The legal aspect of the Ethiopian-Somali dispute is only a small part of a very complex human problem. When the time comes for Mogadishu and Addis Ababa to sit down for a dialogue, the juridical issues will undoubtedly hold less prominence than issues which more accurately reflect the political and economic realities of the Horn of Africa as well as the needs and aspirations of the peoples who are now caught in the middle of a savage war. However, it would be worthwhile to identify the major legal issues involved in the dispute.

The ongoing strife springs from a century of religious and political expansions. As early as the 16th century, Muslims were pushing from the coastal areas toward the Horn's interior amid Christians' drive for its coast. Then Europeans, ravaged by incessant wars, came to plunder the Horn and acquired colonies along the coast through agreements of protection with the indigenous rulers of the captured territories. Relying on such agreements to assert their claims to these territories, Britain, Italy, and France proceeded to carve out their respective "spheres of influence" by means of treaties. Varying, as they were, in form and content, the treaties (in general) asserted the imperial powers' claim to the conquered lands. Among these, however, the 1897 Anglo-Ethiopian Treaty was the single most important agreement affecting the Ethiopian-Somali dispute.

Prompted by the Italian defeat at Adowa in 1896, which completely destroyed the Italian claim to a protectorate over the former Abyssinian empire, the treaty thrusted Ethiopia into a bargaining position in the imperial equation. Accordingly, Britain dispatched its First Secretary in its Cairo Agency to Addis Ababa to enter negotiation with the Emperor there. Thus, all the three colonial powers (Britain, Italy, and France) engaged in a series of agreements with Ethiopia to protect and further their interests in the region. Essentially, it was this latest diplomatic flurry that gave the present dispute between Ethiopia and Somalia a juridical flavor in addition to its political, historical, and social dimensions. A brief sketch of that agreement would give the depth and dimension of the dispute.

The 1897 Treaty contained two main provisions: first, it provided for the demarcation of the Ethiopia-Somaliland border, and secondly, because the frontier so defined cut across and excluded from the British Protectorate certain grazing land frequented annually by Somali tribes, it included an undertaking by Ethiopia that these tribes would be allowed to continue their visits to these grazing grounds. The 1954 Anglo-Ethiopian Agreement, while reaffirming this position, provided for the return to Ethiopia control of the Ogaden (including the Haud) and the "Reserved Area"—regions in which these grazing lands are situated and which, following the liberation of Ethiopia in the Second World War, had remained under temporary British administration.

It appears that neither the Somalis, nor even the Ethiopians, were entirely satisfied with the arrangements of 1897 and 1954. Neither of these agreements was made by the Somalis, or even arranged between the Somalis and the Ethiopians.

The Ethiopian government regards the provisions of the 1954 Agreement relating to the grazing rights as "automatically invalid." Thus, according to the Ethiopian Government, the new state of Somaliland could not succeed to the rights relating to Ethiopian territory which, under the 1954 Agreement, had been secured by Britain. On the other hand, the Somali Republic contended that she couldn't be bound by colonial agreements which she had formally denounced on attainment of independence. In 1960, the former British Somaliland and Italian Somaliland were melded into the modern state of the Somali Republic. The present boundary of the Republic is accepted only on a de facto basis. Official publications of the Somali Government refuse to recognize it as a final de jure line. Thus, the 1897 Anglo-Ethiopian Treaty and the 1908 Italo-Ethiopian Treaty are considered of no legal effect by both parties to the dispute on number of grounds.

First, the agreements purported to transfer parts of the Somali territory over which the colonial powers (Britain and Italy) had no valid title. The Treaties of Protection did not stipulate the transfer of ownership of Somali territory to the protecting states, only obligations to preserve the independence of the protected people. Neither did these treaties provide for the alienation of Somali territory to a third party state. It follows, therefore, that under the fundamental principles of law "Memo dat quad non habet" so long as the protecting powers had no legal ownership of the Somali territory, they could not transfer a valid title to another state, in this case Ethiopia.

