The limitations of international law at the Eritrea-Ethiopia claims commission and its implications for future conflict

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Abstract

This paper examines the litigation strategies adopted by Eritrea and Ethiopia before the Eritrea-Ethiopia Claims Commission convened at The Permanent Commission of Arbitration at The Hague between 2001 and 2009. I pursue insights from the work of Laura Nader concerning how, through binding arbitration, the international community imposes its power on disputing parties as opposed to allowing their competing legal claims to be fairly decided. The claims examined by this paper concern who started the border war and that Ethiopia denationalized 'Eritrean' nationals and unlawfully deprived them of their property. I conclude that the PCA's decisions on Eritrea and Ethiopia were flawed and that its deliberations need to be viewed in a much wider political context; furthermore its decisions contributed to further political instability in the Horn of Africa.

Keywords: war, politics, litigation, international law, arbitration, Eritrea, Ethiopia

This paper examines the arguments which informed the litigation strategies adopted by Eritrea and Ethiopia before the Eritrea-Ethiopia Claims Commission (EECC) convened at The Permanent Commission of Arbitration (PCA) at The Hague between 2001 and 2009. This paper builds on my earlier work which examined how the EECC delimited the contested border and arbitrated certain claims for reparations submitted by both state parties.[1] In this paper I pursue insights from the work of Laura Nader about the application of power by the international community to arbitrate and impose a decision on disputing parties as opposed to assessing their competing legal claims.

I begin by briefly setting out how I accessed key material for this paper. I then provide a brief overview of the Eritrea-Ethiopia border war which led to the imposition of UN Security Council Resolution 1298 which was the basis of the Algiers Agreement of December 2000. The Algiers Agreement compelled both parties to cease hostilities, repatriate prisoners of war, and submit

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their claims to a neutral commission to define their common border and assess their claims for reparations. The Agreement also required the Organization of African Unity (OAU) 'to determine the origins of the conflict'. I set out the evidence submitted to the EECC by Eritrea and Ethiopia – material which has hitherto not been made public – which raises important questions regarding the basis of the EECC's decisions. The third section looks at the process of arbitration at the PCA which has increasingly been imposed on non-western nations. The fourth section looks at submissions made by both state's regarding who started the war and Ethiopia's mass expulsion and denationalization of Eritreans and the confiscation of Eritrean private property. Following a brief examination of other arbitrated border disputes, I argue that this case illustrates the limitations of international law for achieving justice and that attempts to impose 'peace' can be counterproductive in the long-term when they fail to address the underlying issues in the conflict.

Research methodology

In the spring of 2011, following discussions with a journalist who had covered proceedings at the PCA, I was put in touch with a member of the legal team that represented Eritrea in the EECC. We discussed his experience of the proceedings, the way the team gathered data, specific aspects of the EECC's decisions and his belief that political pressure was placed on the EECC. He put me in touch with the leader of Eritrea's legal team, Professor Lea Brilmayer at Yale University. Following an exchange of email, we spoke over the phone and I asked if it was possible to have access to Eritrea's submissions to the EECC. In September 2011 Professor Brilmayer emailed me six submissions made to the PCA and her written approval to use the material.[2] This paper is based on a critical analysis of Eritrea's submissions to the EECC and of a wide range of related material which address the border war which emerged from both states' nation-building projects, e.g. an Ethiopian federal state v. a unified and centralized Eritrean state.

In 2020 I also approached two members of the legal team which represented Ethiopia at the PCA – Mr. John Briscoe and Mr. Knox Bemis – and I wrote to the Ethiopian Ministry of Foreign Affairs via the Ethiopian embassy in London asking for access to Ethiopia's submissions to the Claims Commission. Mr. Brisco and Mr. Knox replied that they were not allowed to release the

documents.[3] I have had not had a reply from the Ethiopian Ministry of Foreign Affairs or from the Ministry of Foreign Affairs of Eritrea to my request for information.[4]

In light of the rapprochement between Eritrea and Ethiopia in 2018 and the latter's belated decision to abide by the Boundary Commission's decision to return the area around Badme to Eritrea, the time seems right to examine how litigation was used to pursue the war after the June 2000 ceasefire and to demonstrate why, in certain situations, international law is unable to resolve political issues between states.

In analyzing this dispute, I follow Laura Nader who refers to the internationalization of Alternative Dispute Resolution to resolve international conflicts as a rhetoric of civilization which is frequently linked to an imbalance of power that favors 'civilized' western states.[5] Nader[6] makes it clear that binding arbitration 'eliminates choice of procedure, removes the right of equal protection before an adversary and … provides for little regulation or accountability'. In short, binding international arbitration becomes a 'mutually regulated dance' that 'obscures unequal social power'. In short, international law is a 'hegemonic' politico-legal process that *reproduces* the basic inequalities of international power without addressing the political issues at the heart of a dispute. To understand how this process works, we need to attend not only to how the disputing parties attempt to litigate their case, we also need to attend to the wider political environment which influences how the dispute is 'decided'.

The background and nature of the border war

By the mid-1990s a growing number of problems – conflict over land along an un-demarcated border, taxes on trade, monetary policy, currency regulation and so on – had emerged between Eritrea and Ethiopia in part because communication between the People's Front for Democracy and Justice (PFDJ) and the Ethiopian People's Revolutionary Democratic Front (EPRDF) had broken down. The two Heads of State relied on their informal relationship to resolve political differences and failed to establish an inter-state framework to demarcate their shared border and agree common policies.[7] As a result of this situation, events rapidly escalated.

According to Eritrea's submission to the EECC, in July 1997 two battalions of Ethiopian troops entered the area of Bada-Adi Murug and set up a base; the troops occupied the area, dug

trenches and set up 'heavy weapons'.[8] In August 1997 Ethiopian forces entered Badme. Both places were in territory claimed by Eritrea and both incidents saw Ethiopian forces forcibly expel Eritrean officials and dismantle the Eritrean administration. Eritrean forces also reported that Ethiopian soldiers were raping Eritrean women, harassing local people, and interfering in development projects. However, Eritrean military forces were instructed not to intervene because the President was personally going to deal with the matter.[9]

During the week of 6 May 1998 Ethiopian soldiers were involved in further incidents along the un-demarcated border[10] where they were alleged to have harassed civilians and burned crops and houses. Shortly afterwards, and a little further to the north, an Eritrean patrol in an Ethiopian-administered area[11] were confronted by Ethiopian soldiers who fanned out around them and opened fire killing their commander and eight soldiers.[12] Eritrea claimed that Ethiopian soldiers continued to attack her troops on subsequent days. On 12 May Eritrean forces counter-attacked and pushed the Ethiopians out of Badme and captured 74 Ethiopian special forces who, it was claimed, provided intel that the Ethiopian attacks had been pre-planned.

