FAVOURABLE AWARDS TO TRANS-BOUNDARY INDIGENOUS PEOPLES

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I Introduction

Most international boundaries are arbitrarily drawn; they are put where there is no rational discontinuity, such as a change in climate, landscape, livelihood, ethnicity or race. In Africa in particular, international boundaries have divided communities and made them subject to different jurisdictions. This sad story has created more minorities within states than would have resulted through the natural course of state-formation. Despite calls from some quarters for the redrawing of such problematic state boundaries,[1] they have been formally sanctioned, first by the legal framework of the Organisation of African Unity ('OAU'), and later by the African Union ('AU').[2] To make matters worse, African states have not progressed towards integration; on the contrary, neighbours have been immersed in deadly conflicts, and engaged in destabilising each other. This gloomy situation means that peoples divided by random lines have not been able to mitigate the consequences of their bad fortune by taking advantage of lax mobility policies.

Arbitrary boundaries also cut members within Indigenous groups off from one another. Some lucky Indigenous peoples, such as the Kunama of Eritrea, may have been within one state when the boundaries were drawn. However, the fact that those Indigenous peoples are oblivious to modern day notions of boundary, territoriality and sovereignty means that they are in greater need of special treatment in regard to cross-boundary movement and the pursuit of livelihood.

Eritrea and Yemen sit on the western and eastern sides of the southern part of the Red Sea, respectively. For centuries, peoples from both coasts have coexisted in the Red Sea, fishing and trading with each other. Ownership of several islands in the Red Sea, and the maritime boundary between the two countries, had not been clarified until recently. This led to tensions, which briefly escalated into a military confrontation in 1995. Consequently, both countries went to an international arbitration. A tribunal of the Permanent Court of Arbitration was established to decide on territorial sovereignty of disputed islands and subsequently delimit the maritime boundary between the two countries. In both awards, the Tribunal made some significant contributions to the causes of Indigenous peoples in border areas ('IPBAs'). This is not an in-passing ruling. As Bernard Oxman and Michael Reisman noted, only less than a third of its 50 pages and 169 paragraphs deals directly with the delimitation of the maritime boundary, despite the fact that the title of the award is the delimitation of that said boundary.[3] A significant part is devoted to clarify certain innovative parts of the first award, in which the Tribunal required Yemen to 'ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men'.[4]

Eritrea and Ethiopia also share three ethnic groups along their common boundary: the Afar,[5] the Saho[6] and the Tigriyna/Tigrawot.[7] The Kunama, identified as an Indigenous people by one study, live at the western border of Eritrea and Ethiopia.[8] However, this ethnic interconnectedness did not spare the countries from devastating war. In May 1998, Eritrea and Ethiopia clashed and subsequently engaged in a two-year long, full-scale war because of differences on their insufficiently delimited and never-demarcated border. After the war, both countries agreed to resort to arbitration by another tribunal, which rendered one of its awards in April 2002. This award has significance for IPBAs as well.

Along with the intensification of the movement of the rights of Indigenous peoples, those who straddle international boundaries have received attention. Indigenous peoples have become subjects of international law. Yet, in their awards both tribunals did not make specific reference to international law related to Indigenous peoples.

Part II of this article highlights the plight of IPBAs in different parts of the world. Part III discusses the relevant international law governing their cross-boundary affairs. Part IV presents the pertinent parts of the awards of both tribunals. In line with the rights of IPBAs, Part V discusses some significant omissions of the awards and some other contentious issues. Part VI concludes the discussion.

II The Fate of IPBAs

As one recent study indicated, Indigenous peoples are often dispersed across national borders and, as a consequence, 'groups that are sociologically similar end up being ascribed different legal nationalities'.[9] However, for any group of Indigenous peoples, 'State boundaries are meaningless and amount to an imposition that has an impact upon, and affects deeply, their immemorial ties with land and water areas, and the natural resources existent in these areas'.[10] Given that borders constitute barriers that inhibit or prevent social and cultural interaction, 'they undermine the cohesion of the group, and thus affect the ability of the group to preserve their common identity'.[11]

Groups who live nomadic lifestyles often migrate across borders as part of their survival, and their movements often go unnoticed and uncontrolled.[12] While international migration of Indigenous peoples is small in magnitude, Indigenous peoples are one of the most vulnerable social groups, meted with discrimination based on their poverty and ethnic origin.[13]

Indigenous peoples live on the margins of state machinery. Their movement, for example, mostly takes place outside the parameters of the law. Few leave and re-enter at officially designated ports, and not many carry passports, despite the fact that they are often required to comply with regular border formalities.[14] In some areas where borders are heavily patrolled for security reasons, such as the border between Mexico and the United States, Indigenous peoples are subjected to abuse.[15] For this reason, two 'Indigenous Peoples Border Summit of the Americas' were conducted in 2006 and in 2007.[16] Participants in the Permanent Forum on Indigenous Issues recognised that current methods and procedures for enforcement of border control by the United States, Canada and Mexico violate several rights of Indigenous peoples. The participants also affirmed 'the vital importance of state recognition of indigenous peoples' and nations' own documentation in relation to their indigenous nation citizenship'.[17]

Often, states' constitutions provide a right for their citizens to leave and return to the country. However, such rights are tightly regulated and controlled. The most common qualifications are the requirements to travel with a passport and through designated points.[18] In fact, in some countries such as Eritrea, international travel is extremely difficult even for non-Indigenous peoples.[19] By contrast, other countries have exemplary exceptions for Indigenous peoples. The *Burkina Faso Forestry Code* ('*Code Forestier*'), for example, provides that, on condition of reciprocity, foreign herds are allowed to cross the country's borders in the context of transhumance upon satisfaction of some simplified conditions: (1) the herders must observe the laws relating to animal sanitation and should be in possession of official documents related to sanitation; (2) they should hold the administratively required certification of transhumance. In addition, the herd should be accompanied and guarded by a sufficient number of adult guardians.[20]

Yet for the most part, states with IPBAs 'have in their legal systems not addressed the situation of Indigenous peoples' migration across official borders. The specific needs of these groups should be assessed and the consequences of their migratory patterns and shared realities should be brought into the ambit of the law'.[21] More flexibility should be introduced into legal regimes to take account of the nature of IPBAs.[22] In this regard, the contributions of the two tribunals discussed in Part IV are significant.

