so-called Belesa and Endeli Projections is not a provisional line subject to further consideration by the Commission of new evidence of State practice in those areas. There is, in short, no further room for the introduction by the Parties of additional new evidence of their conduct, or for the Commission to seek out such evidence.

The Three Boundary Sectors

14. As the Commission indicated in its Delimitation Decision, its approach to the task of delimiting the boundary between Eritrea and Ethiopia was dictated by the December 2000 Agreement, in which the Parties stipulated that the Commission's mandate was to determine the boundary on the basis of the three Treaties and applicable international law. Accordingly, the Commission dealt with the boundary in three sectors corresponding to the three Treaties. As they were not identical in content, the interpretation and application of each by the Commission required different approaches in each of the sectors to which they related.

(a) The Western Sector

15. The boundary in the Western Sector, governed by the 1902 Treaty, was never completely laid down prior to the dispute between the Parties. It was, therefore, a principal task of the Commission to complete the delimitation of that boundary.

16. The Commission concluded that the boundary in the uncompleted section had crystallized by 1935 so as to follow a straight line between Points 6 and 9 as depicted on the map accompanying its Delimitation Decision. That straight line had been represented on many maps, including maps published by Ethiopia as well as Eritrea.

17. The Commission also examined developments after 1935, and concluded that it could "perceive nothing in that chain of developments that has had the effect of altering the boundary between the Parties" (para 5.91). The Commission observes that its finding that the boundary under the 1902 Treaty had by 1935 crystallized along the line of the traditional signature means that the burden rested upon Ethiopia to substantiate any claimed departure from that line on the basis of conduct that would serve to show that Badme village (which lies close to the line) was subject to Ethiopian control. The Commission referred specifically in the Delimitation Decision (paras 5.92-5.95) to the evidence produced by Ethiopia. It noted in particular that

Ethiopia had introduced no evidence in its opening pleading (its Memorial) of governmental activities west of that straight line; although it produced some evidence in its Counter Memorial, it did not add to or develop this in its Reply. Moreover, maps submitted by Ethiopia were inconsistent as to the location of Badme village. Overall, the evidence was nothing like what might have been expected had Ethiopia's presence there in the period before the case been as significant as Ethiopia now alleges. The Commission would note that what is relevant here is governmental and not private activity. The references to Ethiopian governmental control of Badme and its environs were insufficient to persuade the Commission that an Ethiopian presence west of the line from Points 6 to 9 would support a departure from the line that had crystallized by 1935.

18. This conclusion followed from the inadequacy of Ethiopia's evidence. Since Badme village (as opposed to some other parts of the Badme region) lay on what was found to be the Eritrean side of the treaty line, there was no need for the Commission to consider any evidence of Eritrean governmental presence there, although Eritrea did in fact submit such evidence. Moreover, even some maps submitted by Ethiopia not only showed the distinctive straight line between the Setit and Mareb Rivers, but also marked Badme village as being on the Eritrean side of that line. The Commission must also observe that the Ethiopian invocation of the findings of the OAU in respect of Badme in 1998 (Comment, para. 1.4, footnote 4) failed to mention the OAU's express statement that those findings did not "prejudge the final status of that area which will be determined at the end of the delimitation and demarcation process and, if necessary, through arbitration."

(b) The Central Sector

19. In the Central Sector the boundary was decided by reference, in the first place, to the Treaty of 1900. The subsequent conduct of the Parties was then examined with a view to determining whether any such conduct required the Commission to depart from the Treaty line as so determined. The Commission found that on the evidence placed before it such departure was required at a number of locations which were clearly described. However, at two points determination was left to be made more precise later, namely, at Tserona and Zalambessa. The Delimitation Decision contained no indication that the demarcation would involve any change or completion of the boundary at any other locations.

