

Appendix I

Letter dated 7 October 2003 from the President of the Eritrea-Ethiopia Boundary Commission to the Secretary-General

1. The Boundary Commission has received a copy of the letter of 19 September 2003 from the Prime Minister of Ethiopia to the Secretary-General of the United Nations. It is a cause of considerable disquiet to the Commission which, in consequence, deems it necessary to offer a number of observations upon some of the statements made in it that directly relate to the work of the Boundary Commission and which, to our regret, are misconceived and misleading.
2. The Commission wishes to recall that it has been engaged in demarcation activities since 13 April 2002, the date of its Delimitation Decision. A summary of the current status of these activities and of the actions by the parties that are now called for so that demarcation can proceed as required by the Security Council in its recent resolution 1507 (2003) of 12 September 2003 is set forth in the enclosure.
3. The Commission on one previous occasion has thought it beneficial to offer observations on the Commission's approach to the demarcation phase of its work in the light in particular of certain considerations advanced by the parties (see S/2003/257/Add.1). In the light of the recent letter from the Prime Minister of Ethiopia, the Commission considers that the following further comments are called for.
4. The opening paragraph of the Prime Minister's letter states that the peace process between Ethiopia and Eritrea is facing a challenge. Ethiopia characterizes the situation as being one in which "the work of the Commission is in terminal crisis". The Commission does not accept that assessment: there is no "crisis", terminal or otherwise, which cannot be cured by Ethiopia's compliance with its obligations under the Algiers Agreement, in particular its obligations to treat the Commission's delimitation determination as "final and binding" (article 4.15) and "to cooperate with the Commission, its experts and other staff in all respects during the process of ... demarcation" (article 4.14).
5. The key to the "crisis" which Ethiopia discerns in the work of the Commission lies, according to Ethiopia's letter, in the Commission's "totally illegal, unjust and irresponsible decision on Badme and parts of the Central Sector". As that letter deals thereafter only with the situation regarding Badme, it is therefore only to that aspect of the case that the Commission will here refer.
6. The letter states that the "Colonial treaties which are the basis of the Algiers Agreement and which should have been the key basis for the delimitation and demarcation of the boundary leave Badme well inside Ethiopia". On the basis of those colonial treaties as they were interpreted by the Commission in accordance with applicable international law, that is not accurate. The Commission found that on the correct interpretation of the relevant treaty, the boundary, from the point at which it leaves the Setit River (point 6) to where it joins the Mareb River (point 9), ran in part across the Badme plain. If as a result Badme village is found to be located in Eritrea, that is no more than the consequence of the Commission's application of the relevant colonial treaty. Ethiopia argued in the proceedings before the Commission for an interpretation of the treaty which would have resulted in a much different boundary, far to the north-west, which would have had the effect of

placing Badme well within Ethiopia, but the argument for Ethiopia's line was considered carefully by the Commission and rejected.

7. The Ethiopian letter goes on to say that "This [i.e., Badme being left well inside of Ethiopia by the colonial treaties] was also the Commission's own interpretation of the relevant Treaty". This is a misrepresentation of the Commission's reasoning. The only interpretation of the relevant treaty which can be regarded as the Commission's "own interpretation", in accordance with applicable international law, is that which is set out in its delimitation decision of April 2002.

8. The letter then states that "the Commission chose to base its decision on state practice, and having done so, went on and awarded Badme to Eritrea ...". The State practice to which the Commission gave weight consisted primarily of a series of maps, including in particular maps published by Ethiopia. The Commission was convinced that these showed the parties' agreement upon an interpretation of the relevant treaty, which placed the boundary prescribed by that treaty in the location determined by the Commission. Ethiopia failed to show why official Ethiopian maps, which over the years depicted not the line for which it argued in 2001 but the line adopted by the Commission, did not reflect the true line of the boundary.

9. Ethiopia goes on to say that this finding, which resulted in Badme being awarded to Eritrea, was made "despite the overwhelming evidence produced by Ethiopia proving that Badme had always been administered by Ethiopia. Eritrea could not produce even a single document to rebut Ethiopia's submission". The Commission has already (in paragraphs 17 and 18 of its observations of 21 March 2003) commented on the paucity of the evidence produced by the parties in relation specifically to Badme.