III International Law and IPBAs

The *International Labor Organization Convention (No 169) Concerning Indigenous and Trival Peoples in Independent Countries*[23] is a major international treaty on the rights of Indigenous peoples. Article 32 of *ILO Convention No 169* provides that '[g]overnments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between Indigenous and Tribal Peoples across borders, including activities in

the economic, social, cultural, spiritual and environmental fields'.[24] Another important international document is the recent *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').[25] One study contends that the *UNDRIP* 'does not link the protection of indigenous peoples to, or render them dependent on, nationality or citizenship. Rather, the connection between Indigenous peoples and their land, territories, and resources is prioritised'.[26] Thus, relevance is attached to the preamble. In any case, article 36 of the *UNDRIP* deals with IPBAs very clearly. It provides:

> (1) Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
> (2) States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

The distinction between Indigenous peoples and ethnic minorities is not always significant, nor so clear. For this reason, it is important to mention article 2(5) of the United Nations *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*:

> Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.[27]

Indigenous peoples are beneficiaries of other human rights treaties. Important in the context of this article is the right to leave and to return to one's country. Like everyone else, Indigenous peoples are entitled to the right to leave and return to their countries provided for by the *African Charter on Human and Peoples' Rights*,[28] the *International Covenant on Civil and Political Rights*[29] and the *Universal Declaration of Human Rights*.[30] Article 12(2) of the *ACHPR* provides that 'every individual shall have the right to leave any country including his own, and to return to his country'. Article 13 of the *UDHR* states that 'everyone has the right to leave any country, including his own, and to return to his country'. Article 12(2) of the *ICCPR* provides, in relevant part, that 'everyone shall be free to leave any country, including his own', while article 12(4) states that 'no one shall be arbitrarily deprived of the right to enter his own country'.

Migration related rights are prone to abusive restrictions in excess of permissible limitations. Under article 29 of the *UDHR*, the twin rights to leave and to return are subject to general limitation in consideration of everybody's 'duties to the community'. Although the *ACHPR* is known for its trademark of not allowing derogation from its rights even during a state of emergency, some have convincingly argued that article 27(2), which states the 'rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest', will increasingly be used by states as a general limitation in addition to the internal limitations.[31] Article 12(2) contains internal limitation by subjecting the rights to leave and to return to 'restrictions, provided for by law for the protection of national security, law and order, public health or morality'. The only limitation to the right to return contained in the *ICCPR* is that the right is not absolute but subject to derogation. Article 4 allows state parties to, in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, take measures derogating from their obligations to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

IV Awards of the Two Tribunals

A Award of the Eritrea–Yemen Tribunal

Eritrean and Yemeni armed forces clashed in December 1995 on one of the islands (Greater Hanish) situated in the Red Sea, off the coasts of both states.[32] The disputed islands are part of a group that comprises more than 23 hilly, barren islands, islets, and rocks, located more or less at the median of the southern part of the Red Sea.[33] Eventually, both countries signed an 'Agreement on Principles' in Paris, on 21 May 1996, by which they renounced recourse to the use of force and undertook to 'settle their dispute on questions of territorial sovereignty and of delimitation of maritime boundaries peacefully' and to establish an agreement instituting an arbitral tribunal. In furtherance of the Agreement on Principles, on 3 October 1996 both countries concluded an

Arbitration Agreement.[34] Concerning questions of territorial sovereignty, the *Arbitration Agreement* provided that 'the Tribunal shall decide in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles'.[35] The *Arbitration Agreement* further requested that the Tribunal provide rulings in two stages: (1) on territorial sovereignty and on the definition of the scope of the dispute; and (2) delimiting maritime boundaries, taking into account the opinion that it would have formed on questions of territorial sovereignty, the United Nations *Convention on the Law of the Sea*,[36] and any other pertinent factor.[37]

In an award on the first stage, given on 9 October 1998, the Tribunal found some of the islands 'subject to the territorial sovereignty of Eritrea', and others 'subject to the territorial sovereignty of Yemen'.[38] The reasons for the allocation of territorial sovereignty are pertinent in the sense that habitats of IPBAs were not taken as relevant for purposes of delimitation of the boundary. However, in addition to arguments focusing on territorial sovereignty, both parties alluded to the prevalence of the traditional livelihood of fisher-people from both countries. (The pleadings of both parties have not been published;[39] for this reason, this article relies on the Tribunal's brief summaries of them.)

Eritrea asserted that Eritrean fisher-people are dependent upon the contested islands for their livelihood, as they have been throughout recent history.[40] Yemen too claimed that for generations, Yemeni fisher-people have enjoyed virtually exclusive use of the islands, even establishing, in contrast to Eritrean fisher-people, permanent and semi-permanent residence there.[41] Yemen further asserted

> that the Islands are home to a number of Yemeni holy sites and shrines, including the tombs of several venerated holy men. It points to a shrine used primarily by fishermen, who have developed a tradition of leaving unused provisions in the tomb to sustain their fellow fishermen.[42]

The Tribunal observed the traditional openness of southern Red Sea marine resources for fishing, and its role as means for unrestricted traffic from one side to the other, together with the common use of the islands by the populations of both coasts.[43] The Tribunal further noted that a *res communis* (a public domain) had existed for centuries for the benefit of the populations on both sides of the Red Sea.[44] In two paragraphs, which merit quotation in full, the Tribunal found:

> [The] population living around the southern part of the Red Sea on the two opposite coasts have always been interlinked culturally and engaged in the same type of socio-economic activities. Since times immemorial, they were not only conducting exchanges of a human and commercial nature, but they were freely fishing and navigating throughout the maritime space using the existing islands as way stations (*des îles relais*) and occasionally as refuge from the strong northern winds. These activities were carried out for centuries without any need to obtain any authorisations from the rulers on either the Asian or the African side of the Red Sea and in the absence of restrictions or regulations exercised by public authorities.
>
> This traditionally prevailing situation reflected deeply rooted cultural patterns leading to the existence of what could be characterized from a juridical point of view as *res communis* permitting the African as well as the Yemeni fishermen to operate with no limitation throughout the entire area and to sell their catch at the local markets on either coasts to the other used to take temporary refuge from the strong winds on any of the uninhabited islands scattered in that maritime zone without encountering difficulties of a political or administrative nature.[45]

The Tribunal was persuaded by the evidence submitted by both countries that 'deeply-rooted common patterns of behaviour as well as the continuation, even in recent years, of cross-relationships which are marked by eventual recourse to professional fishermen's arbitrators (*aq'il*) in charge of settling disputes in accordance with the local customary law' prevailed,[46] and these patterns 'were perfectly in harmony with classical Islamic law concepts, which practically ignored the principle of "territorial sovereignty" as it developed among the European powers and became a basic feature of nineteenth century western international law'.[47] For these reasons, the Tribunal ruled as follows:

> In finding that the Parties each have sovereignty over various of the Islands the Tribunal stresses to them that such sovereignty is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region. … In the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men.[48]

Emphasising this point, the Tribunal noted that 'the sovereignty found to lie with Yemen entails the perpetuation of the traditional fishing regime in the region, including free access and enjoyment for the fishermen of both Eritrea and Yemen'.[49]

As previously noted, the Tribunal was required to delimit maritime boundaries at the second stage, taking into account the opinion that it will have formed on questions of territorial sovereignty, the *Convention on the Law of the Sea*, and any other pertinent factor. Thus, the initial important ruling became the subject of contention in the second stage, and is elaborated at length in relation to the award given on 17 December 1999. Both parties raised some interesting questions 'about the nature of sovereignty and its relation to the question of delimitation and, not least, to the question of the traditional fishing regime'.[50] As the Tribunal observed:

> The arguments of each Party were advanced essentially in order to demonstrate that the delimitation line proposed by that Party would not alter the existing situation and historical practices, that it would not have a catastrophic effect on local fishermen or on the local or national economy of the other Party or a negative effect on the regional diet of the population of the other Party and, conversely, that the delimitation line proposed by the other Party would indeed alter the existing situation and historical practice, would have a catastrophic or at least a severely adverse effect on the local fishermen or on the first Party's regional economy, and would also have a negative effect on the diet of the population of the first Party.[51]

The parties' arguments are generally supported by international law principles, which discourage drawing maritime boundaries in a way that causes catastrophic effect to either side, disrupts long usage or departs from equitable solution.[52] The assumption is

> that no 'solution' could be equitable which would be inconsistent with long usage, which would present a clear and present danger of a catastrophic result on the local economy of one of the Parties, or which would fail to take into account the need to minimise detrimental effects on fishing communities, and the economic dislocation, of States whose nationals have habitually fished in the relevant area.[53]

Both parties, however, drifted from the centrality of the preservation of traditional way of life, which induced the Tribunal to come up with the traditional fishing regime. In regard to the question of this regime, the Tribunal noted that 'Eritrea has taken the view that these findings entail the establishment of joint resource zones, which the Tribunal should delimit in its Award in the Second Stage'. Further in its prayer for relief, Eritrea also urged the Tribunal to direct the parties to negotiate, so as to achieve certain results it regarded as required by the traditional fishing regime. Eritrea wanted the Tribunal to 'specify with precision what was entailed by its finding as to the traditional fishing regime and where that regime lay within the Red Sea'.[54] As Oxman and Reisman observe, Eritrea was 'trying to regain some of what it had lost' in the first stage.[55]

On the other hand, Yemen took the view that it was for Yemen, in the exercise of its sovereignty, to ensure the preservation of the traditional fishing regime.[56] In addition, Yemen argued that there was no question of Yemen's sovereignty having been made conditional, and thus no agreement with Eritrea was necessary for the administrative measures that might relate to this regime.[57] Yemen was of the view that the Tribunal had not made any finding that there should be joint or common resource zones. Importantly, Yemen argued 'that the Tribunal's finding that Yemen's sovereignty entailed the perpetuation of the traditional fishing regime was a finding in favour of the fishermen of Eritrea and Yemen, not of the State of Eritrea'.[58]

In regard to Yemen's last but interesting claim, the Tribunal noted that '[a]lthough the immediate beneficiaries of this legal concept were and are the fishermen themselves, it applies equally to States in their mutual relations'.[59] Granted, the traditional fishing regime is to be preserved for the benefit of fishermen of both Eritrea and Yemen.[60] 'This does not mean, however, that Eritrea may not act on behalf of its nationals, whether through diplomatic contacts with Yemen or through submissions to this Tribunal'.[61]

The Tribunal rejected Eritrea's contention that the traditional fishing regime pronounced to perpetuate indifference of territorial sovereignty awarded to Yemen is a 'conditional' sovereignty.[62] Furthermore, the Tribunal rejected Eritrea's claim that the traditional fishing regime is an entitlement in common to resources, and thus allows Eritrea to engage in mineral extraction.[63] In rejecting this claim, it had to reiterate the reasons that resulted in the traditional fishing regime. The main ones were the 'deeply rooted common legal traditions which prevailed during several centuries

among the populations of both coasts of the Red Sea', and the 'basic Islamic concept by virtue of which all humans are "stewards of God" on earth, with an inherent right to sustain their nutritional needs through fishing from coast to coast with free access to fish on either side and to trade the surplus'.[64] Further buttressing these reasons, the Tribunal observed:

> What was relevant was that fishermen from both of these nations had, from time immemorial, used these islands for fishing and activities related thereto. Further, the finding on the traditional fishing regime was made in the context of the Award on Sovereignty precisely because classical western territorial sovereignty would have been understood as allowing the power in the sovereign state to exclude fishermen of a different nationality from its waters.[65]

There was another factor that the Tribunal took into account. The islands awarded to Yemen on which the traditional fishing regime was required to perpetuate lay at some distance from the mainland coasts of the parties. Their 'location meant that they were put to a special use by the fishermen as way stations and as places of shelter, and not just, or perhaps even mainly, as fishing grounds. These special factors constituted *a local tradition entitled to the respect and protection of the law*'.[66]

Having rejected Eritrea's claim that the traditional fishing regime constituted an entitlement in common to resources that would allow Eritrea to engage in mineral extraction, the Tribunal had to explain what the regime is.[67] The regime 'entitles both Eritrean and Yemeni fishermen to engage in artisanal fishing around the islands which, in its Award on Sovereignty, the Tribunal attributed to Yemen'. Artisanal fishing

> is to be understood as including diving, carried out by artisanal means, for shells and pearls. Equally, these fishermen remain entitled freely to use these islands for those purposes traditionally associated with such artisanal fishing – the use of the islands for drying fish, for way stations, for the provision of temporary shelter, and for the effecting of repairs.[68]

Fishing using artisanal vessels with simple gear, canoes, vessels fitted with small outboard engines, slightly larger vessels (9–12 metres) fitted with 40–75 horsepower engines, fishing *sambuks* with inboard engines, dugout canoes and small rafts (*ramas*), hand lines, gill nets and long lines is permitted.[69] However, the Tribunal also hinted that traditional livelihood has room for development when it clarified that 'the term "artisanal" is not to be understood as applying in the future only to a certain type of fishing exactly as it is practised today'.[70] As the Tribunal noted:

> 'Artisanal fishing' is used in contrast to 'industrial fishing'. It does not exclude improvements in powering the small boats, in the techniques of navigation, communication or in the techniques of fishing; but the traditional regime of fishing does not extend to large-scale commercial or industrial fishing nor to fishing by nationals of third States in the Red Sea, whether small-scale or industrial.[71]

The Tribunal noted that the traditional regime has also recognised certain associated rights. There must be free access to and from the islands concerned, including unimpeded passage through waters from which, by virtue of its sovereignty over the islands, Yemen is entitled to exclude all third parties or subject their presence to licence, just as it may do in respect of Eritrean industrial fishing. This free passage for artisanal fishermen has traditionally existed not only between Eritrea and the islands, but also between the islands and the Yemeni coast. The entitlement to enter the relevant ports, and to sell and market the fish there, is an integral element of the traditional regime.[72] The Tribunal continued with listing centres of fish marketing on each coast open for such activities:

> Within the fishing markets themselves, the traditional non-discriminatory treatment – so far as cleaning, storing and marketing is concerned – is to be continued. The traditional recourse by artisanal fisherman to the *acquil* system to resolve their disputes *inter se* is to be also maintained and preserved.[73]