Secondly, the protected Somali population expressly convenanted not to alienate their territory save to the protecting powers. A reciprocal obligation, not to permit such territory to pass under the sovereignty of any other state, implicitly devolved upon the British and Italian Governments.

Thirdly, the Somali people had no knowledge of the colonial agreements under which Ethiopia allegedly acquired Somali territory. Neither had they been consulted in the matter.

Fourthly, the agreements between Britain, Italy and Ethiopia are in violation of the principle of self-determination which is given expression in the Charter of the United Nations. The Somali Republic regards self-determination as a legal right which imposes a correspond-

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1. The Ogaden is an Ethiopian territory bordering on Somalia and Somaliland. The Haud is situated partly in Somaliland but mainly in the Ogaden. The Reserved Area is partly in the Ogaden and partly in another part of Ethiopia.
ing legal duty on Ethiopia, to recognize and give effect to this right.

Regardless of the legality or illegality of their position in terms of international law, Somalis believe that their position is "morally" right. The Somali government contends that the whole issue of the Somali territories should be settled on the basis of the right of the inhabitants to self-determination. Somalis contend that on ethnic, cultural and historical grounds they are entitled to form a nation-state, and that neighboring Somalis under Ethiopian rule have a right to self-determination. They further maintain that the homogeneity of their nation establishes a compelling and unique criterion for the exercise of the right of self-determination without evoking precedents elsewhere in Africa.4

Ethiopia rejects the contention that it has a legal duty to permit Somalis in her territory to exercise the right of self-determination. Ethiopia argues that the principle of self-determination should apply only to colonial territories which have not yet attained their independence and not to parts of sovereign or independent states. Therefore, this would constitute an infringement of her sovereignty and territorial integrity.

The principle of "territorial integrity" according to the Somali Government is not applicable to the Somali-Ethiopian territorial dispute because Ethiopia is illegally and forcefully exercising sovereignty over a territory belonging to another state. Therefore, the "territorial integrity" doctrine cannot be juridically applied by Ethiopia to legitimize her domination of the Somali territory as long as her legal title to the area is not recognized as valid.5

These arguments forwarded by the Ethiopian and Somali Governments raise three major issues: (i) whether the Somali clans had sufficient capacity in international law to be considered legal persons; (ii) whether the Somali Republic is successor to the treaties concluded between Britain, Italy and Ethiopia; and (iii) whether Ethiopia has a legal duty to allow Somalis in her jurisdiction to exercise their right to self-determination.

Protection Agreements and Their Effects:

One of the arguments of the government of the Somali Republic was that the Somalis were not consulted about the transfer of their territory over which Britain and Italy assumed protection only and that these colonial powers ceded Somali territory to Ethiopia without valid title. Subsequent treaties between Britain and Italy and Ethiopia are, in the opinion of the Somali government, a breach of earlier treaties of protection with the Somali clans. The issue is whether the Somali clans had sufficient capacity in international law to be considered "legal persons." If they had such a capacity, then their rights couldn't be forfeited due to the protection agreements.

For certain purposes, mandated and trust territories, and some protectorates, were considered as possessing international personality. This, however, depended on the degree of their independence which in turn depended upon the agreements establishing the protectorate and, to some extent, the attitude of the protecting state. In order to determine the extent of the powers of the protecting state the treaties between the protecting state and the protected must be examined. The attitude of the protecting state is equally as important as is the recognition of the protectorate by other states.