These incidents rapidly transformed socio-political relations from a situation of growing tension to open hostility and violent conflict. In effect, they re-opened old memories of 'rivalry and long felt chains of collective resentment' between the two nations.[13] By mid-May the incidents led the political leadership in both countries to make inflammatory comments which contributed to further violence and directed public attention to the presence of 'aliens' living in both countries.

In Ethiopia public attitudes towards Eritrea were strongly affected by EPRDF statements which were reported by the press and used to create a 'war of words', a 'massive propaganda effort' in which Ethiopian media used 'insulting epithets and debasing accusations' which linked 'Eritrean aggression to Italian [colonial] ambitions in the region and to the legacy of racist arrogance they had left behind.'[14] At this point Ethiopia mobilized its military and engaged in a counter-offensive against Eritrea along the entire border. Ethiopian media created and sustained wide-spread anti-Eritrean resentment which played on tropes and images of the Eritrean government as racists and fascists, and it identified 'Eritreans' as the 'enemy within' who were allegedly exploiting their dual citizenship to accumulate power and wealth.[15]

The war was a product of an elite political culture and flawed political institutions unable to hold officials accountable for their actions.[16] In this situation political leaders rapidly turned a minor border skirmish into a full-scale military conflict. Once the war began officials in both states conducted a propaganda battle and prevented international mediation until a clear military outcome was reached in May 2000 by Ethiopia, by which time the war had opened on three fronts and had resulted in 70,000 deaths and had displaced 1.3 million people.

In the discussion which follows it is important to understand three key issues: the nature of 'real politic' in The Horn of Africa, Eritrea's and Ethiopia's indifference to international law, and the effect of the EECC's initial ruling on the border. As Christopher Clapham[17] observed, there was a severe 'mismatch between the values and expectations' with which the combatants and the would-be adjudicators approached the task of deciding the boundary and their recognition of the limitations and rightness of pursuing war in the national interest. Second, binding international arbitration represents an attempt to impose a solution on a state in accord with western notions of 'civilized' standards of inter-state behavior which is based on the continued recognition of colonial boundaries. In the Horn of Africa, which has experienced multiple border conflicts and wars, law serves the interests of those who hold political power. Not only is there little trust in international law in the Horn of Africa, there is little expectation that other states will abide by it. This attitude is documented in the submissions made to the EECC which are replete with accusations about the 'inconsistent' evidence provided by both states, the deliberate fabrication of witness statements and attempts to obfuscate state responsibility for certain incidents. The two parties' attitudes are clearly reflected in the EECC's observation regarding the evidence submitted to it that there were:

> deep and wide-ranging conflicts in the evidence. The hundreds of sworn declarations submitted by the two Parties contained disagreements on many key facts. There are sharp conflicts regarding matters as fundamental as the number of persons who left Ethiopia…; the treatment of expellees' family members; the role of the ICRC; the treatment of expellee's property; and other basic issues. These massive conflicts in the evidence again show the difficulty of determining the truth in the aftermath of a bitter armed conflict. In such circumstances … there can indeed be 'nationalization' of the truth.[18]

The rules and procedures of the International Claims Commission

The PCA[19] adopted procedural rules which required Eritrea and Ethiopia to submit to binding arbitration from which there was no appeal. The procedural rules adopted by the PCA are based on the 1992 'Permanent Court of Arbitration Rules for Arbitrating Disputes Between Two States'[20] which reframe and redefine the issues to be decided, limit the submissions of fact and remove proceedings from public view without creating a public record.

Chapter III of the Eritrea-Ethiopia Boundary Commission's decision on the delimitation of the border set out the procedural issues used to decide claims. First treaties 'are to be interpreted in good faith'. Second, the EECC can apply estoppels or preclusion to identify unreasonable conduct by a party in relation to actions undertaken subsequent to a treaty (i.e. in an attempt to exercise sovereignty on the ground) to allow it to arrive at a stricter interpretation than might otherwise be agreed by treaty. Finally, the EECC relied on various precedents which allowed it to employ customary international law (not merely national law or law relating to the interpretation of treaties). The rules offered few choices to the parties on key matters and made it clear that the 'tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case' (Art. 15).

Specifically, while each party was free to submit its statement of claim and defence, they could not amend or supplement their claim or defence without permission from the tribunal. The EECC also had the power to rule on claims by the parties that it lacked jurisdiction. Third, while each party could determine what evidence it wished to put before the tribunal, '*each party will have the burden of proving the facts relied upon to support its claim or defence*' (Art. 24; author's emphasis). However, the EECC alone determined 'the admissibility, relevance, materiality and weight of the evidence offered' (Art. 25 (6)).[21] In short, the EECC possessed the authority to decide all the issues.

The procedural rules redefined the core political issues between Eritrea and Ethiopia as constituting differing 'perceptions' or 'interests' which were submitted for binding resolution to an 'independent' party that could impose a decision.[22] The EECC[23] met informally in 2001 when it set out: (1) its temporal mandate (i.e. only events between 12 May 1998 and 20 December 2000 would be considered);[24] (2) the nature of the claims to be filed; (3) an agreement that

compensation would take monetary form; (4) a statement that it was bound by rules of international law; and (5) the procedure for making mass claims.[25]

Given the history of cross-border conflict between Ethiopia and Eritrea, the temporal mandate adopted by the EECC was critical because it excluded Eritrea's allegations about Ethiopian aggression prior to 12 May 1998. This decision disregarded Art 3(1) of the Algiers Agreement which expressly stated that 'In order to determine the origins of the conflict, an investigation will be carried out on the incidents of 1 May 1998 and on *any other incident prior to that date* which could have contributed to a misunderstanding between the parties regarding their common border …' (author's emphasis)[26] However, the OAU failed to conduct this enquiry. By setting its temporal mandate at 12 May 1998, the EECC failed to assess all the relevant events which occurred prior to the outbreak of war.

Without access to the submissions made to the EECC, an independent analysis of its decisions would be difficult because there is no public record of the proceedings. Procedural rules also provided the EECC with the scope to define its approach to legal and evidential submissions which, in light of the absence of a public record of proceedings, makes it difficult to assess how the claims were decided. This is evident in the EECCs analysis and decision on Ethiopia's *jus ad bellum* claim that Eritrea caused the war and, therefore, how the EECC awarded damages.[27] For instance, even though it was expressly barred from interpreting Art. 3(1) of the Algiers Agreement,[28] the Commission nevertheless found that Eritrea caused the war.

