

# THE ANGLO-ABYSSINIAN TREATY OF 1897 AND THE SOMALI-ETHIOPIAN DISPUTE

*Abdulqawi A. Yusuf*

The Horn of Africa became the scene of European colonialist scramble in the second half of the 19th century, especially after the opening of the Suez canal. Coinciding with the European push for the acquisition of colonies in the Horn was, however, a movement towards feudal centralization in the Abyssinian principalities and kingdoms, which resulted later through expansion, annexation and occupation of adjacent territories in the establishment of modern Ethiopia.<sup>1</sup> The political history of the Horn of Africa in the second half of the 19th century was therefore a history of colonialism with a dual aspect: European conquest and Abyssinian expansionism.<sup>2</sup> One of the peoples who have suffered most from the resulting process of annexation, incorporation and subjugation was the Somali people who were divided among the British, French, Italian and Ethiopian spheres of colonization.

The partition of the Somali nation was accomplished through occupation, treaties of protection with local rulers, and boundary delimitation agreements between the colonizing powers.<sup>3</sup> The Anglo-Abyssinian treaty of 1897 belongs to this last category; but it is of particular relevance to the present conflict in the Horn because it involved the recognition of Abyssinian jurisdiction over a large part of the Ogaden as well as the Haud and "Reserved Area." Moreover, the Sovereignty of Ethiopia over the territories ceded to her in the 1897 treaty was re-affirmed in the Anglo-Ethiopian Agreement of 1954 which transferred those territories

Abdulqawi A. Yusuf is a Lecturer in Law at the Somali National University, Mogadishu.

back to Ethiopia after a short period of British administration following the liberation of Ethiopia in 1942.<sup>4</sup> The British government retained the control over these areas in an attempt to put all Somali territories (including the former Italian Colony of Somalia and the Somali British Protectorate) under United Nations Trustship administration with Britain as the administering power. This plan was rejected by the Four-Power Commission charged to dispose of former Italian colonies on behalf of the United Nations.

The origin of the present Somali-Ethiopian conflict lies in the Abyssinian expansion of the late 19th century and the participation of Ethiopia in the partition of the Somali nation, of which the 1897 treaty is a legal and political symbol. The conquest of the City-State of Harar in 1887 and the defeat of the Italian army in Adowa (1896) led to the emergence of King Menelik II of Shoa as a powerful Emperor with whom the European powers had to bargain with in order to protect their interests in the Horn.<sup>5</sup> Thus the British sent their Consul General in Cairo to Addis Abeba in 1897 in order to appease the Abyssinian Emperor on the eve of the Mehdist revolt in neighboring Sudan. The British envoy Mr. James Rennel Rodd was instructed to "come to arrangements with King Menelik for a definitive understanding as to the frontier between Abyssinia and the (British Somaliland) protectorate."<sup>6</sup> The Menelik-Rodd negotiations resulted in a treaty which transferred the sovereignty over a part of the protectorate to Abyssinia.

### The Treaty of 1897: Legal Effects

It was stipulated in article II of the treaty that: "the frontiers of the British protectorate on the Somali coast recognized by the Emperor Menelik shall be determined subsequently by exchange of notes between James Rennel Rodd, Esq., as Representative of Her Majesty the Queen, and the Ras Makonnen, as Representative of His Majesty Emperor Menelik, at Harar. These notes shall be annexed to the present treaty, of which they will form an integral part, so soon as they have received approval of the High Contracting Parties, pending which the status quo shall be maintained".<sup>7</sup>

The intention of the British government to appease Emperor Menelik's expansionist policy

through territorial concessions is clearly revealed by the use of the phrase "frontiers . . . . recognized by Emperor Menelik." The wording of the treaty, as well as the subsequent Makonnen-Rodd exchange of letters on the delimitation of the frontiers, was coached in such a way as not to reveal any territorial cession. "I succeeded in getting rid of any phraseology which necessarily implied a recognition of Abyssinian rights beyond our frontier", Rennel Rodd reported to his government.<sup>8</sup>

This was not, however, completely true, for the territorial cession clearly transpires through the exchange of letters between Menelik and Rodd, which is contained in Annex (1) to the treaty. Mr. Rodd writes to Emperor Menelik: "with reference to article II of the treaty which we are to sign today, I am instructed by my government, in the event of a possible occupation by Ethiopia of territories inhabited by tribes who have formerly accepted and enjoyed British protection in the districts excluded from the limits of the British protectorate on the Somali coast, as recognized by your Majesty; . . . . . to receive from your Majesty an assurance that it will be your special care that these tribes receive equitable treatment, and are thus no losers by this transfer of suzerainty."