20. Nonetheless, in the light of further work done in the exercise of its demarcation function, the Commission has identified two areas in the Central Sector where a strict application of the line as delimited in its Delimitation Decision would be manifestly impracticable, namely, certain plateau lands in the vicinity of Point 18 on the boundary, and the area of the delta-like formation where the Ragali River flows into the Salt Lake. Demarcation instructions relating to these areas will be issued later.

21. In addition, the Commission is aware that there may be technical demarcation issues in part of the stretch between Points 17 and 18, where the boundary runs along what it referred to in the Delimitation Decision simply as the "Eritrean claim line." These issues will be addressed in future instructions to the demarcation team.

22. In two additional respects the Commission's delimitation of the boundary in the Central Sector may call for some clarification.

23. Although it now appears that the Commission may have been provided with insufficient information concerning the precise location of Fort Cadorna, this does not affect the delimitation of the boundary in the region that the Commission has identified as "Acran", that is, the area in the southern part of the Belesa Projection defined by the Commission as extending over the relevant part of the boundary line joining Points 14-18. The Commission found that the evidence of Eritrean activity was "sufficient ... to justify treating the Acran region as part of Eritrea." That conclusion is not brought into question by the possible misplacement of Fort Cadorna, and accordingly there is no reason for the Commission to vary the boundary in the southern section of the Belesa Projection as delimited by it.

24. The other respect in which the Delimitation Decision calls for some clarification concerns the course of the boundary between Points 20 and 21, immediately to the southeast of Zalambessa. In that area there is a discrepancy between, on the one hand, the Commission's reasoning (at para. 4.42) and, on the other hand, its summary of the Treaty boundary (para. 4.59(6) and (7)) and the operative part of the Commission's *dispositif*, as shown on Map 11 of the Delimitation Decision. It is accepted as a matter of international law that it is the *dispositif* which is operative and binding, and which prevails if there is any discrepancy between it and the body of a tribunal's award.

25. There is a further issue in that the Commission, based upon map evidence submitted by both Parties, placed Point 20 at the source of a headwater stream of the Muna/Berbera Gado. From the aerial photo survey that the Commission was only recently permitted to conduct, it is apparent that that map evidence was inaccurate. There may therefore be some uncertainty regarding the boundary line around Zalambessa and the commencement of the line passing down the Muna until it meets the Enda Dashim at Point 21. The Commission will give the demarcation team appropriate instructions in due course.

(c) *the Eastern Sector*

26. The boundary in the Eastern Sector was governed by a third Treaty, that of 1908, which used the formula that the boundary should proceed parallel to the coast and at a distance of 60 kilometres from it, adding that the two Governments would fix the line on the ground by common accord, "adapting it to the nature and variation of the terrain." The Commission accordingly sought the views of the Parties as to what adaptations might be

called for in accordance with that provision. In their comments of 24 January 2003, both Parties gave their views on this matter. The Commission has carefully considered those views, and has reached conclusions which it has embodied in the demarcation instructions which it has today given to the demarcation team.

Rivers and islands

27. The Commission also acknowledged in its Delimitation Decision that there could be certain practical difficulties in the demarcation of the boundary in those stretches where it follows the course of a river. It therefore asked both Parties for their views on these questions, which the Parties duly gave in their comments of 24 January 2003. The Commission is considering those views.

Concluding observations

28. It is inherent in any boundary delimitation that it may give rise to anomalies on the ground. This was expressly anticipated and accepted by the Parties in their December 2000 Agreement, and by the Commission in its Demarcation Directions of July 2002. This is essentially a matter for the Parties to deal with by agreement between themselves, or by agreeing to empower the Commission to vary the boundary, or by turning to the United Nations as contemplated in Article 4.16 of the December 2000 Agreement.

29. In its consideration of the comments of the Parties, the Commission must maintain its impartial approach to all matters with which it has to deal. It cannot allow one Party to claim for itself the right to insist on adjustment of parts of the boundary which that Party finds disadvantageous. The Commission continues to owe a duty to both Parties to perform the functions placed upon it by their agreement and it is its intention to perform these functions fully and faithfully.