The wording of the protection agreements suggests that the Somalis surrendered the right to conduct external affairs. In the agreements, the Somali elders "declare that they are pledged and bound never to cede, sell, mortgage or otherwise give for occupation save to the British government any portion of the territory presently inhabited by them or being under their control." They also agreed "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 British, on their part, undertook to extend to the clansmen and their territories "the gracious favour and protection of Her Majesty the Queen-Empress." Similarly, the Somali in their protection agreements with Italy agreed that the Italian flag be hoisted in their land and declared "not to make treaties or contracts with any other government or persons." However, exercise of control was not limited to the conduct of foreign affairs alone. There is evidence that both Italy and Britain exercised a great deal of control over matters of military, police, trade and customs right up to the late 1950's. Also, the fact that the agreements had to be signed with so many different clans, itself, is a testimony to the absence of an organized, established government. There doesn't seem to be any doubt that the main purpose of the colonial powers was to secure a first claim for occupation and annexation of the Somali territories; and, under these circumstances, the Somali clans did not constitute an entity of the type recognized by international custom as capable of possessing rights and duties and bringing international claims.

Effects of the Border Agreements on the Somali Republic as a Successor State

When on July 1, 1960 sovereignty was transferred from the "predecessor states" of Britain and Italy to the "successor state" of the Somali Republic, one of the most significant and germane events to the legal aspects of the border dispute transpired.

Section 57 and 58 of the Constitution of Somaliland provided for the succession by the Somaliland government of rights and obligations entered into by the British Gov-

ernment with third parties (not being states or international organizations). As regards the succession to the Somali Republic, such as rights and obligations of former Somaliland and Somalia, Article 4 of the Act of Union provides:

1. All rights lawfully vested in or obligations lawfully incurred by the independent governments of Somaliland and Somalia or by any person on their behalf, shall be deemed to have been transferred to and accepted by the Somali Republic upon establishment of the Union.

With respect to rights and obligations arising from treaties, Article 4 (2) expressly lays down that the acceptance of the British by the Somali Republic is subject to Article 67 of the Constitution which deals with the ratification of international treaties by the National Assembly.

Finally there was a treaty of Friendship and Exchange of Notes between the Italian Government and the Somali Republic concerning the succession of rights and obligations arising out of international agreements entered by the Italian Government prior to June 30, 1960.

The first question arising, therefore, is whether the Somali Republic, as a successor state to Britain and Italy, inherited the rights and obligations arising out of treaties concluded between them and the Ethiopian Government. The Anglo-Ethiopian Treaties of 1897 and 1954 were not ratified by the National Assembly in accordance with Article 67 of the Somali Constitution. Neither was the Italian-Ethiopian convention of 1908 included in the list of international agreements considered binding on the Somali Republic. In the absence of devolution agreements or any unilateral declaration of acceptance, therefore, the matter was governed by the customary rules of international law relating to state succession.

International jurists have concluded in the past that devolution agreements were a necessary condition for the succession to treaties. They seem to have been led to their conclusion because the first state successions in the context of decolonization were predominantly those in which the United Kingdom was involved and devolution agreements were a matter of course.

However, devolution agreements can neither impose obligations on third states nor confer rights upon them. The non-performance of a devolution agreement makes the new state liable only toward its predecessors, not toward other states. The existence or non-existence of a devolution agreement is of limited importance because the newly independent states have selected those conventions which they claim to have inherited and ignored others, irrespective of whether they were parties to a devolution agreement or not.

The other extreme position which would hold that all treaties automatically devolve upon the successor states has never been suggested. Instead, the law of state succession has avoided a single, all-embracing rule, choosing a middle course. The tendency has been to distinguish between different kinds of treaties as well as different kinds of rights and obligations arising under each treaty. A number of jurists, have taken the view that there are various categories of treaties. These are “personal” and “impersonal” or “dispositive” treaties. The former, because of their contractual nature, lapse when the predecessor state is extinguished. Dispositive treaties, however, are those which impress a territory with some special status and are less affected by a change in sovereignty. These treaties have as their distinctive characteristic that they recognize or grant or transfer “real” rights, that is, rights in rem; for instance, a treaty of cession, a boundary treaty, etc.