The award in the first stage on the traditional fishing regime seems to indicate that the regime is to perpetuate on the islands awarded to Yemen *only*. However, in the second stage, the Tribunal clarified that the traditional fishing regime is not limited to the territorial waters of specified islands. In addition, its limit is not to be drawn by reference to claimed past patterns of fishing. Rather, the Tribunal accepted Yemen's contention that the traditional fishing regime existed throughout the region.[74] Thus, 'it does not depend, either for its existence or for its protection, upon the drawing of an international boundary'.[75]

B Award of the Eritrea–Ethiopia Boundary Commission

In May 1998, hostilities broke out between Eritrea and Ethiopia with regard to some border areas.[76] After a number of attempts to re-establish peace, on 12 December 2000, the parties reached an agreement commonly known as the *Algiers Peace Agreement*.[77] This was preceded by a ceasefire agreement signed in June 2000. The *Algiers Peace Agreement* provided for the permanent termination of military hostilities between the two states. A major component of this agreement was article 4, providing for the establishment of a neutral Eritrea–Ethiopia Boundary Commission ('the Commission'). In the agreement, the parties reaffirmed the principle of respect for the borders existing at independence as stated in a resolution of the OAU summit held in Cairo in 1964. Hence, the boundary was to 'be determined on the basis of pertinent colonial treaties and applicable international law'.[78] The mandate of the Commission was 'to delimit and demarcate the colonial treaty border based on pertinent colonial treaties [of 1900, 1902 and 1908] and applicable international law'.[79]

The three treaties were concluded by Ethiopia and Italy (Eritrea's coloniser). Together, they addressed the entire common boundary of Eritrea and Ethiopia.[80] 'None of the boundaries thus agreed was demarcated. Indeed … each of these boundaries was, to varying degrees, not fully delimited'.[81] The boundary is divided into three sectors, to each of which a different treaty is addressed: the western sector by a treaty of 1902 ('*1902 Treaty*'); the central sector by a treaty of 1900 ('*1900 Treaty*') and the eastern sector by a treaty of 1908 ('*1908 Treaty*').[82] The boundary in the western sector was originally part of the subject of the *1900 Treaty*, but was amended by the *1902 Treaty*.[83] Later, it was revealed that the 'dispute relates to the precise location of extensive parts of the boundary between Eritrea and Ethiopia'.[84]

Considering the Commission was given a clearly defined task – 'to delimit and demarcate the colonial treaty border based on pertinent colonial treaties … and applicable international law' – among others, it thus resolved to specify the treaties and determine the applicable international law.[85] The principles the Commission used to interpret the treaties are not significant to this article. With regard to 'applicable international law', the Commission decided that 'the relevant principles of international law' were not limited in their effect to the international law applicable to the interpretation of treaties; they also required the Commission to take into consideration any rules of customary international law that might have a bearing on the case even if such rules might involve a departure from the position prescribed by the relevant treaty provisions.[86] By this, it is arguable that the Commission made itself open to international law related to the rights of IPBAs.

The border between Eritrea and Ethiopia is typical of those drawn under colonial occupation, creating discontinuities unrelated to any variations in topography, climate or population. Along this common border, three ethnic groups – the Tigriyna/Tigrawot, the Saho and the Afar – are partitioned. If the Commission were to consider delimitation with a view to bringing divided ethnic groups into the fold of one state, then it would have delved into the business of entirely 'redesigning the map of Eritrea and Ethiopia', and in so doing, would have departed unimaginably from its mandate.[87] However, like the Eritrea–Yemen Tribunal, the Commission did not consider the division of Indigenous communities as being relevant to the task of delimiting the boundary, except to the extent required under the relevant treaties.

As noted earlier, the Kunama, a small ethnic group in Eritrea, were treated as an Indigenous people in a recent study aimed at identifying such groups throughout Africa.[88] Article I of the English text of the *1902 Treaty* provides that the line from one point of a river to the junction of another river 'shall be delimited by Italian and Ethiopian delegates, so that the Canama [Kunama] tribe belong to Eritrea'.[89] The Amharic version also, in relevant part, states that the 'representatives entrusted with this decision will decide in such a way that the Negroes of the Cunama tribe are in Eritrean territory'.[90] Looking at the historical record, the Commission found scant contributions by Ethiopia to the negotiations, but from Italy, by then coloniser of Eritrea, there are many. The Commission was convinced by the abundance of evidence in the *1902 Treaty* and 'the growing Italian interest in the Cunama in the preceding years' that the treaty made it clear 'that the line should be so delimited "that the Cunama tribe belong to Eritrea"'.[91] Importantly, the Commission was also convinced that:

> The idea of following tribal boundaries was one which, it appears, was subsequently acknowledged by Menelik [by then ruler of Ethiopia] in his negotiations with Britain in May 1899 for the settlement of the boundary between Sudan and Ethiopia and was repeated on the British side.[92]

The Commission observed that parts of the *1902 Treaty* leaving the Kunama within Eritrea suggested that 'the line described in the Treaty was not completely defined; that a portion of it was still to be delimited by delegates of the two Parties; and that the object of that delimitation was precisely to ensure that the Cunama tribe belonged to Eritrea'.[93] 'Thus,' the Commission further observed,

> the text contemplates that the delegates of the Parties were to perform a two-stage function: first, they would have to ascertain facts, namely, the region regarded as the domain of the Cunama; second, they would have to reflect those facts by the construction of an appropriate line that placed that region in Eritrea not Ethiopia.[94]

As no such delimitation by delegates of both parties ever specifically took place, these tasks fell to the Commission. In carrying them out, the Commission sought to give effect to the notion that the Kunama/Cunama should properly reside wholly within Eritrea; as the Commission eventually established, the Kunama live at the border, but their traditional territory did not cross the international boundary. On this premise, and even on the unlikely assumption that the Commission was cognisant of the rights of IPBAs, it had little ground to provide for trans-boundary rights. However, a recent study noted that the Kunama 'live on both sides of the border between Ethiopia and Eritrea'.[95] This is largely due to the fact that the Kunama have been displaced owing to the abuses meted upon them by the repressive government of Eritrea.[96]

With regard to the eastern sector of the common boundary covered by the *1908 Treaty*, article I states that from the most easterly point of the central frontier, 'the boundary continues south-east, parallel to and at a distance of 60 kilometres from the coast, until it joins the frontier of the French possessions of Somalia [Djibouti]'. This way of delimitation is modified by article II, which states that demarcation can vary slightly depending on 'the nature and variation of the terrain'. Importantly, article III provides that '[t]he two Governments undertake to establish by common accord and as soon as possible the respective dependence of the tribes bordering the frontier on the basis of their traditional and usual residence'. Article IV is more expansive on this point:

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

Article V also provides, in part, that the 'two Governments formally undertake to exercise no interference beyond the frontier-line, and not to allow their dependent tribes to cross the frontier in order to commit acts of violence to the detriment of the tribes on the other side'. Similarly, article VI states that the 'two Governments mutually undertake not to take any action, nor to allow their dependent tribes to take any action, which may give rise to questions or incidents or disturb the tranquillity of the frontier tribes'.