To which Emperor Menelik replied as follows: "your letter, written in Genbot 1899, respecting the Somalis, has reached me. With regard to the question you have put to me, I give you the assurance that the Somalis who may by boundary arrangements become subjects of Ethiopia shall be well treated and have orderly government."

Thus, a substantial portion of the territories of the Somalis who had stipulated treaties of protection with the British government were ceded to Ethiopia through what Menelik euphemistically called "boundary arrangements", and the only thing the protecting power had to ask for them was an "equitable treatment" so that they would be "no losers by this transfer of suzerainty." Of course, the Somalis were neither consulted nor informed by the British of this transfer of territorial sovereignty to Ethiopia. The Ethiopian authorities had in fact considerably encroached on Somali territory before the Menelik-Rodd negotiations, but the British government did not only acquiesce in this forceful occupation of Somali territories, but had also given in

to Menelik's imperialist claims; thus consecrating in a treaty the cession of almost half of the British protectorate to Ethiopia, Rennel Rodd states in his memoirs: "the settlement eventually concluded involved a recognition of Abyssinian jurisdiction over a certain area claimed by our protectorate in which Ethiopian outposts had for some time been established . . . . . Makonnen (Abyssinian governor of Harar) had contemplated a line much further east and complained that we were hard bargainers. I, on the other hand, interpreting the spirit of my instructions to be in the first place the conciliation of Ethiopia during the last phase of the Khartoum campaign, made certain concessions which were criticised by travellers who had penetrated into Somaliland on big game expeditions, and had therefore laid claim to special knowledge."<sup>9</sup>

Ethiopian authorities have since then based their claims to the Ogaden upon the 1897 treaty and the exchange of letters which followed it. The following issues have therefore to be examined in order to ascertain the legal status and effects of the 1897 treaty: (a) Did the legal relationship between Britain and the Somali tribes give to the former the right to cede the territories of the latter to a third state? (b) Could Ethiopia validly rely on such a cession as a title to territory?

### The Legal Relationship Between Britain and the Somali Tribes

Through a series of agreements concluded between 1884 and 1886, the Somali tribal chiefs placed themselves under British protection. In the first group of agreements the Somali elders "desirous of the maintenance of independence, the preservation of order and other good and sufficient reasons", covenanted, *inter alia*, that they would never give for occupation or cede save to the British government any portion of the territory inhabited by them or under their control. They also agreed to permit all vessels under the British flag to trade at all ports in their territory, and to allow a British agent to reside in their territory.<sup>10</sup>

The second group of treaties contained an undertaking by the British government, in compliance with the wish of the elders, "to extend to them and to the territories under their authority and jurisdic-

tion the gracious favour and protection of Her Majesty the Queen-Empress". On the other hand, the elders promised to refrain "from entering into any correspondence, agreement or treaty with any foreign nation or power except with the knowledge and sanction of her Majesty's government." The question now arises whether the British government could, on the basis of these treaties, cede to another state a part of the territory of the protected tribes?

M.F. Lindley thus describes the treaties: "Among the treaties which ceded only the external sovereignty, several of those made by Great Britain in 1886 with native chiefs in the Somali coast are models of conciseness. In two short articles they deal adequately with both those aspects of the arrangement which form the essential features alike of the protectorates of the older type and of the modern colonial protectorate — the promise of protection on the one side and the handing over of the external sovereignty on the other."<sup>11</sup> According to some positivist international lawyers of the 19th and early 20th century, if a European power notified the other signatories of the Berlin act of 1885 in accordance with article 34, it was entitled to convert its treaty relationship of protection vis-a-vis an African ruler into a relationship of absorption and annexation; and that is what author Lindley refers to as the colonial protectorate. It could, however, be argued here that such arrangements between the European powers could not have any legal effect on a treaty of protection, for *pacta tertiis nec nocent nec prosunt*. This intention of annexation is meaningless, it is the treaty of protection that is relevant in international law. Thus a treaty of protection, whether of the older type of the classical law of nations or of the colonial-protectorate type, does not give in law to the protecting state a legal ownership of the territory of the protected ruler or tribal chief. Furthermore, as is clearly outlined by J.E.S. Fawcett, "the fundamental characteristic of a territory under British protection, from which all else follows, is that it is not part of H.M. dominions, but is foreign territory. The Crown in right of the United Kingdom therefore has jurisdiction, but not sovereignty in territories under its protection."<sup>12</sup>

The interpretation placed by the British government on such treaties of protection with African rulers in the 19th century is furnished by Consul

