

ESSAY

SWIMMING AGAINST THE CURRENT:
ETHIOPIA'S QUEST FOR ACCESS TO THE RED
SEA UNDER INTERNATIONAL LAW

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ABSTRACT

In October 2023, Prime Minister Abiy Ahmed Ali declared access to the Red Sea is “an existential matter” for Ethiopia, reigniting the longstanding dispute with Eritrea over the Assab Red Sea coastal areas. This Article addresses the need for a peaceful resolution of this dispute while scrutinizing the legitimacy of Ethiopia’s claim for access to the Red Sea within the framework of international law. Contrary to the prevailing view among Ethiopian scholars, the Article argues that Ethiopia lacks a legitimate ownership claim over Assab or any parts of the Red Sea. However, it argues that Ethiopia, as a landlocked country, is entitled to free access to the Red Sea under the UN Convention on the Law of Sea. Moreover, considering the potential ramifications of defying international law, the Article urges both Ethiopia and Eritrea to think beyond narrowly conceived national interests and foster mutual benefit through cooperation and regional integration.

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I. INTRODUCTION

Ethiopia and Eritrea have fought several bloody wars since the early 1960s. In 1952, Eritrea, a former Italian colony and later British protectorate, was federated as an autonomous unit with Ethiopia.¹ Following the dissolution of the federation in 1962, Eritreans fought Ethiopia for thirty years and gained their independence in 1993.² Between 1998 and 2000, the two countries fought another devastating war, which culminated in

1. Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479, 482–87 (1994).

2. *Id.* at 487; Decision Regarding Delimitation of the Border between Eritrea and Ethiopia, 25 R.I.A.A. 83, 105 (Perm. Ct. Arb. 2005) [hereinafter The Border Commission's Decision]; Jennifer Parmelee, *After 30 Years of War, Eritrea is Rebuilding*, WASH. POST (July 31, 1991), <https://www.washingtonpost.com/archive/politics/1991/07/31/after-30-years-of-war-eritrea-is-rebuilding/823c8fa7-aabe-4705-be9d-0a19bd1e4fde> [https://perma.cc/25BQ-8KVK].

the defeat of Eritrea.³ In the decades following the war, Ethiopia and Eritrea, locked in an intractable stalemate, pursued coercive and destructive policies: While Eritrea provided training and financial and arms support to all guerrilla liberation fronts fighting against Ethiopia,⁴ Ethiopia employed an aggressive containment strategy to isolate the Eritrean capital, Asmara—lobbying for several sanctions against Eritrea diplomatically.⁵

In 2018, Prime Minister Abiy Ahmed came to power following a protracted popular uprising against the Tigray People Liberation Front (TPLF) dominated regime in Ethiopia.⁶ Subsequently, Eritrea normalized its relationship with the federal government in Addis Ababa but continued its animosity with TPLF and directly participated in the civil war in the northern part of Ethiopia, supporting the federal government of Ethiopia.⁷ The Eritrean soldiers were accused of committing various massacres and sexual violence in Tigray, a regional State

3. James D. Fry, *Ethiopian Exceptionalism and the Eritrea-Ethiopia Boundary Commission*, 25 AFR. J. INT'L & COMP. L. 135, 135 (2017) (“Ethiopia, by most accounts, successfully had won the war by 2000, if not by 1999.”).

4. MINISTERIE VAN BUITENLANDSE ZAKEN [MINISTRY OF FOREIGN AFFAIRS (OF THE NETHERLANDS)], COUNTRY OF ORIGIN REPORT ON ERITREA FEBRUARY 2017, at 17 (2017), <https://www.government.nl/documents/reports/2017/02/06/country-of-origin-report-on-eritrea-february-2017> [<https://perma.cc/L7KR-UWDQ>] (“Eritrea supports the Ogaden National Liberation Front (ONLF), Ginbot7 [sic] and the Eritrea-based Ethiopian Tigray People’s Democratic Movement (TPDM).”).

5. *Ethiopian Charge Eager to Sanction Eritrea; Agrees to Consider New Border Dispute Strategy*, WIKILEAKS (Aug. 17, 2009, 9:03 AM), https://wikileaks.org/plusd/cables/09USUNNEWYORK772_a.html [<https://perma.cc/44LW-US6K>].

6. *Ethiopia’s Abiy Ahmed: The Nobel Prize winner who went to war*, BBC (Oct. 11, 2021) [hereinafter *Ethiopia’s Abiy Ahmed*], <https://www.bbc.com/news/world-africa-43567007> [<https://perma.cc/NYR9-BBXW>] (“[Abiy won] the Nobel Peace Prize in October 2019 for finally bringing an end to the 20-year stalemate with Eritrea . . .”).

7. *Id.*; Mahemud Tekuya, *Ethiopia, from Stability to Civil War: A Multiple Streams Explanation of the United States Policies on Ethiopia*, 7 J. INT’L SEC. & STRATEGIC STUD. 2 (2024):

In a bid to monopolize power, Abiy presented himself as a “reformer” and implemented unprecedented changes, including releasing political prisoners, lifting media restrictions, welcoming exiled political parties back into Ethiopia, and making “peace” with neighboring Eritrea. These changes and corruption charges largely targeting former Tigrayan leaders exacerbated the tension between Abiy’s administration and TPLF. In November 2020, the TPLF attacked the northern command of the Ethiopian National Defense Force (ENDF), and Ethiopia descended into a catastrophic civil war.

administered by TPLF.⁸ However, the relationship between Ethiopia and Eritrea deteriorated after the Ethiopian government and the TPLF signed a Cessation of Hostilities Agreement in South Africa.⁹ Presently, tensions are escalating, and another full-blown war seems on the horizon.¹⁰ This time the conflict centers around Ethiopia's access to the Red Sea.

On October 13, 2023, Prime Minister Abiy Ahmed Ali, in a televised speech to the parliament, declared access to the Red Sea is an "existential" matter for Ethiopia and that he would "use force" to free his landlocked country from its "geographic[] prison."¹¹ Eritrea, however, dismissed Abiy's speech as "excessive and perplexing to all concerned observers"¹² and accused him of actively preparing for a potential war, deploying soldiers around Assab, a Red Sea coastal area forty-five miles from the Ethiopian border.¹³

Although these statements and actions have not yet resulted in an outright war between Ethiopia and Eritrea, they have reignited the longstanding dispute over Assab and Ethiopia's direct access to the Red Sea. This Article addresses the need for a peaceful resolution of this dispute within the framework of international law. Accordingly, the Article scrutinizes the

8. See Abdi Latif Dahir & Simon Marks, *Slaughter on Eve of Ethiopian Peace Draws Accusations of War Crimes*, N.Y. TIMES (Mar. 1, 2023), <https://www.nytimes.com/2023/03/01/world/africa/eritrea-ethiopia-tigray-war.html> [https://perma.cc/NS3T-MQXN].

9. Mohamed Kheir Omer, *Are Ethiopia and Eritrea on the Path to War?*, FOREIGN POL'Y (Nov. 7, 2023), <https://foreignpolicy.com/2023/11/07/ethiopia-eritrea-war-tplf> [https://perma.cc/53Y7-HMLM].

10. *Id.*; Eliab Taye, *Potential "Red Sea" War between Ethiopia and Eritrea: A Three-level Analysis*, AFR. ARGUMENTS (Dec. 13, 2023), <https://africanarguments.org/2023/12/potential-red-sea-war-between-ethiopia-and-eritrea-a-three-level-analysis> [https://perma.cc/WU8H-E7NL].