Ethiopia described the area covered by this part of the decision as the 'most sparsely populated portion of the present-day Ethio-Eritrean boundary' whose 'inhospitable terrain is largely inhabited by itinerant peoples, the geographical center of whose social relations are not villages, as in the other portions of the boundary, but instead watering holes, the use of which is shared'.[97]

The Commission seemed content with Ethiopia's description, from which Eritrea did not seem to depart. This might have affected the Commission's understanding of the effects of the above provisions on delimitation, which warrants quoting at length:

> While Article II contemplates departures from the geometric method of Article I in the course of demarcation, those departures are only permissible to take account of 'the nature and variation of the terrain.' This directive is reinforced by Articles III and IV, respectively. Article III establishes that, rather than establishing the boundary by reference to 'the dependence of the tribes bordering the frontier on the basis of their traditional and usual residence,' the respective dependence of the tribes will be established *after* the boundary has been established. Similarly, Article IV establishes that 'the ancient rights and prerogatives of the tribes bordering the frontier,' rather than influencing the location of the boundary, will continue to be recognized reciprocally by the parties to the 1908 Treaty. Nor will the location of the boundary, as determined by the prescribed treaty procedure, affect existing taxes and pasturage dues with reference to the working of the salt plain.[98]

In the opinion of the Commission, the optimum means for delimiting the sector of the border 'is to take a satellite

image of the coastline of Eritrea in the area covered by the 1908 boundary and to move it inland for a distance of 60 km'.[99] While the result of the first step of the delimitation exercise 'produces a line that is faithful to the language of article I of the *1908 Treaty*,' the Commission opined that such a technical replication of the coast 'does not produce a manageable boundary' at all points 60 kilometres from the coast.[100] Both parties also indicated that each expected the Commission to make such adjustments in the boundary as would be necessary to render it manageable and rational.[101]

The *1900 Treaty* governing the central front does not provide for consideration of traditional communities in the border area. Given that this part is populated by the ethnic group that constitutes a majority in Eritrea, and is politically dominant both there and in Ethiopia, consideration of traditional ways of life surely did not feature in the reasoning of the Commission. Yet, since the Eritrea–Ethiopia boundary at the western and central sector is traced by rivers, the Commission decided that '[r]egard should be paid to the customary rights of the local people to have access to the rivers', while at the same time noting that such regard does not affect delimitation, which in any case should follow 'the location of the main channel' of those rivers.[102]

C Post-Verdict Plea for Mitigation of Boundary Arbitrariness

To their credit, Eritrea and Yemen fully accepted their Tribunals' award, and soon worked for its implementation. They immediately resumed good friendship, even before the proceedings on the delimitation (at the second stage) were commenced.[103] This particular dispute has been settled for good. Yet, the potential for conflict over the traditional fishing regime has not been missed:

> Allowing nationals of one state, as of right, to exploit resources and conduct related activities in the waters and territory of the other, and without regard to regulations applicable even to the latter's nationals, may lead to further disputes or may permit the intentional fabrication of disagreements as a means of exerting diplomatic pressure on unrelated matters.[104]

After all, there are many difficult questions:

> Who precisely is entitled to benefit from the traditional fishing regime? If a specific person claiming to be a member of the fishing community is denied access to fishing, to ports, and to markets, how will the case be handled? How may the decisions of the *aq'il* be enforced? May a State override the rules of the traditional fishing regime as regards the access to certain maritime areas and ports by reasons of State security? Answers to these questions do not seem easy to find.[105]

The award of the Eritrea–Ethiopia Boundary Commission is a different story. On 13 May 2002, the Commission received from the Government of Ethiopia a submission entitled, 'Request for Interpretation, Correction and Consultation', in which Ethiopia, among other things, intimated alternation of the delimitation based on the 'Nature and Variation of the Terrain'. However, the Commission found almost all of Ethiopia's claims inadmissible.[106] Perhaps cognisant of Ethiopia's desires, on 8 June 2002 the Commission instructed both parties that it 'has no authority to vary the boundary line. *If it runs through and divides a town or village, the line may be varied only on the basis of an express request agreed between and made by both Parties*'.[107] Regardless, on 24 January 2003, in response to a request by the Commission for comments on draft maps intended to guide the demarcation process, Ethiopia again filed a memorandum setting out its views on the process of demarcation at length. In this memorandum, Ethiopia

> emphasised the necessity of conducting the demarcation in a manner that takes into consideration the human and physical geography through the study of the facts on the ground. It contended that, in the process of demarcation, alterations or adjustments of the delimited boundary should be made so as principally to eliminate those situations in which villages were divided or roads were cut by the boundary.[108]

Eritrea, for its part, insisted that the line described in the delimitation decision should be applied without any change.

This was an opportunity for the Commission to think about the rights of IPBAs. However, the Commission reiterated its previous position that it was 'constrained by the Terms of the *December 2000 [Algiers Peace] Agreement*' and was

> unable to read into that treaty language, either taken by itself or read in the light of the context provided by other associated agreements concluded between the Parties, any authority for it to add to or subtract from the terms of the colonial treaties or to include within the applicable international law elements of flexibility which it does not already contain.[109]

Thus, the Commission ruled that most of Ethiopia's contentions were inadmissible.[110]

Legally, if not equitably, Ethiopia is clearly at fault in rejecting the delimitation decision of the Commission, which is 'final and binding'.[111] In addition, Ethiopia took numerous actions (and was later joined by Eritrea in doing so) that frustrated the Commission, which was committed to expeditious delimitation and demarcation.[112] The Commission observed that the manifest objective of *Algiers Peace Agreement*

> was to bring the border dispute to an end at the earliest possible date by means of the identification of a boundary established by the prescribed colonial treaties and applicable international law with as much precision as could be achieved in the circumstances and without deciding *ex aequo et bono*.[113]

In light of these frustrating acts, and having carefully surveyed the alternatives available to it and studied anew the written and oral presentations made to it by the parties, the Commission felt obliged to adopt another approach to effect the demarcation of the boundary.[114] The Commission observed that:

> Modern techniques of image processing and terrain modelling make it possible, in conjunction with the use of high resolution aerial photography, to demarcate the course of the boundary by identifying the location of turning points … by both grid and geographical coordinates with a degree of accuracy that does not differ significantly from pillar site assessment and emplacement undertaken in the field.[115]

It therefore 'identified by these means the location of points for the emplacement of pillars as a physical manifestation of the boundary on the ground'.[116] Considering that it plainly could not remain in existence indefinitely, the Commission gave the parties 12 months to reach an agreement on the emplacement of the pillars, a deadline that expired at the end of November 2007. If, by the end of that period, the Parties had not by themselves reached the necessary agreement and proceeded significantly to implement it, or had not requested and enabled the Commission to resume its activity, the Commission resolved that 'the boundary will automatically stand as demarcated', and that its mandate could then be regarded as having been fulfilled.[117] The deadline lapsed without the parties' compliance.