Hewitt (The British Representative in West Africa) in a letter to the ruler of Opobo in 1884, in which he states that "the Queen does not want to take your country or your markets, but at the same time she is anxious that no other nations should take them; she undertakes to extend her gracious power and protection which will leave your country still under your government . . ."<sup>13</sup> In any case, nothing in the treaties of protection between the Somali elders and the British government suggests that a transfer of territorial sovereignty was contemplated. In the treaties of 1886 with the British government, the Somalis agreed not to enter into any correspondence, agreement or treaty with any foreign nation and power, except with the knowledge and sanction of H.M. Government. This was a clear recognition of the independence of the Somali tribes and that they were not under the overlordship of any power whatsoever. It could also be interpreted as an admission of the international legal capacity of the rulers of these tribes to enter into valid and binding international agreements. The British Secretary of State for the colonies underlined this fact, when he observed in parliament that "Those agreements with Somali tribes are certainly as binding and valid today as they were when they were signed . . ."<sup>14</sup> This view is also shared by legal writers: C.H. Alexandrowicz notes that "It has sometimes been argued that African treaties were outside the pale of public international law and constituted only private law contracts for the acquisition of land. This view is not tenable in the light of African treaty practice which carefully distinguished between matters of private and public law."<sup>15</sup>

On the other hand, it would be idle to argue that the treaty of 1897 was incompatible with those entered into with the Somalis in 1886, because it is clear that the Somalis, if consulted, would have never consented to the Menelik-Rodd treaty. Needless to say, therefore, the British government had incurred a breach of the obligations assumed with the protection treaties of 1886.

#### The Validity of the Title of Cession

Cession is defined as the transfer of territorial sovereignty from one state to another. It involves a renunciation in favor of the latter of the rights and

title which the former might have to the territory in question. However, in the case under our consideration, the British government having not title to the territory could not have ceded it. Moreover, it is very difficult to see how the Ethiopian government could rely on the agreement, for the title that cession confers is dependent upon the validity of the title of the ceding state — *nemo plus juris transferro potest quam ipse habet*. This was clearly confirmed in the island of Palmas case, where the United States based its claim partly on the treaty of Paris of 1898 which transferred to the United States all rights of sovereignty which Spain might have possessed in a certain region said to include the disputed island. The Arbitrator held that the treaty could not be regarded as conclusive for "it is evident that Spain could not transfer more rights than she herself possessed."<sup>16</sup>

It was thus noted by a British M.P. that "the treaty of 1897 did not succeed in doing what it purported to do since it was not within the power of the British government to transfer these territories." It would therefore be safe to state that the treaty of 1897 could not produce the legal effects that the parties intended for it, for in law such a cession is null and void. It has, however, produced a factual situation whereby Ethiopia proceeded to annex that part of the Somali territory to which the British government gave its consent and acquiescence.

#### The Somali Independence and the Emergence of the Dispute

On June 26, 1960 the British Somaliland protectorate became an independent state outside the Commonwealth. Five days later, it was however united with Somalia — The U.N. Trustship territory under Italian Administration — which achieved its independence on the same day, to form the Somali Republic. Article VI of the Constitution of the new unitary Republic provided that the Somali Republic would promote "by legal and peaceful means the union of Somali territories." It was of course clear that the Somali-inhabited areas in Ethiopia were part of the "territories" referred to by the constitutional provision. The political declarations of the Somali leaders provided also a further confirmation

of the Somali Republic's determination to see those areas in Ethiopia exercise their right to self-determination.<sup>17</sup>

The short-lived government of independent Somaliland did not enter into any devolution agreement with the United Kingdom with respect to the treaties which Her Majesty's government might have stipulated on behalf of the protectorate. It is therefore assumed that in the absence of such an agreement the matter must be governed by the customary norms of international law relating to state succession. In so far as these customary rules are applicable, the short-lived state of independent Somaliland, and later the Somali Republic, would succeed to the treaties of 1897 and 1954, since they had a dispositive nature. It is however very doubtful whether they can be applied to this specific case.

As we have already explained the British government, not having a legal title to the territory in question, could not have legally transferred it to Ethiopia. The treaty could not therefore produce any legal effects, and thus the question of succession to it does not arise. Moreover, even if the treaty of 1897 had originally been valid, it would have been invalidated by Ethiopia's failure to respect key obligations. As was stated by the British government, "many of the actions of the Ethiopian authorities . . . proved to be neither in accord with the letter nor the spirit of the agreements."<sup>18</sup>

Naturally, the Somali Republic inherited the same territory which was administered by the British after the treaty of 1897 as a protectorate; but in her view, and this seems to be supported by the legal status of the treaty of 1897, Ethiopia's sovereignty over the Somali-inhabited areas, not being based on any legal title, amounts only to an act of colonial occupation. According to the Somali government "the situation in the Somali territory under Ethiopian domination represents a typical colonial case. Today, the Somali people under Ethiopian control are subject to constant tyranny and oppression. There is therefore justification on grounds of justice and fundamental human rights to permit these people to determine their political future and shape their own destiny."<sup>19</sup> Thus, successive Somali governments continued to support the demand of the Somalis in Ethiopia for their right to self-determination.