11. *Id.*; Tafi Mhaka, *Abiy Ahmed's Imperial Ambitions are Bad News for Africa, and the World*, AL JAZEERA (Nov. 14, 2023), <https://www.aljazeera.com/opinions/2023/11/14/abiy-ahmeds-imperial-ambitions-are-bad-news-for-africa-and-the-world> [https://perma.cc/E87V-BMHT]; Zecharias Zelalem, *Is Landlocked Ethiopia Starting Another War over Ports in Horn of Africa?*, AL JAZEERA (Nov. 7, 2023), <https://www.aljazeera.com/features/2023/11/7/is-landlocked-ethiopia-starting-another-war-over-ports-in-horn-of-africa>; Brian Gicheru Kinyua, *Ethiopia's Sea Access Ambitions Leave Neighbors Uneasy*, THE MAR. EXEC. (Oct. 22, 2023), <https://maritime-executive.com/article/ethiopia-s-new-desire-for-a-red-sea-port-leaves-neighbors-uneasy>.

12. See Kinyua, *supra* note 11; see also Omer, *supra* note 9.

13. See Omer, *supra* note 9.

legitimacy of Ethiopia's claim for access to the Red Sea in light of several adjacent areas of international law including the law of State succession, international law of treaties, and the law of the sea.

The next Part briefly introduces the historical and geopolitical contexts underlying the relationship between Ethiopia and Eritrea. Part III critically analyzes Ethiopia's ownership claim over Assab in light of international law and asserts that Ethiopia lacks a legitimate ownership claim over Assab or any parts of the Red Sea. Part IV, considering Ethiopia's status as a landlocked country, explores its potential rights under international law including the UN Convention on the Law of Sea (UNCLOS). The final Part concludes this piece and urges both Ethiopia and Eritrea to work for their mutual benefit through cooperation and regional integration.

II. BRIEF HISTORICAL AND GEOPOLITICAL OVERVIEW

Although Ethiopia and Eritrea share a contested precolonial history,¹⁴ this Part focuses only on their colonial and postcolonial history. It commences by briefly summarizing the events leading to the colonization of Eritrea, its integration with—and subsequent secession from—Ethiopia. It then describes the border war between the two countries and highlights the decision of the Ethiopian and Eritrean Boundary Commission (EEBC).

14. Ethiopian scholars argue that Eritrea was an integral part of Ethiopia before colonization. See e.g., Haile, *supra* note 1, at 482 (“The territory now called ‘Eritrea’ has been an integral part of Ethiopia since the Aksumite era in the first century A.D.”). Eritrean scholars, on the other hand, argue that “Eritrea was not historically part of ancient Ethiopia.” See, e.g., Isaias Teklia Berhe, *Anomalous or Legitimate Covetousness: Scholarly Echoes of Ethiopia’s Claim of Sovereign Right for Access to the Sea Under International Law*, 1 ICES 2016 PROCEEDINGS 543, 545 (2016). Yet, another perspective argues only some part of Eritrea was part of ancient Ethiopia. HAGGAI ERLICH, *THE STRUGGLE OVER ERITREA, 1962–1978*, at 11–12 (1983):

[T]he Muslim-populated areas of western and northern Eritrea, were never (with the exception of short insignificant episodes) under the political control of Ethiopian emperors . . . On the other hand, the core regions of today’s Eritrea (essentially, the Christian-populated central highlands) were undoubtedly an integral part—indeed, the cradle—of Ethiopian civilization, statehood, and history.

A. Eritrea's Colonization and Reunification with Ethiopia

The process of Eritrean colonization began in the 1870s when the Italian Rubattino Navigation Company began buying lands in the Assab Red Sea coastal area from local sultans.¹⁵ By the early 1880s, these lands “became the property of the Italian Government. In 1885 Italians landed in Massawa, and two years later they moved inland; however, they were defeated at Dogali by Ras Alula, the Governor of “Mareb Mellash” (Eritrea).”¹⁶

In late 1888, Ras Alula ventured to northwestern Ethiopia to aid Emperor Yohannes IV's fight against the Mahdist forces in Metema.¹⁷ Seizing this opportunity, Italy occupied Asmara.¹⁸ On March 10, 1889, Emperor Yohannes IV died at the battle of Metema, and Italian forces marched towards the highland of Ethiopia.¹⁹ On May 2, 1889, Emperor Menilek II signed the Wichale Treaty, recognizing Italy's occupation of Eritrea.²⁰ The Treaty has both Italian and Amharic versions, and Italy, using Article XVII of the Italian version as a pretext, proclaimed itself as a protectorate of Ethiopia.²¹ It then began incursion into the central part of Ethiopia and suffered a humiliating defeat by Ethiopia at the Battle of Adwa on March 1, 1896.²² In the same

15. See Haile, *supra* note 1, at 482; see also Berhe, *supra* note 14, at 547.

16. See Haile, *supra* note 1, at 482–83. It should be noted that by 1884, Alula had already “established the town of Asmara as his capital, centralized Eritrea's administration and economy, and asserted his control over Keren and what later became western Eritrea.” ERLICH, *supra* note 14, at 12.

17. ERLICH, *supra* note 14, at 12; Haile, *supra* note 1, at 483 (quoting EDWARD ULLENDORFF, *THE ETHIOPIANS: AN INTRODUCTION TO COUNTRY AND PEOPLE* 91 (1973)).

18. ERLICH, *supra* note 14, at 12.

19. See *id.*; see also Haile, *supra* note 1, at 483.

20. Haile, *supra* note 1, at 482–83; see also BAHRU ZEWDE, *A HISTORY OF MODERN ETHIOPIA: 1885–1991*, at 75 (2001); RICHARD PANKHURST, *THE ETHIOPIANS, A HISTORY*, 181–82 (1998).

21. PANKHURST, *supra* note 20; see also ZEWDE, *supra* note 20, at 75. The Italian version reads: “His Majesty the King of Kings of Ethiopia consents to make use of the Italian Government for any negotiations which he may enter into with other Powers or Governments.” Sven Rubenson, *The Protectorate Paragraph of the Wichale Treaty*, 5 J. AFR. HIS. 243, 244 (1964). The Amharic version reads: “የኢትዮጵያ ንጉሥ ነግስት ከኦሮሞ ነገሥት ለግፈፈተት ጉዳይ ሁሉ በኢጣሊያ መንግስት አጋዥነት መላላክ ይችላሉ።” See Rubenson, *supra*, at 250. The Translation of the Amharic version reads: “The King of Kings of Ethiopia, with the kings of Europe, for all the matters which he wants, it shall be possible for him to communicate with the assistance of the Italian government.” Rubenson, *supra*, at 250.

22. Haile, *supra* note 1, at 483; ZEWDE, *supra* note 20, at 76–79; see also PANKHURST, *supra* note 20, at 185–92.

year, Ethiopia signed the Treaty of Addis Ababa with Italy, acknowledging the Italian colonial rule over Eritrea.²³ Ethiopia also signed the 1900 Treaty with Italy, the 1902 Treaty with Great Britain, and the 1908 Treaty with Italy, all of which would help define the Ethiopia-Eritrean boundary.²⁴

For the next four decades, Italy ruled Eritrea as its colony, respecting Ethiopia's sovereignty, and territorial integrity.²⁵ However, in October 1935, fascist Italy invaded Ethiopia, forcing Emperor Haile Selassie into exile and gaining control of the capital city, Addis Ababa, in May 1936.²⁶ Ethiopian patriots fiercely resisted Mussolini's forces until World War II erupted in 1941, allowing emperor Haile Selassie returned with British forces.²⁷ The same year, Ethiopia defeated Italy with the help of Britain and regained its independence.²⁸

Following World War II, the Soviet Union, the United Kingdom, the United States, and France forced Italy to relinquish its colonies in Africa, including Eritrea.²⁹ As a result, Eritrea fell under British military administration between 1941 and 1952.³⁰ By 1950, the UN General Assembly (UNGA) issued Resolution 390A, deciding that "Eritrea shall constitute an autonomous unit

23. PANKHURST, *supra* note 20, at 192; Haile, *supra* note 1, at 483, ZEWDE, *supra* note 20, at 83-84.

24. See The Border Commission's Decision, *supra* note 2, at 140.

25. *Id.*

26. PANKHURST, *supra* note 20, at 229; Richard Pankhurst, *Italian Fascist War Crimes in Ethiopia: A History of Their Discussion, from the League of Nations to the United Nations (1936-1949)*, 6 NORTHEAST AFRICAN STUDIES 83, 84 (1999).