Initially, Eritrea accepted the boundary demarcation by map coordinates 'as an important step forward towards the demarcation on the ground'.[118] It went on to reiterate this acceptance, stating that 'the border dispute is resolved'; the decision of the Commission 'to demarcate the border virtually and quit, has closed the chapter'; and Eritrea's 'border is demarcated more than any other border in' Africa.[119] By contrast, Ethiopia has stated that the 'demarcation coordinates are invalid because they are not the product of a demarcation process recognized by international law',[120] a contention made in spite of the fact that virtual demarcation is as good as actual demarcation, and the provision by the Commission of authorities in international law supporting the move.[121]

V The Controversy on Indigenous-ness and the Awards

A Missing International Law on Indigenous Peoples

Neither tribunal used the term 'Indigenous' even once. Clearly, international law related to Indigenous peoples did not factor into their decisions. The Eritrea–Yemen Tribunal's decision is widely cited in matters related to maritime boundary delimitation. Some have lauded it as a landmark in the acquisition of territorial sovereignty and equitable maritime boundary delimitation.[122] Others accept it as re-averring the law of title to territory.[123] Others simply provided timely reportage of what appeared to them to be the salient points of the ruling.[124]

Significantly for this article, some are troubled by the basis on which the Eritrea–Yemen Tribunal came up with the traditional fishing regime. It was advised that 'perhaps the Tribunal should have presented a more comprehensive description of the tenets of international law that guided it'.[125] The contention is that there was an analogy to be made between the questions at issue and the rights of Indigenous peoples'; as such, '[w]hy the Tribunal did not look instead into the theory of the indigenous peoples' rights … is hardly understandable'.[126] Although still caught in an early stage of development, it was rightly argued that 'the doctrine of the indigenous peoples' rights raises the issue of the rights of those socially organised communities of individuals whose *modus vivendi* subsists extraneously to the western notion of State'.[127] '[R]esorting by analogy to the principles underpinning the rights of Indigenous people to explain the

traditional fishing regime of the Red Sea' is indeed a compelling approach.[128] Nonetheless, the Tribunal's 'innovative and human-orientated perspective' was, despite the omission of Indigenous terminology, duly appreciated as confirming a humanist trend among international tribunals.[129]

The Tribunal's reliance, at least in part, on Islamic law as a justification for the traditional fishing regime is also seen as uncomfortable. 'Founding the traditional fishing regime upon the Islamic legal tradition, although appealing in regional terms and perhaps reflecting somewhat a social reality', the argument goes, 'seems to miss its wider importance for the development of international law, as recognition of immemorial social realities vis-a-vis the State'.[130] The Tribunal's 'introduction of Islamic law, apparently on its own initiative, was far less satisfactory'.[131] This may have seemed 'like a nice local touch or even an ecumenical flourish, but it was unnecessary' and 'with no disparagement of the intellectual richness and force of Islamic law – unwise in context'.[132] Here, the point of departure is that the

> essential function of general international law, as a secular *corpus juris*, is to provide a common standard and to play a mediating role between states with different cultures, legal systems, and belief systems. When, in the absence of a choice of law by the parties, international tribunals incorporate other legal systems – especially those claiming a divine source – the results may prove to be mischievous, even pernicious.[133]

Given these sound claims, it is important to recall that in relation to questions of territorial sovereignty, the *Arbitration Agreement* provided that the Eritrea–Yemen Tribunal 'shall decide in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles'.[134] With regard to delimitation, the Tribunal was required to take into account the *Convention on the Law of the Sea* and any other pertinent factor.[135] Had it been cognisant of the rights of IPBAs, the Tribunal would have found international law pertaining to the rights of IPBAs more authoritative than Islamic tradition. In regard to the Commission, the *Algiers Peace Agreement* reaffirmed the principle of respect for the borders existing at decolonisation; in this regard, the boundary was to be determined on the basis of pertinent colonial treaties on boundaries and applicable international law, which the Commission expanded to include customary international law.[136] The Commission was right in holding that it was unable to include within the applicable international law elements of flexibility affecting delimitation.[137] However, it should have given authorities in support of the notion that regard should be paid to the customary rights of the local people to have access to the rivers and continue their traditional trans-boundary activities regardless of the principle of territorial sovereignty.

B Indigenous or Not

The definition of Indigenous peoples has been debatable in Africa and it is strongly rejected by African states on the ground that all Africans originated in the continent.[138] In the face of such strong objection, a recent study aimed at identifying Indigenous peoples in Africa used three elements, none of which is related to Aboriginality: 'the profound extent of marginalisation suffered, self-identification and dependence on land and resources for survival'.[139] Out of Eritrea's nine ethnic groups, the study identified two – the Kunama and the Nara – as meeting 'the criteria of early settlement, social stigmatisation and economic marginalisation'.[140] The Nara live completely within Eritrea. With regard to the Kunama, the Commission's delimitation was based on leaving the whole Kunama to Eritrea; thus, arguably, no trans-boundary issues arose for the Commission. The study indicated that the Nara and Kunama are not the only Indigenous peoples in Eritrea, but that 'other groups also meet some of the criteria for indigenousness'.[141] Traditional fishermen can easily fit the 'other groups' designation, and some writers have correctly seen obvious and striking similarities between the community of fishermen of the Red Sea and the notion of Indigenous peoples.[142]

Yet, it is important to bear in mind the distinction between Indigenous peoples and others (minorities mostly), because both are entitled to different sets of rights. The Permanent Court of International Justice's definition of minorities is the widely accepted one. The Court defined minorities as:

> a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring with the spirit and traditions of their race and rendering mutual assistance to each other.[143]

On the other hand, the oft-quoted definition describes Indigenous peoples as:

> those which, having a historical continuity with pre-invasion and pre-colonial societies that developed in their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples in accordance with their own cultural patterns, social institutions and legal systems.[144]

These two are very close definitions. However, there is a widely held understanding that they are different. Experts put the distinctions as follows:

> the ideal type of an 'indigenous people' is a group that is Aboriginal (autochthonous) to the territory where it resides today and chooses to perpetuate a distinct cultural identity and distinct collective social and political organization within the territory. The ideal type of a 'minority' is a group that has experienced exclusion or discrimination by the State or its citizens because of its ethnic, national, racial, religious or linguistic characteristics or ancestry.
>
> From a purposive perspective, then, the ideal type of 'minority' focuses on the group's experience of discrimination because the intent of existing international standards has been to combat discrimination, against the group as a whole as well as its individual members, and to provide for them the opportunity to *integrate* themselves freely into national life to the degree they choose. Likewise, the ideal type of 'indigenous peoples' focuses on Aboriginality, territoriality, and the desire to *remain collectively distinct*, all elements which are tied logically to the exercise of the right to internal self-determination, self-government, or autonomy.[145]

