

## 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.<sup>52</sup> 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.

- 6.5 Article IV of the 1908 Treaty states:

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<sup>52</sup> 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.

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.<sup>53</sup> 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.

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<sup>53</sup> 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.

- 6.25 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."
- 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.

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