The EECC also excluded certain war-related claims from consideration on the basis that the claims were filed too late or because they concerned events that occurred before or after its temporal jurisdiction.[29] A further problem concerns the standard of proof – 'somewhere between the standard of probability common in civil proceedings in the US and the standard of 'beyond a reasonable doubt' common in US criminal proceedings'[30] – that was adopted. At the same time, the EECC limited itself to attributing liability only to one or other state for illegal actions or omissions, not for the actions of individuals because it was not a criminal tribunal.[31] Critically, both states were unable to present documents from the International Committee of the Red Cross to show how many individuals had been repatriated (and by inference, how many had been expelled) and under what conditions.

Furthermore, and apart from the agreement of the parties to limit claims relating to mass expulsion – for instance Art. 5(8) of the Algiers Agreement stipulated that a state could make a claim on its own behalf and on behalf of individuals, but individuals could not bring a claim before the EECC – it is not clear whether there were other agreements which shaped the EECC's decisions. For example, until now it was not clear what legal arguments and forms of evidence were relied upon by the two parties. It is with the above reservations that I analyze Eritrea's submissions and its counter-submissions to Ethiopian claims in relation to two major breaches of international law: (a) who started the border war and (b) whether Ethiopia was responsible for the mass expulsion and denationalization of Eritreans and for depriving them of their property.

The EECC's decision regarding who started the war

With respect to the *jus ad bellum* claims – the law concerning when a state may resort to the use of force against another state – a finding of liability could mean that the aggressor state will have to pay reparations for damage or war resulting from its actions.[32] Following a meeting with both parties in July 2001, it was agreed that Art. 5 of the Algiers Agreement did not preclude *jus ad bellum* claims.[33] From this point onwards, both states adopted very different tactics to argue their case. Eritrea relied on its reading of Art. 3 of the Algiers Agreement to submit a single *jus ad bellum* claim, whereas Ethiopia embedded its *jus ad bellum* claims in every submission. Problematically for Eritrea, the OAU failed to make a determination regarding the events leading up to the conflict. The EECC decided to address the principal claims first and to defer hearing the *jus ad bellum* claims until April 2005.

In January 2005 Eritrea submitted its *'Counter-Memorials on Ethiopia's Claims no. 1, 3, 6, 7, 8 and Jus ad Bellum'* based on its reading of Art. 3. Eritrea outlined events prior to 12 May 1998 which demonstrated pre-planned attacks against local Eritrean administrative offices, civilians, and property which, its team argued, constituted 'aggression' in international law. Eritrea also argued that Ethiopia's Economic Claim (no. 7) was 'wholly dependent on its *jus ad bellum* argument in demanding compensation for 'the standard economic consequences of war'.[34] Eritrea pointed out 'omissions' in Ethiopia's argument that it was an 'innocent victim' of Eritrean aggression, whereas in truth, Eritrea claimed, 'the conflict lay in Ethiopia's longstanding ambitions to annex Eritrean land and Ethiopia's continued presence on Eritrean soil years after the final, binding decision of the Eritrea-Ethiopia Boundary Commission' was issued in 2002.

In addition to citing 'independent' evidence regarding Ethiopia's aggression, the Eritrean counter-memorial[35] pointed out inconsistencies in Ethiopia's evidence regarding its incursion into Badme in May 1998 and Ethiopia's failure to provide evidence 'that would show that Eritrea acted illegally on 6 May 1998'. Eritrea identified gaps and contradictions in Ethiopia's evidence; that Ethiopia failed to gather and report evidence of Eritrean aggression in the Central Zone and the fact that the witness accounts provided by Ethiopia 'run counter to Ethiopia's dismissal of the week's events' in early May 1998. Eritrea offered a clear chronology of events which showed that 'The overall picture that emerges from the totality of Ethiopia's allegations is implausible on its face. Even if one consults only Ethiopia's documents, the story collapses under its own weight'. Eritrea asserted that Ethiopia's claims rely on its argument that the events in May 1998 occurred on Ethiopian administered territory, a claim that was undermined by the Boundary Commission's 2002 decision that the area in question was administered by Eritrea.[36] Eritrea's counter-memorial cites the EECC's partial awards which demonstrated Ethiopia's refusal to abide by the Algiers Agreement and its violation of international law including its refusal to return POWs and civilian detainees, its systematic destruction of property throughout the Central Zone, its adoption of legal directives aimed at confiscating the property of Eritreans residing in Ethiopia and the denationalization of 'large numbers of persons possessing Ethiopian nationality'.

The EECC rejected Eritrea's reliance on Art. 3 of the Algiers Agreement because the dates of Ethiopia's alleged actions occurred on or before 6 May 1998, i.e. before its temporal mandate. In response to Eritrea's complaint, the EECC concluded that 'a factual inquiry into the 'origins' and 'misunderstandings' is not the same as a determination of the legal claim advanced by Ethiopia.[37] Thus, although it was expressly barred[38] from interpreting the Algiers Agreement, the EECC found:

> that Eritrea violated Article 2, paragraph 4, of the Charter of the United Nations by resorting to armed force to attack and occupy Badme, then under peaceful administration by Ethiopia, as well as other territory in the Tahtay Adiabo and Laelay Adiabo Weredas of Ethiopia, in an attack that began on May 12, 1998, and is liable to compensate Ethiopia, for the damages caused by that violation of international law.[39]

This finding, which was based on the Commission's decision regarding *uti possidetis juris* – the doctrine that sovereignty over territory is based on previously recognized (colonial) borders –

was taken even though the border had never been delimited.[40] In short, the failure of the OAU to determine the origins of the conflict and the EECC's temporal mandate undermined Eritrea's *jus ad bellum* claim. Their decisions are contradicted by the Border Commission which had awarded the area around Badme to Eritrea.

The EECC's decision regarding the denationalization of Eritrean nationals by Ethiopia

Eritrea contended that 'Ethiopia wrongfully denationalized, expelled, mistreated and deprived of property tens of thousands of Ethiopian citizens of Eritrean origin in violation of multiple legal obligations'.[41] Specifically, Eritrea argued that Ethiopia pursued 'ethnic cleansing' by 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area' on the basis of their ethnic identity.[42]

Eritrea cited the 'precautionary measures' announced by Ethiopia in June 1998 and the subsequent official statement that 'deportation was to be a measure of last resort, judiciously employed against a carefully select group of dangerous aliens'.[43] Eritrea also cited an Amnesty International report that the 'campaign swiftly degenerated from selective targeting to indiscriminate deportations' which Eritrea buttressed with evidence from a database compiled by the Eritrea Relief and Refugee Commission that 'contained the names of 32,000 expelled heads of household, accounting for a total population in excess of 71,000'.[44] This database excluded individuals expelled by Ethiopia to a third country.