Conversely, the Ethiopian government maintains that Somalia's support to the insurgents in the Ogaden constitutes an interference in its internal affairs. The Ethiopian argument is mainly that the principle of self-determination can not apply in the Ogaden since Ethiopia is an African country and is therefore excluded from the club of colonial powers to whom the principle is opposable. Ethiopian authorities contend that their rule over the Ogaden can not be qualified as a colonial occupation.<sup>20</sup> It appears, however, that both in the Charter of the United Nations and of the Organization of African Unity colonial rule is not qualified by the race of the colonizing power. The United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples refers to colonialism in "all its forms and manifestations." A similar phraseology is used in the OAU Charter where the member States pledge themselves to "eradicate all forms of colonialism from Africa." This indicates a functional definition of colonialism in which the fact of a people's subjugation by an alien power is emphasized whatever might be the race or color of such a power.

Moreover, it is generally recognized now that a people struggling against foreign domination "are entitled to seek and to receive support in accordance with the purpose and principles of the Charter."<sup>21</sup> At any moment the oppressed people, living under colonial rule, have the right to resort to armed struggle; while the colonizing power has "the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence."<sup>22</sup>

It should therefore be concluded that the actions of Somalia in support of the peoples of the Ogaden can not be characterized as illegal, since they constitute an aid to a people struggling to realize their right to self-determination. According to contemporary principles of international law, it is the colonizing power which fails to give effect to the right to self-determination that commits a breach of the law, and is taxed with a violation of international norms.

It should also be observed that the treaty of 1897 having no legal effect between the parties, the conflict concerns only the implementation of the right to self-determination of the Somalis under Ethiopian rule. It is on this question that the two countries are presently divided, and upon its resolution will depend the possibility of establishing a lasting peace in the region.

## Notes

1. M. Perham, *The Government of Ethiopia*, pp. 61, 293-94.
2. Addis Hiwet, *Ethiopia from Autocracy to Revolution*, pp. 1-14.
3. See generally, Abdulqawi A. Yusuf (ed.), *A Legal Analysis of Ethiopia's Occupation of Western Somalia* (1977).
4. Latham Brown, "The Ethiopia Somaliland Dispute" *5 International and Comparative Law Quarterly* (1956), pp. 154, et seq.
5. Harold Macus, "Imperialism and Expansionism in Ethiopia from 1865 to 1900" in L.H. Gann and Peter Duignan (ed.), *Colonialism in Africa 1870-1960*, Vol. 1.
6. *Public Records Office*, Foreign Office (1-32), Salisbury to Rodd, N+ 2 of February 24, 1897.
7. Hertslet, E., *The Map of Africa by Treaty*, pp. 614-619.
8. Rodd to Salisbury, n+ 35 of June 4, 1897.
9. J.R. Rodd, *Social and Diplomatic Memoirs 1894-1901*, Sec. Series.
10. Hertslet, *op. cit.*, pp. 523-529.
11. The Acquisition and Government of Backward Territories in *International Law*, p. 183.
12. The British Commonwealth in *International Law*, p. 118.
13. British Government, State Papers, 89:1089.
14. L. Brown, *op. cit.*
15. Alexandrowicz "The Role of Treaties in the European African Confrontation in the Nineteenth Century" in Mensah-Brown (ed.), *African International Legal History*, p. 52.
16. Cited in Fenwick, *Cases in International Law*, p. 476.
17. See, *The Somali Peninsula*, Published by the Information Services of the Somali Government; Also, more recently, *The Portion of Somali Territory under Ethiopian Colonization*, 1974.
18. L. Brown, *op. cit.*
19. *The Portion of Somali Territory under Ethiopian Colonization*, p. 11.
20. See, *The Ethio-Somali Frontier Problem*, published by the Ministry of Information of the Imperial Ethiopian Gov't (1965); Also, Yonas Kebede "The Legal Aspect of Ethiopian-Somali Dispute" *Horn of Africa*, January-March 1978, pp. 26-31.
21. Declaration on Principles of International Law Concerning Friendly Relations And Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV).
22. *Ibid.*