10. The Commission must further observe that its mandate, as agreed in article 4.2 of the Algiers Agreement, was to base its decision "on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law". The parties did not give the Commission the task of deciding which State administered Badme in recent years: and at the critical time when the relevant treaty of 1902 was concluded, Badme and certain other villages and settlements which now exist had not then come into existence. Where villages have sprung up or spread in recent times, and in so doing transgress boundaries previously established by older treaties, it is fully consistent with international law for the treaty-based boundary to be maintained and for the resolution of any consequential human problems to be left for the parties to resolve by agreement. Far from being a "blatant miscarriage of justice" (letter, para. 3), that result is precisely what the International Court of Justice decided, in comparable circumstances, in its recent judgment in the *Cameroon v. Nigeria* case. The parties have long been aware that the result of the Commission's delimitation and consequent demarcation could be that the boundary could run through and divide some settlements (see para. 3 of the Commission's observations of 21 March 2003).

11. In the fourth paragraph of the letter Ethiopia contends that since Eritrea totally rejects any dialogue on demarcation, the Commission's indication of the need for further agreement between the parties to resolve anomalies shows that "nothing worthwhile can therefore be expected from the Commission to salvage the peace process. Indeed, the Commission seems to be determined to continue its disastrous stance whatever the consequences to the peace of the region". The Commission can only repeat what it has previously said, essentially that its mandate is that given to it

by the parties when concluding the Algiers Agreement, and that if that mandate is to be changed it can only be done by some further agreement by the parties: it is not for the Commission to speculate on whether or not such a further agreement is likely to be negotiable. The Commission's position is clearly set out in paragraph 28 of its observations of 21 March 2003.

12. Ethiopia maintains in the fifth paragraph of its letter that "only the Security Council can salvage the peace process", and that "the Boundary Commission has itself acknowledged the responsibility of the United Nations, in accordance with the Algiers Agreement, to assist the two parties to overcome challenges they might face in the process of delimitation and demarcation". The Commission recalls that article 4.16 of the Algiers Agreement is in the following specific terms: "Recognizing that the results of the delimitation and demarcation process are not yet known, the parties request the United Nations to facilitate resolution of problems which may arise due to the transfer of territorial control, including the consequences for individuals residing in previously disputed territory". It is accordingly clear that Ethiopia's construction of the Algiers Agreement and of what the Commission has stated in respect of it is misconceived.

13. Ethiopia then makes a number of specific proposals in order to break what it terms "the present deadlock".

14. In proposal 1, Ethiopia reaffirms "its commitment under the Algiers Agreement": the Commission observes that that Agreement committed both parties, inter alia, to accept the Commission's determination of the boundary as final and binding, and to cooperate with the Commission during the process of demarcation; and Ethiopia, like Eritrea, accepted the delimitation decision when it was rendered. Ethiopia's reference in the third and sixth paragraphs of its letter to some future demarcation being "just and legal" implies that Ethiopia now considers that the Commission's delimitation and demarcation are neither just nor legal. Ethiopia's statement is a repudiation of its repeated acceptance of the Commission's decision since it was rendered.

15. In proposal 3, Ethiopia proposes that "an alternative mechanism to demarcate the contested parts of the boundary" be set up. Such an alternative mechanism would involve a departure from, and thus an amendment to, the terms of article 4.2 of the Algiers Agreement, which gives the Commission the mandate to demarcate the boundary. Moreover, Ethiopia's reference to "the contested boundary" can only be understood as a reference to those parts of the boundary to which it alone and unilaterally takes exception: no part of the boundary is "contested" by both parties.

16. Proposal 5 states that Ethiopia "will recognize ... the southern boundary of the Temporary Security Zone as the boundary between the two countries". The parties have agreed, however, in article 4.15 of the Algiers Agreement, that the boundary between the two countries is the boundary as delimited by the Commission.

17. The Commission has recently sent a letter to the parties directing that they immediately take the necessary steps (as envisaged, inter alia, in the enclosure to the present letter) to allow demarcation to proceed according to the schedule of the order of activities ahead. Only by thus enabling demarcation to proceed unhindered can the mandate given to the Commission by the parties in the Algiers Agreement, namely to expeditiously demarcate the boundary, be fulfilled.

18. The Commission would be grateful if you would be good enough to share the present letter with the members of the Security Council.

(Signed) Sir Elihu **Lauterpacht**