Eritrea contended that mass expulsions violated international and Ethiopian law. A key issue for the EECC was whether Ethiopia instituted some form of due process to assess individuals or whether individuals were arbitrarily arrested and expelled. Eritrea submitted extensive evidence to substantiate its claim that Ethiopia had not put into place due process procedures and that 'Eritreans' were ill-treated, detained and wrongfully expelled. In support of its argument, Eritrea cited a July 1998 Ethiopian television interview with Prime Minister Zenawi who is alleged to have said:

> Eritreans live in Ethiopia with the goodwill of the Ethiopian government. In the absence of goodwill, the Ethiopian government has every right to deport Eritreans from its country for whatever reason…If the Ethiopian government says we don't like the color of your eyes and therefore get out, they have to get out. This is without the need to raise security or any other issue...Nothing will stop us from sending any foreign national out of the country…It is the right of every nation to say "get out of our country".[45]

Eritrea argued that the Prime Minister's statement provided the rationalization for Ethiopia's conduct which was 'entirely dependent on a newly coined, and legally misconceived, re-characterization of its entire Eritrean minority community as aliens'.[46]

For its part Ethiopia acknowledged its expulsion of a much smaller number of people and contended that all such persons had acquired Eritrean nationality by voting in the 1993 Eritrean referendum and that as aliens they were legally expelled.[47] Against this argument, Eritrea contended that until the war began Ethiopia had not challenged the nationality of 'Eritreans'. In fact, Ethiopia had continued to renew the passports of Ethiopian-born ethnic Eritreans. Eritrea argued that the individuals expelled 'were required to relinquish their Ethiopian passports upon their departure', that nationals in third countries were not allowed to return to Ethiopia and that at least two hundred thousand 'Eritreans' who continued to reside in Ethiopia were denationalized.[48]

To assess this allegation the EECC examined the nationality of the individuals who left to decide how many had been expelled, repatriated or who had left voluntarily. With respect to the first question, Ethiopia had argued that by registering and voting in the 1993 Referendum on Eritrean independence, individuals had acquired Eritrean nationality even though at the time Eritrea was not an independent state.[49] Regardless of the fact that neither Ethiopia nor Eritrea had informed 'Eritreans' that voting in the referendum would have implications for their Ethiopian nationality, the EECC[50] found that 'those who qualified to participate in the Referendum in fact acquired dual nationality. They became citizens of the new state of Eritrea pursuant to Eritrea's Proclamation no. 21/1992 *but at the same time* Ethiopia continued to regard them as its own nationals'. [authors emphasis]

In examining whether deprivation of citizenship was arbitrary, the EECC noted Ethiopia's claim that nationality is lost when 'an Ethiopian acquires another nationality'. In arriving at this decision, the EECC relied on Ethiopia's assertion that the *Ethiopian Nationality Law of 1930*[51] was in force. Several caveats regarding Ethiopia's assertion about the 1930 law are worth noting. First it appears that this law had been superseded by Section 2 of an *Ethiopian Federal Act* ratified on 11 September 1952 when Eritrea was federated into Ethiopia as an 'autonomous unit'.[52] The Act granted full rights of Ethiopian citizenship to Eritrean nationals.[53] It appears, however, that the Eritrean legal team was not aware of the 1952 Act because it was not submitted

to the EECC. Second, international law requires that safeguards be in place to ensure that a person cannot lose their nationality arbitrarily. Finally, the arrests and deportations occurred *after* Ethiopia adopted a Federal Constitution in 1994. Art.33 states that 'No Ethiopian national shall be deprived of his or her Ethiopian nationality against his or her will. Marriage of an Ethiopian national of either sex to a foreign national shall not annul his or her Ethiopian nationality.'

As occurred throughout the arbitration process, there were major discrepancies between the evidence supplied by both parties regarding the nature and extent of expulsions from Ethiopia. Eritrea's principle data derived from the Eritrean Relief and Refugee Commission's database[54] which provided extensive information on 65,000 individuals expelled into Eritrea and which was corroborated by 'independent'[55] secondary sources. In sharp contrast, Ethiopia stated that it had only expelled fifteen thousand four hundred and seventy-five individuals, who were followed by the 'voluntary departure' of a further twenty-one thousand nine hundred and five family members.[56]

Eritrea argued that there were 'three major flaws' in Ethiopia's evidence.[57] First, regarding Ethiopia's claim that it routinely subjected expellees to 'individualized security' assessments, in fact Ethiopia provided no evidence for this assertion, not even a list of names. It appears that the majority of expulsions were undertaken by local committees, police and militia and were unlawful. Second, even if it was accepted that only 37,000+ individuals had been expelled and/or had left voluntarily, Ethiopia failed to explain how the departure of the remaining 28,000+ individuals who fled to Eritrea and who were registered on Eritrea's database as having been expelled was possible.

Finally, regarding Ethiopia's claims about the 'voluntary' departure of Eritreans, Eritrea argued that there was substantial evidence that 'a large number' were subject to detention and were required to provide a list of their property (which was not the usual procedure for processing departures from the country). Indeed, Eritrea argued that 'a dragnet' was used to identify, arrest and detain Eritreans, whose property was 'systematically shuttered and then looted' through the mandatory appointment of Ethiopian 'agents' to 'manage' Eritrean property, by '30-day forced real estate sales', confiscatory taxes on sale proceeds, arbitrary imposition of other taxes, and measures operated as a network of measures that had the effect of 'the loss of all or most of the [Eritreans'] assets'.[58] In support of its arguments, Eritrea[59] submitted a folder

containing copies of original Ethiopian documents, reports from Addis Ababa City Council, the Commercial Bank of Ethiopia and the Development Bank of Ethiopia showing the appointment of agents for Eritreans held in police custody, of bank foreclosures, the taxation of assets, the compulsory sale of Eritrean property and, after their property was sold and taxed, the placement of the remaining balances into special 'blocked accounts' at the Commercial Bank of Ethiopia. In response to these allegations, Ethiopia failed to provide Bank or tax records regarding the disposition of Eritrean property. Instead Ethiopia 'contended that any losses resulted from the lawful enforcement of private parties contract rights, or the non-discriminatory application of legitimate Ethiopian tax or other laws and regulations.'[60]

In its assessment of the expulsion of Eritreans residing in Ethiopia the EECC found that:

> Given … that Ethiopia did not implement that law [the 1930 Nationality Law] until sometime in 1998 with respect to its nationals who had acquired Eritrean nationality between 1993 and 1998, the possibility could not be excluded that some persons who had acquired Eritrean nationality had subsequently lost it and thus were made stateless.[61]

The Commission stated that individuals whose cases were assessed by the immigration authority were deemed to have been legally expelled. However, there was evidence that many 'Eritreans' had not been assessed by 'an objective decision maker' which indicated the absence of due process and reasonable human rights safeguards. The EECC identified three classes of individuals who had been arbitrarily denationalized. First a large but unknown number of 'dual nationals remaining in Ethiopia' were 'deprived of their nationality and who, in August 1999, [were] required … to present themselves and register as aliens and obtain a residence permit'. These individuals were issued with 'yellow alien identity cards.' The two parties disputed the exact number of 'yellow-card' persons: Eritrea claimed that 500,000 persons were affected; Ethiopia claimed that it had only issued 24,000 yellow cards. The EECC adopted the middle-ground between the parties and found: '[t]here was no process to identify individuals warranting special consideration and no apparent possibility of review or appeal … [t]he Commission finds that this wide-scale deprivation of Ethiopian nationality … was … arbitrary and contrary to international law'.