27. PANKHURST, *supra* note 20, at 243-49.

28. See *id.* at 238, 243-49.

29. See Treaty of Peace with Italy art. 23, ¶ 1, Feb. 10, 1947, 49 U.N.T.S. 139 [hereinafter the 1947 Treaty]. The 1947 Treaty explicitly stated that "[t]he final disposal" of the Italian colonies in Africa "shall be determined jointly by the Governments of the Soviet Union, of the United Kingdom, of the United States of America, and of France" as specified in the joint declaration of February 10, 1947. *Id.* art. 23 ¶ 3. The joint declaration, replicated in the 1947 Treaty as Annex XI, also provided that if, within one year from the coming into force of the 1947 Treaty, these governments were "unable to agree upon [the] disposal" of the former Italian colonies, "the matter shall be referred to the General Assembly of the United Nations for a recommendation, and the Four Powers agree to accept the recommendation and to take appropriate measures for giving effect to it." *Id.* annex XI, ¶ 3. Since the Four Powers failed to reach an agreement, the final disposal of Eritrea was brought before the UN General Assembly (UNGA). Haile, *supra* note 1, at 484.

30. The Border Commission's Decision, *supra* note 2, at 104.

federated with Ethiopia under the sovereignty of the Ethiopian Crown.”³¹ Two years later, Eritrea was federated with Ethiopia.³² However, “On 15 November 1962, the [Eritrean] assembly voted its own dissolution and Eritrea’s full reunification with Ethiopia.”³³ Thus, Eritrea became the fourteenth province of Ethiopia, and Eritreans began an armed struggle for independence.³⁴

In 1974, Colonel Mengistu Haile Mariam, a leader of the Dergue, or military junta, overthrew Emperor Haile Selassie.³⁵ By 1988, the military regime established Assab as an autonomous region under the Afar people’s administration.³⁶ Meanwhile, the

31. G.A. Res. 390A, U.N. GAOR, 5th Sess., Supp. No. 20, at 20, U.N. Doc. A/1775, ¶ 1 (1950) [hereinafter Resolution 390A]. It should be noted that the UNGA issued Resolution 289 (V) on November 21, 1949, establishing a Commission, comprising members from Burma, Guatemala, Norway, Pakistan, and South Africa. G.A. Res. 289 (IV), U.N. GAOR, 5th Sess., Supp. No. 1, at 11, U.N. Doc. A/1287 (1949). The Commission was tasked “to ascertain more fully the wishes and the best means of promoting the welfare of the inhabitants of Eritrea, to examine the question of the disposal of Eritrea and to prepare a report for . . . the solution of the problem Eritrea.” *Id.* After an extensive five-month investigation, the Commission submitted its report to the UNGA in 1950. Considering “[t]he close affinities between . . . Eritrean and Ethiopian peoples, the strong demand for reunion by the majority of Eritreans, [and] the common strategic interests of the two countries,” the delegates of Burma, Norway, and South Africa recommended that “the best solution for Eritrea must be based on close political association with Ethiopia.” Rep. of the United Nations Commission for Eritrea, U.N. GAOR, 5th Sess., Supp. No. 8, ¶ 159, U.N. Doc. A/1285 (1950). The delegates of Burma and South Africa accordingly proposed to the UNGA that Eritrea should be reunited with Ethiopia as “a self-governing unit of a federation.” *Id.* ¶ 170. Meanwhile, the delegate of Norway agreed with the reunification of “the whole territory of Eritrea” with Ethiopia, provided that the Western Province remained under British control provisionally. *Id.* ¶ 183. In contrast, the delegates from Guatemala and Pakistan proposed “placing the [Eritrean] territory under direct trusteeship by the United Nations for a maximum period of ten years, at the end of which it should become completely independent.” *Id.* ¶ 265.

32. Haile, *supra* note 1, at 487; *see also* The Border Commission’s Decision, *supra* note 2, at 105.

33. ERLICH, *supra* note 14, at 9.

34. Gebre Hiwet Tesfagiorgis, *Self-Determination: Its Evolution and Practice by the United Nations and Its Application to the Case of Eritrea*, 6 WIS. INT’L L.J. 75, 107–08 (1987).

35. Haile, *supra* note 1, at 487; *see also* The Border Commission’s Decision, *supra* note 2, at 105.

36. Yasin Mohammed Yasin, *Political History of the Afar in Ethiopia and Eritrea*, 43 AFR. SPECTRUM 39, 49 (2008). The Afars are indigenous people in Ethiopia, Eritrea, and Djibouti and inhabit the Afar Triangle—the Red Sea coastal area in the Horn of Africa. *Id.* at 42; Joseph Magnet, Afar Perspectives on Ethiopia-Eritrea Rapprochement: Two

Eritrean People's Liberation Front (EPLF) allied with other liberation fronts like the Tigray Peoples Liberation Front (TPLF) continued fighting the military regime until the Dergue was overthrown in 1991.

B. Eritrean Independence, and the War Between Ethiopia and Eritrea

In May 1991, the EPLF and the TPLF ousted the military junta and controlled Addis Ababa.³⁷ Eritrea immediately gained de facto independence from Ethiopia.³⁸ Meanwhile, the Ethiopian People's Revolutionary Democratic Front (EPRDF),³⁹ led by TPLF, formed a transitional government in Ethiopia.⁴⁰ The Transitional Charter, which provided rules and principles for the transitional period, recognized "[t]he right of nations, nationalities, and peoples . . . to self-determination of independence."⁴¹ In April, 1993, Eritreans exercised this right in a referendum, decisively voting for their independence.⁴² Ethiopia swiftly recognized Eritrea's independence,⁴³ and on May

Roads to Assab 7–8 (July 16, 2020) (unpublished manuscript) (on file with The University of Ottawa Faculty of Law). The Afar people have their distinct language, culture, tradition, and way of life. Magnet, *supra*; Yasin, *supra*, at 42. Afars are the indigenous owners of the Assab Red Sea coastal areas. Magnet, *supra*, at 7.

37. The Border Commission's Decision, *supra* note 2, at 105. GETACHEW METAFERIA, ETHIOPIA AND THE UNITED STATES: HISTORY, DIPLOMACY, AND ANALYSIS 71 (2009).

38. AMNESTY INT'L, ERITREA 20 YEARS OF INDEPENDENCE, BUT STILL NO FREEDOM 11 (2013), <https://www.amnestyusa.org/wp-content/uploads/2017/04/afr640012013.pdf> [<https://perma.cc/2D3P-QM8N>].

39. The Ethiopia People Revolutionary Democratic Front (EPRDF) was a coalition of four ethnic parties: The Tigray People's Liberation Front (TPLF), the Oromo People's Democratic Organization (OPDO) later Oromo Democratic Party (ODP), the Amhara National Democratic Movement (ANDM), later Amhara Democratic Party (ADP), the Southern Ethiopian People's Democratic Movement (SEPDM). Abdur Rahman Alfa Shaban, *Ethiopia's ruling Amhara bloc Announces Name, Logo Overhaul*, AFRICANEWS, <https://www.africanews.com/2018/10/01/ethiopia-s-ruling-amhara-bloc-announces-name-logo-overhaul> [<https://perma.cc/WYU8-7W6X>] (Sep. 5, 2019).