The International Law Association, in its study of the Effects of Independence on Treaties, also states that boundary problems are the examples par excellence of dispositive treaties and even cites the Ethiopia/Somalia border dispute as an example. This may not be surprising since both the provisions of the 1897 Anglo-Ethiopian Treaty and those of the 1954 Agreement (the frontier and grazing provisions) involved land and, therefore, came within the traditional category of “rights in rem”: It is established in theory and state practice that where a treaty demarcates a frontier between the parties, the frontier agreement is executed upon ratification and operates a kind of conveyance. A Successor State then succeeds not to the treaty, but to the frontiers of its territory, as it does to the other facts of its new international life. Once the frontier provisions are executed, they frontier provisions are executed, they lose their contractual character, and may be severed from any other treaty provisions.

The underlying consideration for this view is the creation of stability and finality between two countries once a frontier is established. Unless frontier provisions are regarded as executed and thus severable from the rest of the treaty, the frontier line established will be open to question whenever other provisions of the treaty are challenged.

This view was shared by the Ethiopian Government which announced that it would regard the grazing rights as “automatically invalid” while avoiding a general denuncia-

9. Ibid. p. 368.
tion of the 1897 and 1954 agreements.\textsuperscript{14} The suggestion was that the Somali Republic succeeded to the frontier irrespective of the fate of the other provisions in the Agreements. The Somali Government, on its part, declared that it would not accept the 1897 boundary.\textsuperscript{15} Its argument was that a new State is not bound to recognize its frontiers as previously agreed upon by its parent State with third States. It is difficult to side with either one of these positions. One cannot accept the Ethiopian position without a head-on collision with the widely accepted existence of localized or dispositive treaties that create rights \textit{in rem} or international servitude automatically devolving on successor States. After all, what better example of rights of territorial character can one find than the right to graze? The Somali contention is no less difficult for it challenges the existence of treaty-conveyances, equally accepted in theory and State practice.

Treaty succession can be considered a question of the existence of general rule of law.\textsuperscript{16} It is not, strictly speaking, the treaty that passes but the obligations that are created by the treaty. It follows that the intention of the High Contracting Parties, which is apparent at the time the treaty is concluded must be taken into account. For our purposes, the question narrows down to the intentions of Ethiopia and Britain at the conclusion of the 1897 and 1954 Agreements. What were the intentions of the High Contracting Parties with regard to the demarcation provisions and the provisions relating to grazing rights?

If both the provisions relating to the demarcation of the frontier and those relating to the grazing rights were intended by Ethiopia and Britain to create rights and obligations of a real nature, these rights and their corresponding obligations will remain binding despite the change in territorial sovereignty. If the demarcation and grazing provisions are intended to create rights \textit{in personam}, the rights and obligations will lapse with the change in sovereignty since the bases of the restrictions imposed on the territory are destroyed. The third possibility is the intention by the High Contracting Parties to establish rights and obligations \textit{in rem} with regard to the provisions relating to boundary demarcation and rights and obligations \textit{personam} with regard to those relating to grazing. The change of sovereignty in this case affects only the grazing rights while leaving the demarcation provisions intact. And finally, the intention of the parties could be the reverse of the third possibility.

After the Italian annexation of Ethiopia in 1936, the British Government found it necessary to reaffirm the grazing rights in another agreement that the parties conferred a degree of permanence on the grazing rights. The extent of the grazing rights declared in this Exchange of Notes indicates a recognition on the part of both the British and the Italians that the boundary demarcation of the 1897 Treaty was intended to be binding in perpetuity and therefore was not affected by the state succession in Ethiopian territory. The 1942 and 1944 Agreements, even though they conferred British military administration on the Reserved Area and the Ogaden, recognized that the sovereignty of the entire region, placed under British temporary-administration, remained vested in Ethiopia. Thus, on at least two occasions when a succession of States took place in relation to Ethiopian territory, British conduct supported the view that the boundary demarcation of the 1897 Treaty was intended to be binding in perpetuity.