Second, the EECC found that Ethiopia arbitrarily denationalized dual nationals in third countries and those who left Ethiopia to go to third countries because, as with the "yellow-card'

people, there was no evidence that these people could reasonably be presumed to be security threats. Nor were such persons individually assessed.

Third the EECC found that 'an unknown, but considerable number of dual nationals living in smaller towns and agricultural areas near the border' were unlawfully deprived of their nationality because they 'were rounded up by local authorities and forced into Eritrea for reasons that cannot be established'.

In its assessment of the evidence the EECC observed that:

> Ethiopia maintained that 15,475 persons with Eritrean nationality were individually identified through its security process and then deprived of Ethiopian nationality and expelled. This is a large group, but it is less than 25% of the more than 66,000 persons in Ethiopia who qualified to vote for the Referendum. It is 3% of the more than 500,000 persons in Ethiopia both parties cited as having Eritrean antecedents … even if the total were much higher, the record indicates an expulsion process involving deliberation and selection, not indiscriminate roundups and expulsions based on ethnicity. Eritrea's claim that Ethiopia engaged in indiscriminate mass expulsions based on ethnicity or in ethnic cleansing is rejected for lack of proof.

In as much as 145,000 persons were estimated to have been expelled/repatriated by both parties during the war,[62] a finding of liability would have had major implications in terms of compensation. This fact provided both parties with every incentive to inflate its claim regarding the conduct of its enemy while simultaneously minimizing its own responsibility. Because the EECC was not able to compel the parties to submit evidence, the arbitration process created a situation which ensured that both states claimed that their evidence was true.

The ICRC possessed the most complete record of the individuals whom it had repatriated from both countries, but it forbade Eritrea and Ethiopia from submitting its documents to the EECC because it feared that in the future its ability to repatriate people fleeing war, and its ability to access Prisoners of War, would be jeopardized.[63] Both parties attempted to fill-in the huge lacunae created by the ICRCs refusal to provide information by submitting their own evidence and reports by human rights organizations but this left a massive hole in the evidence. Both parties also sought to undermine the veracity of their opponent's submissions sometimes by deploying quite imaginative if dubious arguments and sometimes by undertaking a careful analysis of its opponent's evidence. Faced with a mass of conflicting claims and evidence the EECC found[64] that 'the evidence did not permit judgements' as to the nationality of the children and spouses of those said to have left 'voluntarily' (and thus whether they were illegally

expelled) nor was it able to come to a judgment about 'the frequency or extent of varying types of departures'.

Regarding the claim that Ethiopia had unlawfully confiscated the private property of 'Eritreans', Eritrea:

> alleged that Ethiopia implemented a widespread program aimed at unlawfully seizing Eritrean private assets, including assets of expellees and of other persons outside of Ethiopia, and of transferring those assets to Ethiopian governmental or private interests. Ethiopia denied that it took any such actions. It contended that any losses resulted from the lawful enforcement of private parties' contract rights, or the non-discriminatory application of legitimate Ethiopian tax or other laws and regulations.[65]

Indeed, Eritrea argued that[66] 'In practice, it quickly became apparent that the goal was not merely ethnic cleansing, but "economic cleansing," as the two primary selection criteria that emerged were Eritrean extraction and affluence'. Eritrea contended that the expropriation of 'Eritrean' property occurred through the arbitrary revocation of the business licenses held by members of Ethiopia's Eritrean minority (from family-business to large firms and banks); the forced sale of property at a fraction of its actual value; direct government seizure of private property which was auctioned off at "fire-sale" prices; and that savings-accounts were frozen and that once expelled the owners lost the ability to reclaim their funds. In addition, members of Ethiopia's Eritrean minority community were arbitrarily and illegally fired from their jobs, entailing not only loss of salary but also loss of other job-related benefits, such as accumulated pension and credit union funds.

A notable feature of the expropriation was the attempt by Ethiopian officials to convince deportees to sign power of attorney over to them, an action which the EECC found to be illegal.[67] The net effect of these actions was to reduce individuals and their families to penury. Eritrea entered a claim against Ethiopia for Birr 10.1 billion [US$47 million] – of which Birr 5.1 billion was for real property, Birr 3.9 billion for movable property and Birr 760 million was for financial assets – to reimburse 22,374 'Eritrean' expellees for their losses.[68]

Ethiopia did not deny the measures. Instead, it refuted the number of valid claims, objected to Eritrea's claim forms, objected that the types of property identified on the forms did not correspond to the EECC's liability findings, disputed Eritrea's calculations of the value of property and argued that the proceeds from forced sales had been placed in 'blocked' accounts in the Commercial Bank of Ethiopia on behalf of affected individuals.[69]

At the end of the hearings the EECC[70] found Ethiopia liable for:

1. Limiting to one month the period available for the compulsory sale of Eritrean expellees' real property.

2. The discriminatory imposition of a 100% 'location tax' on proceeds from the forced sales on some expellees' real estate.

3. Maintaining a system for collecting taxes from expellees that did not meet the required minimum standards of fair and reasonable treatment.

4. Creating and facilitating a cumulative network of economic measures, some lawful and others not, that collectively resulted in the loss of all or most of the assets in Ethiopia of Eritrean expellees, contrary to Ethiopia's duty to ensure the protection of aliens' assets.

Because it found difficulties with the evidence submitted by both parties, the EECC arrived at its own conclusions regarding the number and the value of the claims which Ethiopia was held liable for; it awarded US$24.5 million of the US$47 million that Eritrea had claimed.

At the end of the proceedings the EECC[71] awarded Eritrea damages for Ethiopia's violation of the claims discussed in this paper as follows:

1. $US50,000 in respect of a small number of dual nationals who were arbitrarily deprived of their nationality while present in a third country.

2. $US15 million in respect of the wrongful expulsion of an unknown number of dual nationals by local Ethiopian authorities.

3. $US2 million for the failure to provide humane and safe treatment for persons being expelled from Ethiopia.

4. $US46 million for expellee's loss of property on account of Ethiopia's wrongful actions.