40. *Transitional Period Charter of Ethiopia*, Proclamation No.1, FEDERAL NEGARIT GAZETA art. 6, July 22, 1991 (Eth.) [hereinafter *Transitional Charter*].

41. *Id.* art. 2.

42. The Border Commission's Decision, *supra* note 2, at 105.

43. *See id.*

28, 1993, Eritrea officially became a member of the United Nations.⁴⁴ Ethiopia thus became a landlocked country.

In subsequent years, the two countries had an exemplary relationship: they “maintained an open border,”⁴⁵ and trusted each other to the extent “that the arsenal of one might be shared with that of the other.”⁴⁶ Ethiopia continued using the ports in Eritrea freely, while Eritrea used Ethiopian Birr as its currency.⁴⁷ However, the good neighborship between the two sisterly nations deteriorated in May 1998 when the Eritrean forces invaded Ethiopia and occupied the town of Badme.⁴⁸ After two years of devastating war, Ethiopia defeated Eritrea and liberated its territories.⁴⁹ In June 2000, the two countries agreed to cease hostilities and eventually signed the Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Ethiopia (Algiers Agreement).⁵⁰

The Algiers Agreement established “a neutral Boundary Commission . . . with a mandate to delimit and demarcate the colonial treaty border based on *pertinent colonial treaties (1900, 1902 and 1908)* and applicable international law.”⁵¹ The Boundary Commission awarded the town of Badme to Eritrea.⁵²

44. See G.A. Res. 47/230, Admission of Eritrea to Membership in the United Nations (May 28, 1993).

45. Karl Vick, *Despite Historic Ties, Ethiopia and Eritrea Gird for War*, WASH. POST, June 24, 1998, at A19, <https://www.washingtonpost.com/wp-srv/inatl/longterm/eritrea/stories/historic062498.htm> [<https://perma.cc/Y35W-8H54>].

46. *Id.*

47. Kaleab T. Sigat, *No Peace No War: The Ethiopian–Eritrean Conflict*, ACAD. & APPLIED RSCH. MIL. & PUB. MGMT. SCI. 82 (2019).

48. *Id.* at 84.

49. Fry, *supra* note 3, at 135. (“Ethiopia, by most accounts, successfully had won the war by 2000, if not by 1999.”).

50. Agreement on Cessation of Hostilities Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Dec. 12, 2000, 2138 U.N.T.S. 85 [hereinafter Algiers Agreement].

51. Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia for the Resettlement of Displaced Persons, as well as Rehabilitation and Peacebuilding in Both Countries art. 4 ¶ 2, Dec. 12, 2000, 2138 U.N.T.S. 93 [hereinafter Algiers Agreement II] (emphasis added).

52. The Border Commission’s Decision, *supra* note 2, at 22:

Since Badme village . . . lay on what was found to be the Eritrean side of the treaty line, there was no need for the Commission to consider any evidence of

Ethiopia refused to comply with the “final and binding” ruling of the Commission, characterizing it as “totally illegal, unjust and irresponsible.”⁵³ Eritrea demanded an unconditional and immediate implementation of the Boundary Commission’s decision.⁵⁴ As a result, the two countries became locked in an intractable stalemate until Prime Minister Abiy Ahmed came to power in Ethiopia in 2018 and unconditionally accepted the ruling of the commission.⁵⁵ The same year Ethiopia and Eritrea signed the Jeddah Treaty, officially ending the “no war, no peace” state of affairs and normalizing their relationship.⁵⁶ Recently, however, this relationship has deteriorated due to Ethiopia’s claim for access to the Red Sea.⁵⁷

III. DECONSTRUCTING ETHIOPIA’S ARGUMENTS FOR SOVEREIGN ACCESS TO RED SEA

Given the economic and geopolitical significance of the Red Sea, Ethiopian scholars offered several legal arguments to justify Ethiopia’s sovereignty claim over the coastal area of Assab. Some scholars, considering Italy’s invasion of Ethiopia as a material breach of the “pertinent colonial treaties,” argue that the treaties that established the boundary between Ethiopia and Eritrea are null and void, and that the Assab region belongs to Ethiopia.⁵⁸ Others invoke UNGA Resolution 390A, which recognizes

Eritrean governmental presence there, although Eritrea did in fact submit such evidence. Moreover, even some maps submitted by Ethiopia . . . marked Badme village as being on the Eritrean side of that line.

See also SALLY HEALY & MARTIN PLAUT, ETHIOPIA AND ERITREA: ALLERGIC TO PERSUASION 4 (2007) (“Once it became clear that Badme had been awarded to Eritrea, Ethiopia began to row back from full acceptance.”).

53. *Id.*

54. *Id.*

55. *Ethiopia’s Abiy Ahmed: The Nobel Prize Winner who Went to War*, *supra* note 6.

56. Kidanu Atinafu Temesgen, *Ethiopia-Eritrea Relations: Implication for Sub-Regional Security*, 8 INT’L J. POL. SCI. DEV. 66, 68 (2020).

57. Omer, *supra* note 9; Zelalem, *supra* note 11; Kinyua, *supra* note 11.

58. See Abebe T. Kahsay, Ethiopia’s Sovereign Right of Access to the Sea under International Law (Jan. 1, 2007) (LL.M. thesis, University of Georgia) (on file with the Digital Commons at University of Georgia School of Law); Negussay Ayele, *Reflections on Border Regimes and Colonial Treaties on the Horn*, MEDIAETHIOPIA.COM (June 17, 2000), https://www.ethiopians.com/Views/Negussay_On_TheWar.htm [https://perma.cc/85FG-UZTD].

“Ethiopia’s legitimate need for adequate access to the sea”⁵⁹ and asserts that Ethiopia is entitled to own Assab since the resolution supersedes the former colonial treaties.⁶⁰ A third view contends that TPLF and EPLF had no legitimate authority to alter the “internal law” of Ethiopia by making the Assab region part of Eritrea, and that “any future government can raise this violation of Ethiopia’s internal law to repudiate current arrangements, even if they are UN sanctioned, and legally restore the Assab Region back to Ethiopia.”⁶¹ Yet, another perspective invokes the principle of *uti possidetis juris*, which requires that newly independent States inherit pre-independence boundaries⁶² and argues that Eritrea cannot inherit Assab port as it was a self-administrating province before Eritrean independence.⁶³ Finally, a fifth view contends that “Ethiopia can invoke the right of the Afar people around Assab to self-determination and to join the majority of the Afar in Ethiopia.”⁶⁴

To take on these arguments in turn, the first argument, on the impact of Italy’s invasion of Ethiopia, presupposes the existence of material breaches of the 1900, 1902, and 1908 treaties. Article 60 of the Vienna Convention on the Law of Treaties (VCLT),⁶⁵ which is considered customary international law by the International Court of Justice (ICJ),⁶⁶ allows States to

59. Resolution 390A, *supra* note 31, pmbl. C.

60. Kahsay, *supra* note 58, at 3-4; *see also* Ayele, *supra* note 58 (“[I]n December, 1950, the United Nations General Assembly, after due consultations with Eritrean parties and peoples, decided by Res. 390 A (V) that Eritrea be an ‘autonomous federated unit under the sovereignty of the Ethiopian Crown.’ If one is to invoke border regime documents this United Nations Document could certainly qualify as defining a border regime that has more validity in the course of the region’s long checkered history than defunct colonial ‘treaties.’”)

61. Teodros Brehan, *Reflections on the Political and Legal Alternatives for the Restoration of Ethiopia’s Legitimate Rights to the Assab Region*, MEDIAETHIOPIA.COM (July 30, 2000), https://www.ethiopians.com/teodros_brehan_On_Assab.htm [<https://perma.cc/85QZ-PWW5>].

