

## 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 Mereb and 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.<sup>29</sup>

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 16<sup>th</sup> 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.<sup>30</sup>

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<sup>29</sup> Translation provided in the Eritrean pleadings.

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

- 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.<sup>31</sup> Another agreement between Sudan and Eritrea of the same date describes the demarcation of this boundary.<sup>32</sup> A further agreement of 22 November 1901 provides for the completion of the delimitation between Sudan and Eritrea “as far as the junction of the Khor Um Hagar with the River Setit” – “the line to be eventually demarcated by special Delegates.”<sup>33</sup> 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.<sup>34</sup>
- 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 1903<sup>35</sup> 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.<sup>36</sup>

- 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.<sup>37</sup>

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<sup>31</sup> *African Boundaries*, p. 864.

<sup>32</sup> *Id.*

<sup>33</sup> *Ibid.*, p. 865.

<sup>34</sup> *Ibid.*, p. 866.

<sup>35</sup> *Ibid.*, p. 868.

<sup>36</sup> *Ibid.*, p. 871.

<sup>37</sup> *Ibid.*, p. 877.

Thus, it was the February 1903 demarcation that brought the tripoint to the north bank 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,<sup>38</sup> 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 towards the confluence of the Mareb and the Mai Ambessa (Point 9). This other river is named the “Maiteb” 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, “Maiteb” 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).

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<sup>38</sup> See Chapter VII, below, for consideration of the boundary within rivers.

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 “Maieteb.” 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.

## Map 8

- 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.*<sup>39</sup>

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."

- 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*<sup>40</sup> *etermined 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.<sup>41</sup>

- 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 nego-

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<sup>39</sup> Commission's emphasis.

<sup>40</sup> See Map 8.

<sup>41</sup> Commission's emphasis.

## Map 9



tiations 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 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.<sup>42</sup>

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

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<sup>42</sup> 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.

the Abyssinian boundary, a zone of territory to the east of the Todluc-Maiteb line, *which will give to Erythrea the whole of the Cunama tribe up to the Mareb.*<sup>43</sup>

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.*<sup>44</sup>

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 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.

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<sup>43</sup> Commission’s emphasis.

<sup>44</sup> Commission’s emphasis.

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.<sup>45</sup>

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

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

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.

*Martini letter, 3 August 1902*

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

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<sup>46</sup> 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.

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 the recent 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 data 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 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.*<sup>47</sup>

*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.<sup>48</sup> 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

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<sup>47</sup> Commission’s emphasis.

<sup>48</sup> See, e.g., Zoli in 1929, para. 5.68, below.

western location (Point 3), the line to Point 9 would have cut the Cunama territory in half.

*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)<sup>49</sup> 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 to end 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.*<sup>50</sup>

*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

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<sup>49</sup> See para. 5.50, above.

<sup>50</sup> Commission’s emphasis.

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” 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.<sup>51</sup>

*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

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<sup>51</sup> 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.

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 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 Mochiti, 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° 17' in the west and 37° 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° 17' and 37° 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.

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