With regard to all the claims and counterclaims made by both states, the EECC awarded US$161 million to the Government of Eritrea and $174 million to the Government of Ethiopia. In each case the amount awarded was far below the sums claimed by the parties. The EECC's decisions were said to reflect a pragmatic and cautious deliberation and its concerns about the poor quality of the evidence submitted to it.[72]

Conclusion

If the international community seriously thought that international arbitration could resolve the dispute between Eritrea and Ethiopia, litigation at the EECC and subsequent events were to prove them wrong. The terms of the Algiers Accord simply did not reflect political reality: by

compelling both states to submit to binding arbitration international law failed to address the underlying political issues and left ordinary Eritreans and Ethiopians to rebuild their lives with minimal support.

While its rules of procedure provided the EECC with the authority to settle the dispute, in reality its application of these rules to the 'facts' was flawed. Critically the 2002 decision by the Boundary Commission ignored regional politics – i.e. Ethiopia's continued occupation of the disputed territory and the wishes of the population living along the border – when it delimited the international boundary and awarded the area of Badme to Eritrea.[73] When Ethiopia refused to hand this territory back to Eritrea, the Boundary Commission's decision rebounded against it and undermined the PCA's authority and given the instrumentalist views of both parties towards international law resulted in the refusal of Eritrea and Ethiopia to accept the EECC's decisions.

Furthermore, the temporal remit adopted by the EECC unnecessarily compounded its difficulties when it found that Eritrea caused the war. In effect the decision of the EEBC and EECC clashed: Ethiopia was adjudged to have been attacked by Eritrea but the location where that attack occurred was found to be in Eritrea. By defining the underlying political issues as mere 'interests' which it could decide, the EECC failed to address underlying political issues of Eritrean sovereignty. In addition, Ethiopia's superior military power and its continued occupation of Eritrean territory in contravention of the Border Commission was, directly and indirectly, supported by the international community. It is worth noting that not only was Eritrea deeply skeptical of the arbitration process from the beginning, so too was its legal counsel. Professor Brilmayer expressed disappointment regarding the EECCs approach to statelessness/nationality which undermined Eritrea's arguments regarding Ethiopia's denationalization of Ethiopian-born ethnic Eritreans. In addition, Eritrea's junior counsel saw the invisible hand of the US State Department influence the EECC's decision which relied on the approach adopted in the Iran-US hostage arbitration proceedings to decide the claims.[74] The process of arbitration at the EECC supports Nader's argument that binding international arbitration is a controlling process that constructs and institutionalizes a 'pacification process' in which 'the weaker party looks to adjudication while the stronger party prefers to negotiate'; it 'is

a cop-out, an avoidance of root causes by means of human management techniques' because it transforms 'dispute resolution from the rule of law to the rule of coercion'.[75]

The EECC's decisions demonstrate why binding arbitration is not appropriate for deciding international boundaries and war claims unless the disputing parties are on an equal legal and political footing *and* the process is not influenced by international pressure. For instance, the requirement that both parties need to provide 'clear and convincing evidence' of violations which occurred in a 'frequent or pervasive manner' in each other's country resulted in very few 'findings of unlawful acts'.[76] The procedural rules gave rise to a situation in which 'proof' of a claim or allegation depended largely upon the evidence provided by the other state. The rules gave rise to many unfounded allegations and resulted in a major challenge to the EECC's claim to be the arbiter of truth because, in the face of 'deep and wide ranging conflicts in the evidence', the absence of proof, and the failure of both parties to assist it to find the truth, the Claim's Commission had to define the 'truth' for itself. Seen from a different perspective, the arbitration process created a situation in which both parties nationalized the truth which seriously reduced the EECC's ability to make findings of fact, decide liability and establish the basis for regional peace.

The failure of international law and the international community to resolve border disputes is evident in the region and elsewhere.[77] During the 30-year war of liberation between the EPLF and Ethiopia (1961-1991), the international community failed to intervene largely because Ethiopia and the OAU supported the maintenance of the colonial boundaries bequeathed to Ethiopia. International failure can also be seen in the 1977-78 Ogaden War between Ethiopia and Somalia which was backed by the USA and Russia (which ran its course at a huge human cost), and in the 2008-2018 border dispute between Eritrea and Djibouti which Ethiopia mediated. Indeed there have been countless military conflicts in the Horn of Africa, very few of which have been arbitrated. While the Eritrea-Yemen arbitration by the International Court of Justice (in 1999) is seen as a successful outcome, the two country's acceptance of the award needs to be seen in light of broader international interests in ending the threat to shipping in the Red Sea and preventing an escalation of the conflict involving Israel and Saudi Arabia. Indeed the fact that Yemen was embroiled in an internal conflict of its own and Eritrea was at war with Ethiopia strongly suggests that external factors were important in pushing both parties to accept the ICJ's

decisions. If we look further afield it is clear that arbitration in the Dayton Agreement (involving Bosnia and Herzegovina) and the Abyei Boundary Commission (involving the Republic of Sudan and South Sudan) would have failed without the presence/absence of international military force to reinforce the decision. Indeed, as The Carter Center's survey clearly indicates, when a major power supports a disputing party to a conflict and when the value placed on territory is intimately linked to a state's reputation, strategic position or the popularity of its government, there can be insurmountable barriers to mediating a conclusive end to a border conflict.

Outside the PCA, complex regional political processes had the effect of rendering its decisions redundant. By 2002 both states had refused to co-operate with the Boundary Commission. Ethiopia refused to implement the Boundary Commissions decision, and – by relying on US support for its role in the War on Terror in the Horn of Africa – it refused to pay compensation as determined by the EECC. Eritrea, on the other hand, failed to play its diplomatic cards well and became increasingly isolated from the international community. Eritrea's decision to restrict the operations of UNMEE led the Security Council to threaten sanctions but, in the face of the rising cost of maintaining UNMEE in the 'Temporary Security Zone' and virtually no prospect of demarcating the border, the UN Security Council terminated UNMEE's mandate in 2008.[78]

In effect, until 2018 there was a political stalemate in the Horn in part because neither the UN nor the EECC addressed any of the contentious bi-lateral economic issues of trade, the exchange value of currency, migration and investment that were also at the heart of the border conflict.[79] The border between Eritrea and Ethiopia was not demarcated on the ground, compensation was not paid, and Eritrean and Ethiopian troops continued to face each other across the disputed border.