62. MALCOLM N. SHAW, *INTERNATIONAL LAW* 290 (6TH ED. 2008) (“In terms of the concept of the freezing of territorial boundaries as at the moment of independence (save by mutual consent), the norm is referred to as *uti possidetis juris*.”).

63. *See* Kahsay, *supra* note 58, at 74. *See generally* Brehan, *supra* note 61.

64. Kahsay, *supra* note 58, at 75.

65. Vienna Convention on the Law of Treaties art. 60, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

66. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),

terminate, in whole or in part, a bilateral treaty if the other party violates “a provision essential to the accomplishment of the object or purpose of the treaty.”⁶⁷ The main purpose of these colonial treaties was to settle longstanding frontier questions among Ethiopia, Eritrea (an Italian colony), and to some extent Sudan (a British colony).⁶⁸ In invading Ethiopia and including its territories into the Italian East Africa colony, Italy arguably committed a material breach of these colonial treaties, opening the door for Ethiopia to terminate part or whole of these treaties. As a result, Ethiopia declared the treaties “null and void” on September 11, 1952.⁶⁹

However, instead of renegotiating boundaries, Ethiopia recognized Eritrea with its colonial boundaries in 1993.⁷⁰ And, following the devastating two-year war with Eritrea, Ethiopia agreed, in the Algiers Agreement, that the boundaries between Eritrea and Ethiopia should be delimited and demarcated based on the 1900, 1902, and 1908 colonial treaties.⁷¹ Then, the Boundary Commission, relying on these colonial treaties and an agreement concluded between Ethiopia and Eritrea in 1994, concluded that the parties “placed their common boundary at Bure,” a checkpoint sixty kilometers away from the Assab Red Sea coastal area.⁷² Therefore, given Ethiopia’s own willful admission that colonial treaties established its boundaries with Eritrea, and considering the Boundary Commission’s decision that “the boundary between [Ethiopia and Eritrea] occurred at Bure,”⁷³ it is hardly possible for Ethiopia to invoke material breach and claim the coastal area of Assab.

Advisory Opinion, 1971 I.C.J. 16, 47 (June 21); *Gabcikovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶¶ 4, 96 (Sept. 25).

67. VCLT, *supra* note 65, art. 60.

68. The Border Commission’s Decision, *supra* note 2, at 130–32 (The object and purpose of the 1900 Treaty was “the desire to regulate the question of the frontier between the Colony of Eritrea and Ethiopia which has remained open since the conclusion of the Treaty of Peace of Addis Ababa of the 26th October 1896.”); *see also id.* at 146 (“[T]he [1902] treaty was intended to determine a boundary.”).

69. *Id.* at 105.

70. *Id.* at 171.

71. Algiers Agreement II, *supra* note 51, art. 4 ¶ 2.

72. The Border Commission’s Decision, *supra* note 2, at 170.

73. *Id.*

The second argument combines a pair of premises (1) that the United Nations recognized Ethiopia's legitimate access to the sea, and (2) that the UNGA Resolution 390A supersedes the former colonial treaties.⁷⁴ Regarding the first premise, the United Nations, issuing Resolution 390A, did consider "Ethiopia's legitimate need for adequate access to the sea" in 1950 when it federated Eritrea with Ethiopia.⁷⁵ However, the same organ also recognized the sovereignty and territorial integrity of Eritrea when it became independent in 1993 with the blessing of Ethiopia.⁷⁶ The United Nations' recognition of Ethiopia's access to the Red Sea does not contradict the sovereignty and territorial integrity of Eritrea as Ethiopia can exercise its right to access the sea based on the UN Convention on the Law of Sea (UNCLOS).⁷⁷ As demonstrated below, UNCLOS recognizes "the right of access to and from the sea" and "freedom of transit" of landlocked states.⁷⁸ However, even if the recognition contradicts Eritrea's sovereignty, it does not entitle Ethiopia to claim sovereignty over the Assab coastal areas. For starters, per the later-in-time, or *lex posterior*, principle, the later UN recognition prevails over the former under international law.⁷⁹ Moreover, since the Resolution does not delineate boundaries, determining the boundary between the two countries requires further negotiations. Yet, as indicated above, Ethiopia and Eritrea concluded an agreement in 1994 and "limit[ed] . . . their respective territorial sovereignty" at Bure.⁸⁰ Given that this fact was clearly recognized by the Boundary Commission, it would be impossible for Ethiopia to claim sovereignty over the coastal areas of Assab under the pretext of a "legitimate need for adequate access to the sea" enshrined in Resolution 390A.

The second premise, which invokes Resolution 390A to invalidate the 1900, 1902, and 1908 colonial treaties, is not grounded in international law. The *lex posterior* principle under

74. Kahsay, *supra* note 58, at 3-4; *see also* Ayele, *supra* note 58, at 4.

75. Resolution 390A, *supra* note 31, pmbl. C.

76. The Border Commission's Decision, *supra* note 2, at 105.

77. *See generally* U.N. Convention on the Law of Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

78. *Id.* art. 125.

79. VCLT, *supra* note 65, art. 59.

80. *See* The Border Commission's Decision, *supra* note 2, at 171.

international law permits states to supersede past treaties by concluding a new treaty governing the same matter.⁸¹ However, the assertion that Resolution 390A replaced the colonial treaties is questionable. First, per Article 59 of the VCLT, the later treaty supersedes the prior treaty when the two conflict on an *analogous* point of international law.⁸² Here, Resolution 390A is not a legally-binding treaty capable of abrogating the pre-existing treaties. Under the UN Charter, only the UN Security Council has the power to issue binding resolutions and the resolutions of the UNGA are non-binding recommendations.⁸³ Resolution 390A was issued by the UNGA, and therefore it is not legally binding to abrogate 1900, 1902, and 1908 colonial treaties.

Even assuming, *arguendo*, that Resolution 390A is a legally binding instrument, it can still be abrogated by subsequent treaties. As noted above, Ethiopia recognized Eritrean independence with its colonial territories in 1993,⁸⁴ concluded the 1994 Agreement determining its boundary with Eritrea at Bure,⁸⁵ and signed the Algiers Agreement, consenting that the boundaries between Eritrea and Ethiopia should be delimited and demarcated based on the 1900, 1902, and 1908 colonial treaties.⁸⁶ Therefore, Eritrea can invoke all these agreements to invalidate Resolution 390A based on the *lex posterior* principle.

The third argument, which invokes the “violation of Ethiopia’s internal law to repudiate current arrangements,”⁸⁷ is misleading. Although it is true that the TPLF-led EPRDF was not elected democratically when Eritrea became independent in 1993, it had the legal mandate to alter the “internal law” of Ethiopia and recognize Eritrea’s independence.⁸⁸ The Transitional Charter, which entitled nations, nationalities, and

81. VCLT, *supra* note 65, art. 59.

82. *Id.*

83. U.N. Charter art. 12 (indicating that the UNGA may make recommendations); *see also id.* art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

84. The Border Commission’s Decision, *supra* note 2, at 105.

85. *Id.* at 170.

86. Algiers Agreement II, *supra* note 51, art. 4 ¶ 2.

87. Brehan, *supra* note 61.

88. *Transitional Charter*, *supra* note 40, arts. 2, 8, 9(d), 9(h).

peoples to the right of self-determination up to secession,⁸⁹ explicitly empowered the “Transitional Government . . . [to] exercise all legal and political responsibility for the governance of Ethiopia”⁹⁰ including, *inter alia*, “initiation and promulgation of proclamations”⁹¹ and the conclusion and ratification of “international agreements.”⁹² Moreover, when the EPRDF signed the Algiers Agreement in 2000 and consented to the boundaries of Ethiopia and Eritrea based on colonial treaties, it was an elected government effectively administering Ethiopia. Therefore, Ethiopia cannot legitimately claim that the EPRDF-led government did not have legal authority.