Furthermore, when the Ethiopian Government resumed administrative control of its territories, the British found it necessary to reaffirm the grazing rights in another agreement (1954) while not questioning the boundary provisions of the 1897 Treaty.

Article 1 of the Agreement of 1954 provides as follows:

The full and exclusive sovereignty of Ethiopia over the territories which are set forth in the attached schedule . . . recognized by the Anglo-Ethiopian Treaty of 1897, is hereby reaffirmed.

Article 2 provides:

The right of tribes coming respectively from Ethiopia and the Somaliland Protectorate to cross the frontier for the purpose of grazing, as originally set out in the Anglo-Ethiopian Treaty of 1897 and the letters annexed thereto, is reaffirmed by the two Contracting Parties who shall take steps to ensure that as far as possible tribal grazing rights in the area shall be protected.

Thus the Agreement of 1954 seems to indicate that the grazing rights provision was finally given equal durability as the frontier demarcation. Previous to this time the evidence supported the contention that the grazing rights were intended to be of a less enduring nature.

Article 5 of the Agreement is perhaps the clearest indication that the parties conferred a degree of permanence on the grazing rights. It provides that the Agreement is to remain in force for fifteen years, and shall continue to remain in force unless terminated by a notice by either party. Notwithstanding this right of termination, however, the article also expressly states that “the termination of the Agreement shall not affect the grazing rights referred to in Article 2.”

Regarding the evidence found in the Anglo-Ethiopian treaty of 1897 and the 1954 Agreement and the conduct of the British Government in the occasions of State Succession in the Ethiopian territory it would seem that the intention of the High Contracting Parties was to create rights and corresponding obligations of equally enduring nature. The frontier demarcation and grazing rights provisions attach...

\textsuperscript{15} Brown, Ibid., p. 167, 171-172.
to the territory and therefore remain binding despite the change in territorial sovereignty.

**Self-Determination versus Self-Preservation**

Examining the General Assembly resolutions on self-determination, we find that self-determination has been given to colonial peoples by an accelerated rate since the Assembly’s Declaration on the Granting of Independence to Colonial Peoples in 1960. This declaration states that “all peoples have the right of self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” The General Assembly resolutions on the principle of self-determination have been recognized by a majority of the international community since the making of the Charter of the United Nations from which it was adopted and incorporated in the Charter of the United Nations. Indeed, no state has said outright that it does not recognize the principle of self-determination.

Under these circumstances, it appears that the principle has been recognized by the international community as, at least, a guiding principle for action of States in relation to dependent peoples. The conclusion gains further support from the inclusion of the principle in Article 1 (2) and 55 of the Charter of the United Nations.

General Assembly resolutions may become legally binding among members, by the act of voting for the resolution, provided there is a clear intention to be so bound. There is nothing to prevent States from announcing their intention to incur the legal obligation incorporated in the resolution at the time they vote affirmatively for it or even after the voting has taken place. This is consistent with the theory of sovereignty and consent of state doctrine.17

Essentially, one of the fundamental issues that the Ethiopian-Somali border dispute raised was the questions of “self-preservation of states” on the one hand and “self-determination of peoples” on the other. Given a situation where a colonial territory has attained sovereign independence, to what extent can it permit its own minority groups to invoke a right of self-determination against the territorial integrity of the new State? This question lies at the very heart of African territorial problems and was a major factor in the passing of the resolution by the OAU which enjoined its members, by the act of voting for the resolution, to respect colonial boundaries as they stood at the time of national independence.

The Declaration on the Granting of Independence of Colonial Countries of 1960 and the International Covenants of Human Rights of 1966, declare that “all peoples” have the right of self-determination. What is meant by “all peoples?” Are these any limitations on number of inhabitants having ethnic, religious or other affinities within a particular state before the term “all peoples” can apply? The 1960 Resolution states:

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

It would seem from the outset that the right of self-determination is not to be applied to territories which are an integral part of a national entity and that secession is contrary to the spirit of the Charter of the United Nations, since it would allow national minorities to carve out states for themselves from already existing ones. Is self-determination, then, a right which once exercised is thereafter extinguished? It would seem that norms accepted by the international community subordinate the right of self-determination to that of self-preservation of the state.