In 2018, following political divisions inside the ruling EPRDF, a new Prime Minister emerged who initiated major political reforms including a rapprochement with Eritrea in which he promised to return the disputed territory of Badme, currently under Ethiopian administration, to Eritrea as required by the Boundary Commission.[80] While political relations were restored with Eritrea and the disputed border was temporarily reopened, Eritrea failed to pursue political reforms that might threaten President Afeworki's continued domination. However, in 2020 and in the context of the

Ethiopian Prime Minister's mounting domestic political difficulties arising from regionally-based political parties, in particular the Tigrayan Peoples' Liberation Front (which had been the dominant party in the EPRDF), political relations between the two countries were temporarily reset when President Isaias was asked to send Eritrean troops into Tigray to help eliminate the TPLF (who had been responsible for prosecuting the border war against Eritrea). In November 2020 Eritrean troops and Amhara militia supported the Ethiopian military's 'policing' exercise in Tigray[81] which led to massive human rights violations, mass rape, the death of hundreds of civilians and at least 60,000 refugees fleeing to Sudan.[82] Under pressure from the international community the Ethiopian Prime Minister has promised to allow humanitarian relief to Tigray and to investigate possible human rights violations. He also stated that Eritrean troops would withdraw from Tigray – but this has not happened. Instead, Eritrea occupied extensive territory well inside northern Tigray to the north and south of a line connecting Adwa/Aksum to Shire and Sheraro in the west.[83] Eritrea's occupation of Ethiopian territory raises uncomfortable questions about the future of Tigray, about the consequences of the Tigray 'policing' operation for the integrity of a federal Ethiopia and regarding how Eritrea will pursue its interests to protect its sovereignty.

Notes

[1] Campbell, *Nationalism, Law and Statelessness*, Chapter 2.
[2] In 2009 I wrote to Prime Minister Meles, via the Ethiopian embassy in London, asking for information about the readmission of deported Eritreans back in Ethiopia under a 2009 Proclamation. My letter was intercepted by Berhanu Kebede, then ambassador to the UK, who refuted allegations that Ethiopia had deported its nationals. In 2010 I spoke with a senior official at the Ministry of Foreign Affairs in Addis Ababa about the status of deportees (see Campbell, *Nationalism, Law and Statelessness*).
[3] Email correspondence 11 and 18 June 2020. On 11 June 2020 I wrote to the Deputy Head of Mission at the Eritrean Embassy in London asking for access to all of Eritrea's the submissions made to the PCA.
[4] The major study of litigation at the EECC was written by three members of Ethiopia's legal team who clearly drew on Ethiopia's legal submissions, see Murphy, Kidane and Snider, *Litigating War*.
[5] Nader, "Civilization and its Negotiations", Chap. 10.
[6] Nader, *The Life of the Law*, Chap. 3.
[7] See: Abbink, "Briefing"; Gilkes, *Ethiopia – Perspectives on Conflict*; Gilkes and Plaut, *War in The Horn*; Human Rights Watch. *The Horn of Africa War*; Iyob, "The Ethiopian-Eritrean Conflict".
[8] Eritrea, *Counter-Memorials 2005*.
[9] Negash and Tronvoll, *Brothers at War*, Chap. 4. Their analysis is based on an exchange of letters between the President of Eritrea and the Prime Minister of Ethiopia prior to the outbreak of the war.
[10] Eritrea, *Counter-Memorials 2005*, ¶1.20-f.
[11] Eritrea's submissions on this issue are contradictory. It states that the initial conflict occurred in Ethiopian-administered territory, but at ¶1.47 that the conflict occurred in Eritrean administered territory.
[12] The Eritrean counter-memorial substantiates its allegations of Ethiopian actions with affidavits from Eritrean officers and soldiers, medical evidence regarding the death of Eritrean solders, a statement by a US NGO, and by identifying gaps in the evidence submitted by Ethiopia to the EECC in its Statements of Claim submitted to the OAU in June 1998 and in its submissions and Counter-memorial to the EECC.

[13] Triulzi, "Violence and the acknowledgement," ¶5.
[14] Ibid., ¶7.
[15] Campbell, *Nationalism, Law and Statelessness*, Chap. 1 and 2.
[16] For background to the war, see Negash and Tronvoll, *Brothers at War*, and Jacquin-Berdal and Plaut, *Unfinished business*.
[17] Clapham, "Indigenous statehood and international law", 168.
[18] EECC, "Eritrea's Claims": ¶32.
[19] For information about the PCA see: van Haersoltevan van Hof, "The Revitalization".
[20] See Permanent Commission of Arbitration. Arbitration rules. The Hague. https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/ (accessed 17 August 2021)
[21] The parties submit evidence without the rules of admissibility which prevail in other jurisdictions. The arbitration rules do not define the 'burden of proof' which applies in its hearings; indeed that burden may vary but in general 'it is close to the balance of probabilities' (see von Mehren and Salomon, "Submitting Evidence").
[22] Contrast this with litigation which, while messy and confrontational, proceeds through an open hearing in which the parties are required to submit evidence, and which examines the issues at the heart of the dispute.
[23] See Permanent Commission of Arbitration. Decisions. The Hague. http://www.pca-cpa.org/showpage.asp?pag_id=1151 (accessed 1 June 2018).
[24] Paragraph 9 of Decision no. 1 indicates a clear disagreement between the parties regarding the date the war began.
[25] EECC's 'Decision no. 8', which reiterated Art. 5(8) of the Algiers Agreement, stated that each state would either file claims on behalf of individuals whose nationals they were (which Eritrean did on behalf of six named individuals) or that state claims would include claims for damages on behalf of individuals which, if upheld, would be compensated via relief or development programs and not by payment to individuals.
[26] See Article 3(1) of the Algiers Agreement 'Agreement.
[27] Murphy, Kidane and Snider, *Litigating War* (sec. iv). With respect to the absence of evidence contained in the EECC's decisions, the authors on 112 state: 'As is the case for all the Commission's awards, it is difficult to see within the limits of the *jus ad bellum* partial award (and the associated damages award) exactly what evidence was presented by Ethiopia in support of its claim and what evidence was marshalled by Eritrea in its defence … there is no detailed discussion of the quantity and quality of the vast amount of information that was submitted to the Commission …' [author's emphasis].
[28] Greppi, "The 2000 Algiers Agreement".
[29] For instance, Ethiopia's expelled Eritreans after the peace treaty was signed (cf. Kidane (2007) and Gray (p.705).
[30] Won Kidane, "Civil Liability for Violations" and Murphy, "The Experience of the Eritrea-Ethiopia".
[31] EECC, "Eritrea's Claims", ¶90.
[32] Stahn, "Jus ad bellum".
[33] Murphy, Kidane and Snider, *Litigating War*, 104-105. The author's discuss this and the options which this decision precluded, namely an agreement not to submit a *jus ad bellum* claim.
[34] Eritrea, *Counter-Memorials*: ¶1.5, 1.76. Specifically, losses in its tourism industry, a national economic downturn in the economy, reduced foreign aid, expenses in road projects interrupted by the war, lost tax revenue, reduced foreign and domestic investment and costs suffered by Ethiopian Airlines could not be claimed.
[35] The evidence cited in this paper come from Eritrea, *Counter-Memorials*: ¶1.30-1.70.
[36] Eritrea argued that Ethiopia's claims had no basis in international humanitarian law, including the Geneva Convention, and that Ethiopia had offered no evidence that Eritrea violated bi-lateral agreements.
[37] See EECC, "Jus Ad Bellum": 9, 12.
[38] Art. 3 of the Algiers Agreement assigns the task of assessing the origins of the conflict to a third, undefined, institution.
[39] EECC, "Jus Ad Bellum": ¶16.
[40] See Murphy, Kidane and Snider's (*Litigating War*, 119-f) discussion of Eritrea's 'unsuccessful defences' which hinged on its *jus ad bellum* claim.
[41] Eritrea, *Counter-Memorial of the State 2004a*, ¶10.
[42] Eritrea, *Memorial of the State 2002*, ¶2.03.
[43] Ibid, ¶2.25.
[44] Ibid, ¶2.27-f.
[45] Eritrea, *Memorial of the State 2007*, ¶3.10.
[46] Eritrea, *Memorial of the State 2002,* ¶2.79.
[47] EECC, "Eritrea's Claims", ¶11.