Even assuming, *arguendo*, that the EPRDF-led government lacked legal authority, Ethiopia cannot legitimately dispute the current arrangement based on the violation of its internal law. First, per the precedent of ICJ in *Cameroon v. Nigeria*, “there is no general legal obligation for States to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States.”⁹³ In that case, the Court declined to require the observance of internal laws for the conclusion of international agreements based on the assumption that the Head of State or government represents their States in the conclusion of treaties.⁹⁴ Here, the recognition of Eritrea’s independence in 1993, the 1994 Agreement, and the Algiers Agreement all were concluded by the head of government of Ethiopia. Therefore, Ethiopia cannot invoke the violation of its internal law and invalidate these agreements. Moreover, Article 27 of the VCLT, which is considered a reflection of customary international law,⁹⁵ clearly establishes that States cannot invoke “internal law as justification for . . . [their] failure to perform a treaty.”⁹⁶

89. See generally *Transitional Charter*, *supra* note 40, art. 2.

90. *Id.* art. 8.

91. *Id.* art. 9 (d).

92. *Id.* art. 9 (h).

93. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Judgment, 2002 I.C.J. 303, ¶ 266 (Oct. 10).

94. *Id.* ¶ 265.

95. SHAW, *supra* note 62, at 134; MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES, 374–75 (2009)

96. VCLT, *supra* note 65, art. 27.

Therefore, despite the fact that EPRDF-led government was not democratically elected, Ethiopia can legally be bound by its international acts and agreements under that regime as a matter of international law.

The fourth argument relies inappropriately on the principle of *uti possidetis juris*, which requires newly independent States to inherit the boundaries in place at the time of independence.⁹⁷ As noted, Ethiopia made Assab an autonomous region under the administration of the Afar people in 1988.⁹⁸ However, the practice—which lasted only three years—is too short to crystalize as customary international law. Even assuming that it did crystalize as customary international law, the principle of *uti possidetis juris* could only allow Ethiopia to claim Assab and negotiate its boundaries with Eritrea in the early 1990s. However, now in the aftermath of the Algiers Agreement, and the decision of the Boundary Commission, it would be impossible for Ethiopia to claim the coastal areas of Assab based on the principle of *uti possidetis juris*.

The last argument, which proposes the annexation of Assab to Ethiopia under the pretext of the self-determination of the Afar people, is akin to Russia's annexation of Crimea. In the early 1990s, Ukraine gained independence following the balkanization of the former Soviet Union.⁹⁹ After independence, Ukraine and Russia concluded various agreements recognizing Ukraine's sovereignty over Crimea,¹⁰⁰ even though the significant majority of its residents were Russian.¹⁰¹ In February 2014, following the Ukrainian parliament's overthrow of President Yanukovich, Russians in Crimea, with the support of the Russian Federation, assumed control of Crimea.¹⁰² In a matter of weeks, Russian forces intervened in the territories of Ukraine; Crimea declared its independence; the people of Crimea voted via referendum to

97. SHAW, *supra* note 62, 290.

98. Yasin, *supra* note 36, at 49.

99. Hiruni Alwishewa, *Revisiting Crimea and the Utility of International Law*, OPINIOJURIS (Aug. 3, 2022), <https://opiniojuris.org/2022/03/08/revisiting-crimea-and-the-utility-of-international-law> [<https://perma.cc/K2FX-P4SR>].

100. *Id.*

101. *Id.*

102. Christian Marxsen, *The Crimea Crisis: An International Law Perspective*, 74 HEIDELBERG J. INT'L L. 369 (2014).

join the Federation of Russia; and Russia formally annexed Crimea.¹⁰³

This contemporary precedent resembles the argument proposing the annexation of Assab to Ethiopia. Like Ukraine, Eritrea became independent following the end of the Cold War in the early 1990s. Ethiopia and Eritrea, akin to Russia and Ukraine, entered into boundary agreements recognizing Eritrea's sovereignty over Assab even though Assab's residents—primarily Afars—have significant ties to Ethiopia.¹⁰⁴ Accordingly, like Russia, Ethiopia could annex Assab into its territory, thus encouraging the Afar people to declare their independence and join Ethiopia.

However, if Ethiopia follows through with the proposal and annexes Assab into its territory, its actions would violate the UN Charter.¹⁰⁵ Under international law, the Afar people in Assab have the right to self-determination within the State of Eritrea.¹⁰⁶ This right, however, does not extend to seceding from the State of Eritrea¹⁰⁷ and “join[ing] the majority of the Afar in Ethiopia.”¹⁰⁸ If Ethiopia uses the Afar people and annexes Assab, it would commit “acts of aggression,” violating one of the *jus cogens* norms of international law—the prohibition of “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁰⁹ Therefore, Ethiopia cannot legitimately claim sovereignty over the coastal areas of Assab.

IV. ETHIOPIA'S LEGITIMATE RIGHTS UNDER INTERNATIONAL LAW

Having established that Ethiopia lacks legitimate ownership claim over coastal areas of Assab, this Part now considers Ethiopia as a landlocked State (“a State which has no sea-coast”¹¹⁰) and

103. *Id.*

104. See Berhan, *supra* note 61. See generally Yasin, *supra* note 36, at 49.

105. See U.N. Charter arts. 1 ¶ 1, 2 ¶ 4.

106. See International Covenant on Civil and Political Rights art. 1 ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1 ¶ 1, Dec. 16, 1966, 993 U.N.T.S. 3.

107. See generally Haile, *supra* note 1 (arguing against Eritrea's secession).

108. Berhan, *supra* note 61.

109. U.N. Charter art. 2 ¶ 4.

110. UNCLOS, *supra* note 77, art. 124 (a).

explores its legitimate rights under international law. It first briefly reflects on the theoretical debates regarding the right of access of landlocked States to the sea and the sovereignty of coastal States, and it thereafter scrutinizes Ethiopia's rights under various international instruments, including UNCLOS.

A. Theories Justifying the Right of Access to the Sea for Landlocked States

Several theories have been developed to justify why landlocked States should have the right of access to the sea. The first theory, derived from Hugo Grotius's natural law theory, asserts that since oceans belong to all nations (*res communis*), landlocked States have the sovereign right to free transit and exercise their rights in the high seas.¹¹¹ The second theory, derived from the notion of servitude in Roman law, contends that landlocked States have servitude to navigate through the territories of neighboring States.¹¹² In this context, the notion of servitude enables landlocked States to "obtain *stricto jure*, as enclave States, an access to the sea by establishing in their favor a servitude of passage grafting the nation whose territory forms an obstacle to this communication."¹¹³ The third theory considers access to the sea as a "fundamental necessity" for the economic development of all nations and asserts that landlocked States should have "the right of passage . . . provided only that its exercise cause no damage to interests of the transit State."¹¹⁴ The fourth and final theory, derived from the principle of innocent passage, contended that "the right of land-locked States to free transit over land is the same as recognized in territorial waters as a right of innocent passage."¹¹⁵

111. A. Mpazi Sinjela, *Freedom of Transit and the Right of Access for Land-Locked States: The Evolution of Principle and Law*, GA. J. INT'L & COMP. L. 32 (1982).

112. *Id.*, at 32–33; Kishor Uprety, *Landlocked States and Access to the Sea: An Evolutionary Study of a Contested Right*, 12 DICK. J. INT'L L. 401, 421 (1994) ("[A]n international servitude is an injunctive limitation imposed upon the internal or external sovereignty of a state in favor of another country.").

113. Uprety, *supra* note 112, at 422 (internal citation omitted).

114. Sinjela, *supra* note 111, at 33.

115. *Id.* at 34 (internal citation omitted).