Thus, the legal positions taken by the governments of the Somali Republic and of Ethiopia narrow the issues down to three. The first question is whether the Somali Republic has succeeded to the rights and obligations in the Anglo-Ethiopian Treaties of 1897 and 1954.

The formation of the Somali Republic on July 1, 1960 made it the “successor state” to the Somaliland Protectorate and the Trust Territory of Somalia. No devolution agreements were signed upon transfer of government. The Somali Constitution provided for ratification of international treaties by the National Assembly. In the absence of devolution agreements with the predecessor states and any unilateral declaration of acceptance of the boundary treaties by the Somali government, the matter would be governed by customary international law.

Most new states have not bothered to conclude devolution agreements with their predecessors, undermining the view that devolution agreements are a necessary condition for the succession to treaties. Even if it were still accepted, the non-performance of devolution agreement makes the new state liable only to its predecessor and can neither impose obligations on third parties nor confer rights upon them.

It would seem from the above argument alone that the Somali Republic as a successor state is bound by the Anglo-Ethiopian Treaty of 1897. According to the Republic, however, the frontier provisions in this treaty remained executory owing to their dependence on the performance of the grazing provisions. It is established in theory and state practice that frontier agreements are executed upon ratification and severable from the rest of the treaty. The successor state inherits not the treaty but the frontiers of its territory. In this context the frontier provisions would be binding on the Somali Republic, irrespective of the fate of the grazing rights. Treaty succession can be considered a question of treaty interpretation rather than simply a question of general rule of law. But, once the intention of the High Contracting Parties has been ascertained it is for international law to give or deny effect to it.

In the first place, evidence that the parties to the 1897

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Treaty intended to create a permanent settlement is plain in that the treaty was a "boundary treaty." Furthermore, British conduct on at least two occasions of state succession in relation to Ethiopian territory supports the view that the boundary demarcation of 1897 was intended to be binding in perpetuity. When in 1954 the Ethiopian government resumed administrative control of the Reserved Areas and the Ogaden, the boundary provisions were not questioned. In fact, the Anglo-Ethiopian Agreement of 1954 reaffirmed the sovereignty of Ethiopia over these regions. It also gives the grazing provisions a degree of permanence by protecting them even from the termination of the 1954 Agreement itself.

Having regard to established theory and state practice as well as to the intention of the High Contracting Parties, it must be concluded that the frontier and grazing provisions encompassed in the Anglo-Ethiopian Treaties of 1897 and 1954 remain binding despite the change in sovereignty.

The second major issue is whether the Somali tribes had sufficient capacity in international law to be considered legal persons and if they did, whether they subsequently did not forfeit their legal capacity in international law when signing protection agreements with the colonial powers. Trust Territories and Protectorates are considered legal persons in international law depending on the degree of independence. If there was any semblance of sovereignty that Somali clans possessed, it was no more than just an empty shell under the complete dominance of internal and external matters by the "protecting" state. The historical development that led up to the signing of the protection agreements as well as the wording of the agreements are both further testimony to that effect. It is concluded, therefore, that the Somali clans did not have the capacity in international law to be considered legal persons capable of making treaties and agreements valid in international law.

The third and final question is whether Ethiopia has the duty to allow the Somalis in her territory to exercise their right of self-determination without an infringement on her territorial integrity. There is overwhelming evidence showing that a great majority of states believe that self-determination has developed into an international right. Self-determination is regarded as part of the obligations stemming from the Charter of the United Nations. However, the reference to "all peoples" having the right of self-determination in the Declaration on the Granting of Independence of Colonial Countries and in the International Covenants of Human Rights seems to apply only to people who are under colonial rule.