30. The next steps to be taken are clear: the Commission's surveyors must be allowed to continue, without hindrance, to establish the locations of the marker pillars and the contractors must be allowed to construct the pillars. The Parties must cooperate with the Commission in ensuring that the Commission be enabled to complete its work as set out in the Schedule of Operations. The Commission's personnel must be fully safeguarded in their operations. While the Commission notes with appreciation the firm undertakings that both Parties have given in this connection, it still remains for the Parties to discuss with the Chief Surveyor at an early date the details of the manner in which they propose to fulfill these undertakings.

London, 21 March 2003

Signed by the Commission:

(Signed) Sir Elihu Lauterpacht
President

(Signed) Prince Bola Adesumbo Ajobola

(Signed) W. Michael Reisman

(Signed) Judge Stephen M. Schwebel

(Signed) Sir Arthur Watts

(Signed) Dr. Hiroshi Murakami
Secretary

(Signed) Bette E. Shifman
Registrar

DEMARCATIION INSTRUCTIONS, 21 MARCH 2003

INSTRUCTIONS RELATIVES À LA DÉMARCATIION, 21 MARS 2003

First set of technical instructions regarding demarcation—Zalambessa and Tserona.

Première série d'instructions techniques concernant la démarcatiion – Zalambessa et Tserona.

DEMARCATIION INSTRUCTIONS, 21 MARCH 2003

The Commission issues the following first set of technical instructions regarding demarcation:

Straight line boundaries

1. Where there is a straight line boundary between turning points, any intermediate boundary pillars shall be placed on the boundary line, so that it falls across the tops of the boundary pillars.

Towns of Zalambessa and Tserona

2. The demarcation team will submit the Ethiopian proposal for the boundary around the town of Zalambessa to Eritrea for comment.

3. The demarcation team shall invite Eritrea to prepare a draft boundary for the town of Tserona. The demarcation team shall then submit that draft boundary to Ethiopia for comment.

Identification of pillar sites in Eastern Sector

4. The requirements for identifying pillar sites in this sector are:

- (a) Helicopter access to pillar and associated marker site;
- (b) Practicability of the site for emplacing the pillar and associated markers;
- (c) Maintenance of an area balance between the line joining the final chosen sites compared to the original delimitation line of 13 April 2002 in the order of 3 per cent;
- (d) Determination of the midpoint between the pre-conflict Eritrean and Ethiopian customs posts on the road near Bure;
- (e) A reinstatement of the original pillar emplaced by the French on Mousa'ali in the course of the original demarcation of the Djibouti-Ethiopia border.

DEMARCATIION INSTRUCTIONS, 22 AUGUST 2003

INSTRUCTIONS RELATIVES À LA DÉMARCATIION, 22 AOÛT 2003

Second set of technical instructions regarding demarcation—Zalambessa and Tserona—consideration of whether certain aspects of the boundary as set out in the Delimitation Decision are manifestly impracticable—river boundaries and islands.

Deuxième série d'instructions techniques concernant la démarcation – Zalambessa et Tserona – examen de la question de savoir si certains aspects de la frontière définis dans la décision relative à la délimitation sont manifestement impraticables; frontières et îles fluviales.

DEMARCATIION INSTRUCTIONS, 22 AUGUST 2003

The Commission issues the following second set of technical instructions regarding demarcation:

Towns of Tserona and Zalambessa

1. The demarcation team shall take the fullest account of the proposed boundaries in the Parties' comments on Tserona and Zalambessa and the instructions in Paragraph 14 E of the Demarcation Directions, and shall prepare a report on these towns.

Identification of pillar sites

Salt Lake

2. The demarcation team shall identify the edge of the Salt Lake in the neighbourhood of Point 31 and fix the position of that point accordingly.