Although landlocked States used these theories to justify their growing demand to freely access the Sea, coastal States pushed back, claiming “sovereign jurisdiction over all activities in their territories . . .”¹¹⁶ These States often invoke the principle of sovereignty and territorial integrity to prohibit landlocked States from traversing through their territories.¹¹⁷ As a result, the landlocked States began calling for the recognition of their right of access to the sea under international law.¹¹⁸

B. The Evolutive Development of the Law of Access to the Sea

The development of the law towards recognizing the right of access of landlocked States to the sea began in 1921 at the Barcelona Conference where the Statute of Transit was adopted.¹¹⁹ The Statute required “the Contracting States . . . [to] facilitate free transit by rail or waterway on routes in use convenient for international transit.”¹²⁰ However, the Statute carved out exceptions to the principle of freedom transit, allowing transit States to prohibit the transit of passengers or goods forbidden in their territories, and take other exceptional measures, “in case of an emergency affecting . . . [their] safety . . . or vital interests . . .”¹²¹

Although the Barcelona Statute was a step in the right direction, it did not impose meaningful obligations on transit States.¹²² As a result, landlocked States, especially in Asia, continued urging the international community to fully recognize their right of access to the Sea.¹²³ In 1957, the UNGA issued a resolution and recommended that an “[international] conference should study the question of free access to the sea of land-locked countries, as established by international practice of

116. *Id.* at 35.

117. *Id.*

118. *Id.* at 34–35.

119. Convention and Statute on Freedom of Transit, Apr. 20, 1921, 7 L.N.T.S. 11 [hereinafter Barcelona Statute].

120. *Id.* art. 2.

121. *Id.* art. 7.

122. Sinjela, *supra* note 111, at 36–37.

123. *Id.* at 38–39.

treaties.”¹²⁴ After several meetings, the Convention on the High Seas (1958 Convention) was adopted in 1958.¹²⁵ The 1958 Convention recognized landlocked States’ right to freely access the sea and “enjoy the freedom of the seas on equal terms with coastal States.”¹²⁶ However, in what seems to be a “one gives and another takes” scenario, the 1958 Convention required a preliminary agreement between coastal States¹²⁷ and landlocked States guaranteeing the latter, “on a basis of reciprocity, free transit through their territory.”¹²⁸ Thus, the Convention imposed virtually no obligation on coastal States.

In the subsequent years, the landlocked States continued calling for the recognition of the right of free access to the sea. In 1965, the United Nations adopted the New York Convention on Transit Trade of Land-locked States (the New York Convention) and recognized “the right of each land-locked State of free access to the sea [as] an essential principle for the expansion of international trade and economic development.”¹²⁹ The New York Convention afforded identical rights to “vessels flying the flag of land-locked countries . . . and vessels flying the flag of coastal States”¹³⁰ It also stipulated that “[f]reedom of transit shall be granted . . . for traffic in transit and means of transport,”¹³¹ and that the “rules governing the use of means of transport . . . shall be established by common agreement.”¹³² Moreover, it exempted traffic in transit from any tax or customs duties;¹³³ required coastal States, “[e]xcept in cases of force majeure . . . to avoid delays in or restrictions on traffic in transit;”¹³⁴ and recommended the establishment of “free zones or

124. Sinjela, *supra* note 111, at 38–39 (citing U.N. GAOR, 11th Sess., 658th plen. mtg. at 54, U.N. Doc. A/PV.658 (Feb. 21, 1957)).

125. Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82 (1958).

126. *Id.* at annex II, art. 3 ¶ 1.

127. *Id.* at annex II, art. 3 ¶ 2.

128. *Id.* at annex II, art. 3 ¶ 1(a).

129. U.N. New York Convention on Transit Trade of Land-locked States, princ. I, July 8, 1965, 597 U.N.T.S. 3.

130. *Id.* princ. II.

131. *Id.* art. 2. ¶ 1.

132. *Id.* art. 2. ¶ 2.

133. *Id.* art. 3.

134. *Id.* art. 7.

other customs facilities . . . at the ports of entry and exit in the transit States.”¹³⁵

The New York Convention also considered the interests of coastal states. It allowed coastal States to prohibit the transit of passengers or goods forbidden in their territories,¹³⁶ and impose restrictions on freedom of transit in exceptional circumstances.¹³⁷ Moreover, like the 1958 Convention, the New York Convention required the application of its “provisions . . . on a basis of reciprocity.”¹³⁸ As with the 1958 Convention, the requirement of reciprocity clearly indicated how the New York Convention failed to distinguish “the needs for transit arising from the geographical location of States having no sea coast” from “other transit serving only to facilitate transport and communication.”¹³⁹ This factor and the fact that the New York Convention was ratified by only a handful of coastal States necessitated landlocked States to push for a global convention, under the auspices of the third UN Conference on the Law of the Sea.¹⁴⁰

C. The UN Convention on the Law of Sea

Following painstaking negotiations, the third UN Conference on the Law of the Sea produced the UN Convention on the Law of Sea (UNCLOS) in September 1982, and opened it for signature on December 10, 1982.¹⁴¹ UNCLOS, initially lauded as a “constitution for the oceans,”¹⁴² is a comprehensive treaty addressing “virtually all uses of the oceans.”¹⁴³ Although UNCLOS provides general frameworks for almost all aspects of

135. *Id.* art. 8.

136. *Id.* art. 11

137. *Id.* art. 12

138. *Id.* art. 15.

139. Sinjela, *supra* note 111, at 43.

140. *Id.*

141. DONALD R. ROTHWELL & TIM STEPHENS, *THE INTERNATIONAL LAW OF THE SEA* 12–14 (2010). *See generally* UNCLOS, *supra* note 77.

142. President of the Third U.N. Conference on the Law of the Sea, *A Constitution for the Oceans* (Dec. 10, 1982), https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf [<https://perma.cc/V8ZV-ZTXT>].

143. Kishor Uprety, *Right of Access to the Sea of Land-Locked States: Retrospect and Prospect for Development*, 1 J. INT’L LEGAL STUD. 21, 72 (1995).

the oceans, it specifically recognizes the rights of landlocked States, confirming their “right of access to and from the sea” and “freedom of transit through the territory of transit States by all means of transport.”¹⁴⁴ UNCLOS designated Part X to elaborate on the right of access in detail. In this regard, Article 125 provides,

1. Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.
2. The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional or regional agreements.
3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interests.¹⁴⁵

In the context of Ethiopia and Eritrea, Article 125 entitles Ethiopia to the right to access the Red Sea, and to enjoy the freedom of transit through the territories of Eritrea.¹⁴⁶ However, the article is not enforceable against Eritrea since it has not signed or ratified the UNCLOS.¹⁴⁷ Even if it were enforceable, the article

144. UNCLOS, *supra* note 77, art. 125.

145. *Id.*

146. Ethiopia ratified the UNCLOS in 2012, but did not deposit the ratification in the United Nations. See *Proclamation To Ratify The United Nations Convention on the Law of The Sea*, Proclamation No. 742/2012, FEDERAL NEGARIT GAZETA, June 8, 2012 (Eth.). For the list of countries that signed and ratified (deposited their ratifications), see *Chapter XXI Law of the Sea: 6. United Nations Convention on the Law of the Sea*, U.N. TREATY COLLECTION: DEPOSITARY, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en [https://perma.cc/D5PK-WHHF] (last visited Apr. 30, 2024). See also VCLT, *supra* note 65, art. 34.

147. *Chapter XXI Law of the Sea, supra* note 146.

equally recognizes Eritrea's full sovereignty over its territory, granting it the right to protect its legitimate interests by imposing restrictions on Ethiopia's access to the Red Sea. Additionally, the article requires Ethiopia to conclude an agreement with Eritrea to access the Red Sea through the territories of Eritrea. Ethiopia previously concluded an agreement with Italy, granting "Ethiopia a free zone in the Port of Asseb and allowed it to construct warehouses in the zone."¹⁴⁸ Ethiopia also signed the Transit and Port Services Agreement with Eritrea in 1993.¹⁴⁹ However, following the border conflict between Ethiopia and Eritrea, the Boundary Commission found that the agreement had "ceased to be operative" because of the war.¹⁵⁰ Since then, there is no publicly accessible agreement between the two countries regarding access to the Red Sea.