In the words of Asbjørn Eide, the difference between the rights of ethnic minorities and Indigenous peoples can probably best be formulated as follows:

> whereas the *Minority Declaration*[146] and other instruments concerning persons belonging to minorities aim at ensuring a space for pluralism in togetherness, the instruments concerning indigenous peoples are intended to allow for a high degree of autonomous development. Whereas the *Minority Declaration* places considerable emphasis on effective participation in the larger society of which the minority is a part … the provisions regarding Indigenous peoples seek to allocate authority to these peoples so that they can make their own decisions.[147]

It is widely held that

> the principal legal distinction between the rights of minorities and Indigenous peoples in contemporary international law is with respect to internal self-determination: the right of a group to govern itself within a recognized geographical area, without state interference (albeit in some cooperative relationship with state authorities, as in any federal system of national government).[148]

Only Indigenous peoples are currently recognised to possess a right to political identity and self-government as a matter of international law, and the territorial element is central to the claims of Indigenous peoples.[149] The categorisation of a group as either an Indigenous or a minority one thus has huge implications, because the rights of minorities are 'premised on the integration model', whereas Indigenous peoples 'have the promise of rights to land, control over natural resources, political self-government, language rights, and legal pluralism'.[150] Some see the United Nations' official position on these issues as surprisingly simple, 'namely, that "indigenous peoples" have a right to accommodation, whereas "minorities" have a right to integration'.[151]

Indeed, 'indigenous peoples have much stronger claims to self-government than minorities'.[152] Yet, when it comes to the rights of IPBAs, the difference between being a member of a minority group and being an Indigenous person is minimal. *ILO Convention No 169* provides that '[g]overnments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields'.[153] Article 36 of the *UNDRIP* provides that 'Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders'. The same article obliges states to 'take effective measures to facilitate the exercise and ensure the implementation of this [trans-boundary] right'. Similarly, article 2(5) of the *Declaration on the Rights of Minorities* provides:

> Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.[154]

VI Conclusions

Both tribunals did not take the presence of IPBAs as a determining factor for territorial sovereignty and the delimitation of boundaries. The omission should not come as a surprise. First, the rights of IPBAs are not yet well embraced on the international plane. There is not sufficient discourse to force such Tribunals to be cognisant of the area. Second, arbitrators who are selected for their expertise in resolution of territorial disputes are not likely to be familiar with the rights of IPBAs.

Rather, what is interesting about the awards is that both tribunals came as close to respecting the rights of IPBAs as they did. They hinted that certain notions of sovereignty and territoriality should not affect individuals that can be assimilated with IPBAs. In light of this, the failure to justify this humanistic ruling with reference to the rights of IPBAs is truly regrettable. Yet both awards are significant in advancing the causes of IPBAs.

The award of the Eritrea–Yemen Tribunal is being observed. It is hoped that both countries do not dwell on its conflict-potentiating dimensions. The award from the Eritrea–Ethiopia Boundary Commission will be given to regimes with appalling human rights records – regimes that cannot even pretend to care about basic human rights. Eritrea, a siege state, has been enjoying, though not overtly, Ethiopia's rejection of the final and binding award as an excuse for the prevailing repression. Ethiopia's claim for reconsideration of the delimitation process on humanistic grounds is bogus, as both tribunals have made perpetuation of traditional livelihood on border areas immune from the red lines.

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4 *Maritime Delimitation (Eritrea v Yemen) (Award Second Stage)* (1999) 22 RIAA 335, 356 [47] ('*Eritrea–Yemen Maritime Delimitation (Award)*').

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10 Nuno Sérgio Marques Antunes, 'The 1999 Eritrea–Yemen Maritime Delimitation Award and the Development of International Law' (2001) 50 *International and Comparative Law Quarterly* 299, 315.

11 *Overview Report on the Protection of the Rights of Indigenous Peoples*, above n 9, 149.

12 Ibid.

13 United Nations Economic Commission for Latin America and the Caribbean, *Social Panorama of Latin America 2006* (United Nations Publications, 2007) 200.

14 *Overview Report on the Protection of the Rights of Indigenous Peoples*, above n 9, 151.

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16 See *Final Report from the Indigenous Peoples' Border Summit of the Americas II* (7–10 November 2007) Native Village <http://www.nativevillage.org/Inspiration-/final_report%20indigenous%20people%27s%20border%20summit.htm>.

17 *Report of the North American Preparatory Meeting for the Sixth Session of the United Nations Permanent Forum on Indigenous Issues*, UN GAOR, 6th sess, UN Doc E/C.19/2007/CRP.7 (7 May 2007) [44].

18 *Overview Report on the Protection of the Rights of Indigenous Peoples*, above n 9, 151.

19 Simon M Weldehaimanot, 'The Right to Leave and Its Ramifications in Eritrea' (2011) 17(1) *East African Journal of Peace and Human Rights,* 230.

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24 *ILO Convention No 169* art 32.

25 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) ('*UNDRIP*').

26 *Overview Report on the Protection of the Rights of Indigenous Peoples*, above n 9, 150.

27 GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Agenda Item 97(b), UN Doc A/RES/47/135 (18 December 1992) art 2 ('*Declaration on the Rights of Minorities*').

28 Signed 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) ('*ACHPR*').

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41 Ibid 223 [37].

42 Ibid 224 [38].

43 Ibid 244[126].

44 Ibid.

45 Ibid 244 [127]–[128].

46 Ibid 244–5 [129].

47 Ibid 245 [130].

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52 See generally *Fisheries Case (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116; *Convention on the Law of the Sea* arts 7(5), 74(1), 83.
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55 Oxman and Reisman, above n 3, 730.
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78 Ibid art 4(1).
79 Ibid art 4(2).
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82 Ibid 106 [2.20].
83 Ibid 107 [2.21].
84 Ibid 105 [2.14].
85 Ibid 109 [3.2].
86 Ibid 112–3 [3.14]–[3.15].
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88 Simon M Weldehaimanot, *Eritrea: Constitutional, Legislative and Administrative Provisions Concerning Indigenous Peoples* (International Labor Organization and African Commission on Human and Peoples' Rights, 2009) 5 <http://www.unhcr.org/refworld/country,,ILO,,ERI,,4d4aa7942,0.html>.
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90 *Eritrea–Ethiopia Border Delimitation (Decision*) (2002) 25 RIAA 83, 140 [5.3].
91 Ibid 146–7 [5.31].
92 Ibid 147 [5.31].
93 Ibid 147 [5.34].
94 Ibid.
95 *Overview Report on the Protection of the Rights of Indigenous Peoples*, above n 9, 149.
96 Ibid.
97 *Eritrea–Ethiopia Border Delimitation (Decision*) (2002) 25 RIAA 83, 165 [6.8].
98 Ibid 167 [6.17]. See also at [6.5], at which the Commission observed that the 'primacy of the geometric method of delimitation' and '[p]rior *effectivités*, which might have been adduced to determine the location of the boundary, are recognised prospectively only as the basis for transboundary rights, but are not to play a role in the calculation as to where the boundary is located'.
99 Ibid 168 [6.21].
100 Ibid 169 [6.22].
101 Ibid.
102 Ibid 172 [7.3].
103 Martin Plaut, 'Yemen and Eritrea: Friends Once More?' (1998) 25 *Review of African Political Economy* 659, 661.
104 Oxman and Reisman, above n 3, 731.
105 Marques Antunes, above n 10, 309.
106 *Request for Interpretation, Correction and Consultation (Eritrea v Ethiopia) (Decision)* (2002) 25 RIAA 196, 196 [1], 197 [12], 198 [18].