Ragali Delta

3. The demarcation team shall fix the position of Point 30 between the banks of the Ragali.

Ragali Gorge

4. The demarcation team shall fix the position of the pillar site as close as possible to Point 29 so as to ensure that both Parties have continuous access to the waters of the Ragali.

Points 26, 23 and 22

5. With respect to Points 26, 23, and 22, the boundary shall be located at the intersection of the main channel of each tributary with a line joining the

upper and lower sections of the permanent bank of the main stream, and shall be marked by the demarcation team with an appropriate pillar site.

Points 24 and 25

6. The demarcation team shall fix Points 24 and 25 in accordance with Paragraph 14 D of the Demarcation Directions.

Boundary from Zalambessa to Point 21

7. The demarcation team shall investigate the area north of the Muna/Berbero Gado in order to determine whether there is a physical barrier affecting access from the north to the northern side of the river that makes the boundary as set out in the Delimitation Decision manifestly impracticable.

Plateau Land East of Zalambessa

8. The demarcation team shall examine whether the delimitation as contemplated in the Commission's Delimitation Decision is manifestly impracticable so as instead to require running a series of straight lines, in a generally east and south-east direction, from the north-eastern point of the outer boundary of Zalambessa, as proposed by Ethiopia in its comments.

Plateau Lands Near Point 18

9. The demarcation team shall fix pillar sites at the outer and westernmost tips of the perimeter of the plateau, linked by a series of straight lines traversing the valleys in between.

10. The demarcation team shall, insofar as practicable, fix pillar sites so that the pillars will be intervisible.

Eritrean Claim Line

11. The demarcation team shall fix pillar sites between which a series of straight lines would be drawn so as to reflect the Eritrean claim line as depicted on the Soviet map (1:100,000), these pillar sites to be located within approximately 200 metres of the coordinates extracted from the Soviet map.

12. The demarcation team shall, insofar as practicable, fix pillar sites so that the pillars will be intervisible.

13. The demarcation team shall fix a pillar site on the bank opposite the intersection of the tributary on the Eritrean claim line with the Belesa B.

14. The boundary following the main channel of the Belesa A and the main channel of the tributary shall be located at the intersection of the main channel of the tributary with a line joining the upper and lower sections of the permanent bank of the Belesa A, and shall be marked by the demarcation team with an appropriate pillar site.

Point 17

15. The boundary following the main channel of the Belesa A and the main channel of the tributary shall be located at the intersection of the main channel of the tributary with a line joining the upper and lower sections of the permanent bank of the Belesa A, and shall be marked by the demarcation team with an appropriate pillar site.

Points 15 and 16

16. The demarcation team shall fix the position of Points 15 and 16 in accordance with Paragraph 14 D of the Demarcation Directions.

Point 14

17. The boundary following the main channel of the Belesa B and the main channel of the tributary shall be located at the intersection of the main channel of the tributary with a line joining the upper and lower sections of the permanent bank of the Belesa B, and shall be marked by the demarcation team with an appropriate pillar site.

Points 6 and 9

18. The demarcation team shall now fix the position of Points 6 and 9.

Criteria for pillar site selection

19. The requirements for identifying pillar sites in the Central and Western Sectors are:

- (a) helicopter and/or vehicle access to all sites;
- (b) suitability of the site for emplacing the pillar and associated markers.

River boundaries and islands

20. Having considered the submissions and comments of the Parties, the Commission determines that:

- (a) the identification of a river, as a boundary, should normally suffice without actual demarcation therein save as regards the identification of such turning points as might otherwise give rise to doubts, and of headwaters or sources;
- (b) the boundary is the middle of the main channel (the channel of greatest volume) and will move in accordance with any change in position of the middle of the main channel;
- (c) the middle of the main channel, as defined in (b) above, shall not be demarcated;
- (d) islands shall fall within the territory of either Party according to their location in relationship to the main channel.

21. The demarcation team shall determine by appropriate methods the position in relation to the main channel of those islands identified by the Parties in their comments.