[48] Eritrea, *Memorial of the State 2002,* ¶2.100-f. This allegation is fully in line with Human Rights Watch, *The Horn of Africa War*, 18-28 – a report of the arrest and expulsion of Ethiopian-born ethnic Eritreans as 'enemy aliens.
[49] EECC, "Eritrea's Claims", ¶39-f.
[50] Ibid: ¶51.
[51] Ethiopian Nationality Law of 1930. https://www.refworld.org/docid/3ae6b52ac.html (accessed 22 June 2021).
[52] Ewing, *Consolidated Laws of Ethiopia*.
[53] Sec. 6 of the Act states 'A single nationality shall prevail throughout the Federation: (a) all inhabitants of Eritrea, except persons possessing foreign nationality, shall be nationals of Ethiopia; (b) All inhabitants of Eritrea and having at least one indigenous parent or grandparent shall also be nationals of Ethiopia…' Sec. 7 states: 'The Federal Government, as well as Eritrea, shall ensure to residents in Eritrea, without distinction of nationality, race, sex, language or religion the enjoyment of human rights and fundamental liberties …' Even though Ethiopia formally abrogated the federal status of Eritrea in 1962 when it formally incorporated it into the Empire, subsequent Acts did not remove or alter the right of Eritreans to Ethiopian citizenship. This evidence would have reinforced Eritrea's claim that Art. 33 of the Ethiopian Constitution – barring Ethiopia from depriving Ethiopian citizens of their citizenship 'without consent' – applied to Eritrean nationals of Ethiopia. The Act was apparently "amended and substantially repealed by the Revised Constitution and by the Termination of the Federal Status of Eritrea Order, 22/3 (1962)' (p. 37).
[54] Eritrea, *Memorial of the State 2007*, ¶1.9-f. Ethiopia alleged that the database was 'riddled with errors and duplications' yet it only provided 'a handful' of examples.
[55] Eritrea checked its data against reports initially issued by the ICRC and against Ethiopia's Counter Memorial 'accusations of inaccuracy and inconsistency' and the witness statements provided by Ethiopia (Eritrea. 2008: 2.3.60-84; Eritrea, *Memorial of the State 2007*, ¶117-f).
[56] Eritrea, *Memorial of the State 2007,* ¶1.10-f.
[57] Eritrea, *Counter-Memorial of the State 2004a*, ¶1.28-f.
[58] Eritrea, *Memorial of the State 2007,* ¶2.1, 2.4-ff.
[59] Eritrea. *State of Eritrea Case*.
[60] EECC, "Eritrea's Claims", ¶123.
[61] EECC, "Eritrea's Claims", ¶62. The evidence cited in the following five paragraphs is taken from the same decision, specifically ¶70-80.
[62] Human Rights Watch, *The Horn of Africa War*.
[63] See EECC, 2004b: ¶129-f and Eritrea 2007: ¶151-f.
[64] EECC, "Eritrea's Claims", ¶93-97.
[65] EECC, "Eritrea's Claims", ¶123.
[66] Eritrea, *Memorial of the State 2002*, ¶2.168-174.
[67] Ibid, ¶2.185-f.
[68] Eritrea, *Memorial of the State 2007*, ¶2.120-2.122.
[69] EECC, 2004: ¶145-f; 2009a: ¶326- 330. Eritreans whose assets were seized during the war were unable to gain access to their property and to money in 'blocked accounts'.
[70] EECC, *Counter-Memorial of the State 2004a*, 37-f.
[71] EECC, "Final Award. Eritrea's Damages", ¶95-96.
[72] The EECCs approach to the evidence is reflected in its assessment of liability, specifically its assessment of the 'dominant and effective nationality' of Eritrean nationals and its assessment of conflicting approaches to claiming damages, cf. EECC, "Final Award. Eritrea's Damages" and "Final Award. Ethiopia's Damages".
[73] Gray, "The Eritrea-Ethiopia Claims", 699-721.
[74] College, "The Iran-United States Claims".
[75] Nader, *The Life of the Law*, 149, 164. Even so, counsel for both parties accepted the risks by participating in the process.
[76] Art. 24 of the EECC's procedure states that 'each party will have the burden of proving the facts relied upon to support its claim or defence'.
[77] This paragraph is based on the following sources: Abraham, "Lines Upon Maps"; Carter Center, *Approaches to Solving Territorial Conflicts*; Kwiatkowska, "The Eritrea-Yemen Arbitration"; Mesfin Wolde Mariam, "The Background"; and Reisman, "Eritrea-Yemen Arbitration". While there is evidence that arbitration works in some situations and that states have arrived at peaceful compromises regarding their border (Miles, "Development, not Division"), arbitration is not a universal panacea.
[78] See the website of UNMEE mission. https://unmee.unmissions.org/
[79] Styan, "Twisting Ethio-Eritrean Economic Ties".

[80] Ylonen, "From demonisation to rapprochement".
[81] See Crisis Group, *Ethiopia's Tigray War: A Deadly, Dangerous Stalemate*, Briefing 171, 2 APRIL 2021, https://www.crisisgroup.org/africa/horn-africa/ethiopia/b171-ethiopias-tigray-war-deadly-dangerous-stalemate
[82] See, *UNOCHA, Ethiopia - Northern Ethiopia Humanitarian Update Situation Report, 23 Sept 2021*, https://reliefweb.int/report/ethiopia/ethiopia-northern-ethiopia-humanitarian-update-situation-report-23-sept-2021
[83] Annys et al, "Tigray: Atlas", 20 – see Map 10.

Acknowledgements

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