107 *Demarcation of the Eritrea/Ethiopia Boundary (Eritrea v Ethiopia) (Directions)* (2002) 25 RIAA 207, 214 [14(A)].

108 'Statement by the Commission', *Delimitation of the Border between Eritrea and Ethiopia (Eritrea v Ethiopia)*, Eritrea–Ethiopia Boundary Commission, 27 November 2006, 2–3.

109 *Observations of the Eritrea–Ethiopia Boundary Commission*, UN SCOR, 58th sess, UN Doc S/2003/257/Add.1 (21 March 2003) [6].

110 Ibid [29].

111 *Algiers Peace Agreement* art 4(15) reads: '[t]he parties agree that the delimitation and demarcation determinations of the Commission shall be final and binding. Each party shall respect the border so determined, as well as territorial integrity and sovereignty of the other party'.

112 For the list of frustrating acts taken by both countries, see 'Statement by the Commission', *Delimitation of the Border between Eritrea and Ethiopia (Eritrea v Ethiopia)*, Eritrea–Ethiopia Boundary Commission, 27 November 2006, [8]–[16].

113 Ibid [18].

114 Ibid [19]. Citing *Algiers Peace Agreement* arts 4(12)–(13), the Commission rightly noted that its task was to be done with a sense of urgency. Article 4(12) provides that the

> Commission shall commence its work not more than 15 days after it is constituted and shall endeavour to make its decision concerning delimitation of the border within six months of its first meeting. The Commission shall take this objective into consideration when establishing its schedule. At its discretion, the Commission may extend this deadline.

'Upon reaching a final decision regarding delimitation of the borders,' art 4(13) also provided that 'the Commission shall transmit its decision to the parties and Secretaries General of the OAU and the United Nations for publication, and the Commission shall arrange for expeditious demarcation'.

115 'Statement by the Commission', *Delimitation of the Border between Eritrea and Ethiopia (Eritrea v Ethiopia)*, Eritrea–Ethiopia Boundary Commission, 27 November 2006, [20].

116 Ibid.

117 Ibid [22].

118 *Report of the Secretary-General on Ethiopia and Eritrea*, UN SCOR, 63rd sess, UN Doc S/2008/40 (23 January 2008) 4 [16].

119 Riz Khan, Interview with Isais Afwerki, President of Eritrea (Al Jazeera Interview, 22 May 2008) <http://www.youtube.com/watch?v=UAXKsZ8OsWo>.

120 *Report of the Secretary-General on Ethiopia and Eritrea*, UN Doc S/2008/40, 4 [17].

121 'Statement by the Commission', *Delimitation of the Border between Eritrea and Ethiopia (Eritrea v Ethiopia)*, Eritrea–Ethiopia Boundary Commission, 27 November 2006, [23]–[26].

122 Barbara Kwiatkowska, 'The Eritrea/Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation' (2000) *IBRU Boundary and Security Bulletin* 66.

123 Nuno Sérgio Marques Antunes, 'The Eritrea-Yemen Arbitration: First Stage – The Law of Title to Territory Re-averred' (1999) 48 *International and Comparative Law Quarterly* 362.

124 W Michael Reisman, 'The Government of the State of Eritrea and the Government of the Republic of Yemen' (1999) 93 *American Journal of International Law* 668; W Michael Reisman, 'Eritrea–Yemen Arbitration (Award, Phase II: Maritime Delimitation)' (2000) 94 *American Journal of International Law* 721.

125 Marques Antunes, above n 10, 310.

126 Ibid 316.

127 Ibid 313.

128 Ibid 316.

129 Ibid.

130 Ibid.

131 Oxman and Reisman, above n 3, 728.

132 Ibid 729.

133 Ibid.

134 *Eritrea–Yemen Maritime Delimitation (Award)* (1999) 22 RIAA 335, annex 1, art 2(2).

135 Ibid arts 2(1)–(3).

136 *Algiers Peace Agreement* art 4(1).

137 *Observations of the Eritrea–Ethiopia Boundary Commission*, UN Doc S/2003/257/Add.1.

138 For more discussion on this, see Amelia Cook and Jeremy Sarkin, 'Who Is Indigenous?: Indigenous Rights Globally, in Africa, and among the San in Botswana' (2009) 18 *Tulane Journal of International and Comparative Law* 93.

139 *Overview Report on the Protection of the Rights of Indigenous Peoples*, above n 9, 5. See also African Commission on Human and Peoples' Rights and International Workgroup for Indigenous Affairs, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (2005) 87–95.

140 Ibid 6.

141 Weldehaimanot, above n 88, 5.

142 Marques Antunes, above n 10, 315.

143 Quoted in Francesco Capotori, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (United Nations Publications, 1991) 5 [21].

144 Ibid xx. See also S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 1996) 3.

145 Erica-Irene Daes, *Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and Those of Indigenous Peoples*, UN ESCOR, 52nd sess, Provisional Agenda Item 8, UN Doc, E/CN.4/Sub.2/2000/10 (19 July 2000) [48]–[49] (emphasis added).

146 *Declaration on the Rights of Minorities*, UN Doc A/RES/47/135.

147 Asbjørn Eide, *Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and Those of Indigenous Peoples*, UN ESCOR, 52nd sess, Provisional Agenda Item 8, UN Doc, E/CN.4/Sub.2/2000/10 (19 July 2000) [8].

148 Daes, above n 145, [43].

149 Ibid [44]–[45]. See also Steven Wheatley, *Democracy, Minority and International Law* (Cambridge University Press, 2005) 65; Joshua Castellino, *International Law and Self-determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-colonial National Identity* (Martinus Nijhoff Publishers, 2000) 66.

150 Will Kymlicka, 'The Internationalisation of Minority Rights' (2008) 6 *International Journal of Constitutional Law* 1, 16.

151 Ibid 3.

152 Ibid 2.

153 *ILO Convention No 169* art 32.

154 *Declaration on the Rights of Minorities*, UN Doc A/RES/47/135, art 2(5).