If and when Eritrea accedes to the UNCLOS, Article 127 would exempt Ethiopia from "any customs duties, taxes or other charges" within the territories of Eritrea.¹⁵¹ It also prohibits Eritrea from charging Ethiopia for "[m]eans of transport . . . higher than those levied for the use of means of transport of the transit State."¹⁵² According to Article 128, Ethiopia and Eritrea may establish free zones or other customs facilities.¹⁵³ While Article 129 provides guidelines for the two countries to cooperate "in the construction and improvement of means of transport,"¹⁵⁴ Article 130 requires Eritrea to "take all appropriate measures to avoid delays or other difficulties of a technical nature in traffic in transit."¹⁵⁵ This article also requires the two countries to

148. Gebre Hiwet Tesfagiorgis, *Access to the Sea in the Context of Eritrea and Ethiopia*, ERIPLATFORM 7(2022).

149. Partial Award – Economic Loss Throughout Ethiopia – Ethiopia's Claim 7 (Eth. v. Eri.), 26 R.I.A.A. 445, 454 (Eri.-Eth. Claims Comm'n 2008).

150. *Id.*

151. *See* UNCLOS, *supra* note 77, art. 127 ¶ 1. This provision has an exception for "charges levied for specific services rendered in connection with such traffic." *Id.*

152. *See id.*

153. *See id.* art. 128.

154. *See id.* art. 129.

155. *See id.* art. 130.

cooperate when such delays nevertheless occur.¹⁵⁶ Article 131, which governs equal treatment in maritime ports, stipulates that ships flying Ethiopia's flag "shall enjoy treatment equal to that accorded to other foreign ships in maritime ports."¹⁵⁷

In addition to the right to access to the sea, the UNCLOS recognized other rights of landlocked States. According to Article 69, for instance:

[l]and-locked States shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones [EEZs] of coastal States of the same subregion or region, taking into account the relevant economic and geographical circumstances of all the States concerned¹⁵⁸

Accordingly, Article 69 entitled Ethiopia to equitably exploit living resources like fish in the EEZ of Eritrea, which extends 200 nautical miles into the sea from the baseline in the territorial sea, provided that there is a "surplus of living resources."¹⁵⁹

Article 87 also recognizes Freedom of the high seas including, inter alia, freedom of navigation, overflight, fishing, and scientific research both to coastal and landlocked states.¹⁶⁰ Article 90 further affirms the right of landlocked states "right to sail ships flying [their] flag on the high seas."¹⁶¹ Importantly, the navigational rights of landlocked states are parts of customary international law.¹⁶² This means that Ethiopia can invoke these rights against Eritrea, despite Eritrea not being a party to UNCLOS. Moreover, the UNCLOS recognizes the notion of the "common heritage of mankind."¹⁶³ In the relevant part, Article 137 provides that "[n]o State shall claim . . . sovereign rights over any part of the [High Sea] or its resources, nor shall any State or natural or juridical person appropriate any part thereof."¹⁶⁴ It further adds that "[a]ll rights in the resources of the [High Sea]

156. *See id.*

157. *See id.* art. 131.

158. *Id.* art. 69.

159. *Id.*

160. *Id.* art. 87.

161. *Id.* art. 90.

162. YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 387 (2012).

163. UNCLOS, *supra* note 77, art. 36.

164. *Id.* art. 137.

are vested in mankind as a whole.”¹⁶⁵ Certainly, the actual enjoyment of this right and effective exploitation of this common heritage requires access to and from the sea. Ethiopia can therefore invoke this principle to demand access to the Red Sea.

V. CONCLUSION

This Article argues that Ethiopia does not have a legitimate ownership claim over Assab or any parts of the Red Sea. Ethiopia could have legitimately claimed sovereignty over Assab when Eritrea gained independence in 1993 and before signing the Algiers Agreement in 2000. However, in mandating the Boundary Commission to demarcate the boundary between Ethiopia and Eritrea based on the 1900, 1902, and 1908 treaties, Ethiopia abandoned its ownership claim over Assab and any parts of the Red Sea. Therefore, it cannot legitimately claim that territory.

However, as Prime Minister Abiy Ahmed recently announced, Ethiopia may annex the coastal areas of Assab, and secure direct access to the Red Sea.¹⁶⁶ If Ethiopia annexes Assab, it will commit “acts of aggression,” violating one of the *jus cogens* norms of international law—the prohibition of “the threat or use of force against the territorial integrity or political independence of any state.”¹⁶⁷ Indeed, this approach, if pursued, would have devastating socioeconomic and political consequences for the Horn of Africa and destabilize the entire region. It would certainly generate harsh condemnation from the international community. Given the absence of centralized enforcement mechanisms under international law, one may assume that Ethiopia would get away with such flagrant violations as Russia did after annexing Crimea. However, Ethiopia is not Russia: While Russia, a global power with a developed economy and increasing military capabilities,¹⁶⁸ has significant diplomatic leverage as a

165. *Id.*

166. See Omer, *supra* note 9; see also Taye, *supra* note 10. See generally Mhaka, *supra* note 11.

167. U.N. Charter arts. 1 ¶ 1, 2 ¶ 4.

168. Faisal Islam & Hannah Mullan, *Russia to grow faster than all advanced economies says IMF*, BBC (Apr. 16, 2024), <https://www.bbc.com/news/business-68823399> [<https://perma.cc/2PWH-VYRC>]. See generally Bettina Renz, *Why Russia is Reviving Its Conventional Military Power*, 46 *PARAMETER* 30 (2016).

permanent member of the UN Security Council,¹⁶⁹ Ethiopia is one of the least developed countries in the world.¹⁷⁰ It cannot survive without assistance from foreign countries.¹⁷¹ Ethiopia could pay a significant price if it pursues the approach of annexing Assab.

Therefore, Ethiopia should accept that the EPRDF-led government abandoned its legitimate ownership claims over the port of Assab, refrain from defying international law, and forge a mutually beneficial initiative with Eritrea based on regional integration. This approach is beneficial to the entire Horn of Africa, and the economic development of the two countries. It would also boost Ethiopia's stature globally—paving the way for Ethiopia to regain its leadership role in African diplomacy. More importantly, it would save lives, preventing the devastating war looming on the horizon.

Ultimately, both Ethiopia and Eritrea need to capitalize on the legal framework provided in the UNCLOS: Eritrea must accede to the UNCLOS, while Ethiopia should deposit its ratification to the United Nations as required under Article 308.¹⁷² The two countries must think beyond narrowly conceived national interests: they cannot afford to approach access to the Red Sea in zero-sum terms anymore. They must therefore replace their coercive and destabilizing policies with cooperation and regional integration.

169. See U.N. Charter arts. 23, 27 ¶ 3.

170. *Least Developed Country Category Profile: Ethiopia*, U.N. DEP'T OF ECON. & SOC. AFFS.: ECON. ANALYSIS, <https://www.un.org/development/desa/dpad/least-developed-country-category-ethiopia.html> [<https://perma.cc/LB2N-JUPZ>] (last visited Apr. 29, 2024).

171. See *World Food Program says its ramping up aid to reach 3 million Ethiopians. Millions more are in need*, ASSOCIATED PRESS (Feb. 7, 2024) <https://apnews.com/article/ethiopia-world-food-program-hunger-crisis-1a542c13bba97bbfe403973fb16d56bd> [<https://perma.cc/PKL3-EWYB>].

172. UNCLOS, *supra* note 77, art. 308 ¶ 2.

