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Addis Ababa University
School of Graduate Studies
College of Law and Governance

Emerging Challenges to the African Boundary Treaties with a particular focus of the Application of Principle of *uti possidetis*

A Thesis Submitted in Partial Fulfillment of the Requirements
of LL.M. Degree in Public International Law

BY: -

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Addis Ababa

May, 2014

Approval Sheet by the Board of Examiners

**Emerging Challenges to the African Boundary Treaties with a particular
focus on the Application of the Principle of *uti possidetis***

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Dedication

I, the undersigned, hereby declare that this thesis is my own and original work. It is submitted in partial fulfillment of the requirements of the degree of Master(LLM) of Public International Law field at College of Law and Governance of the Addis Ababa University. It has not been submitted before any degree or examination in any other university and all sources of materials used for the thesis have been duly acknowledged.

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I, Fasil Amdetsion, have read this thesis and approved it for examination.

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Signature *Fasil Amdetsion*

Date *May 29, 2018*

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I would like also to mention that he is the source of the idea since I have decided to research on this topic after taking his course, the Law of Treaties.

Acronyms

AIC	Association Intemationule du Congo
AU	African Union
BC	Berlin Conference
CA	Constitutive Act
DFRCS	Declaration of Friendly Relations and Cooperation among States
DGICCP	Declaration on the Granting of Independence to Colonial Countries and Peoples
EEBC	Ethiopia and Eritrea Boundary Commission
ESD	External Self determination
ICJ	International Court of Justice
OAU	Organizations of African Unity
UNGA	United Nations General Assembly
UN	United Nations
VCLT	Vienna Convention of the Law of Treaties

Abstract

The adoption of territorial integrity principle by the Organization of African Unity was not an easy decision. Since the continent was extremely divided by the limitless interests of European colonialists, there were politicians and scholars who were calling for revising and redefining these boundaries. With assumption of the tangibility of colonial boundaries and the commitment to save the continent from disintegration during independence, the organization adopted the principle which accepts colonial administrative boundaries as international boundaries of African newly independent states.

The principle however did not escape from criticism in the past decades for its failure to prevent boundary conflict and ensure peace and stability as it was initially aspired. In this paper, the researcher has endeavoured to examine the general nature of African boundary related treaties, the shortcomings of the application of the principle and the new challenges of the boundaries and the principle.

The finding of the research shows that the African colonial boundary treaties are questionable as to their tangibility and certainty. The boundaries are results of continuous multilateral and bilateral treaties of colonialists. Their certainty is very questionable. The purposes and objectives of the treaties of the boundaries were ensuring competing interests of colonialists against the interests of Africans and their legality is also challengeable. Implementing these over century old boundary related treaties at these days are becoming difficult due to their vagueness and contradiction to the practical situation of borders. The application of territorial integrity *uti possidetis* principle adapted by OAU to identify and transfer the colonial boundaries found to be illusive, incomplete and vulnerable to unrestricted interpretation of ICJ. The principle is critically tested by new challenges such as secession and demarcation in its failure to accommodating new developments around borders since independence.

The issue is continental and further research is very necessary. The practice of the application of the principle (*ut ipossidetis*) should not be the only boundary establishing mechanism and it need to be equally supported by other asserting mechanisms principle such as effective control, public administration, etc. Expanding democracy and encouraging the application of internal self-determination is critical to avoid secession before it became threat of boundary. The need to border integration should not be postponed not only to reduce boundary problems but it is a base for other integrations. ICJ's interpretation trend focusing only on seeking the purpose and intention of parties of the treaty need intervention and change. There has to be a kind of effective type of interpretation since the disputants of boundaries were not parties of the treaties.

Key terms: boundary, *uti possidetis*, ICJ, critical-date, secession, territorial integrity

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Chapter I -Introduction

1.1 Background

Almost the entirety of Africa's current political map was drawn in the 19th and early 20th centuries at negotiation tables in various European capitals.¹The problem is serious in that Africa's 53 sovereign states are divided over 165 borders which make it the most bisected continent² in the world. Many African countries have been in conflict since independence because of trans-boundary minorities, unclear frontiers, and the contestation or difficulty of implementing existing colonial and post-colonial boundary agreements.³

Between the 1950s and 1990s, more than half of Africa's states have involved in some form of boundary related conflicts. In terms of disputes between countries, Algeria alone has had border disputes with nearly eight countries which mean that it is at loggerheads over boundaries with all of its neighbours.⁴ Although the claims are potent and not yet critical, Ethiopia has border disagreements with Somalia, Kenya, Sudan, Djibouti.⁵ European colonialism disorganized, disoriented, displaced and disunited the African continent⁶.

European countries started to control and divide African countries in earlier times but the agreement reached among European countries in Berlin in a conference held between 1884 and 1885 is quoted widely for its effect on Africa's modern boundaries. The very purpose of the Berlin Conference(BC) was to draw colonial territories and partitioned the continent among them through different bilateral and multilateral treaties without the participation and

¹-----Delimitation and Demarcation of Boundaries in Africa The User's Guide African Union Border Programme (AUBP), Commission of the African Union, Department of Peace and Security, Addis Ababa, May 2013. P.1. Accessed on 22/07/2013 from <http://www.peaceau.org/uploads/au-2-en-2013-delim-a-demar-user-guide.pdf>.

² Francis Nguendi Ikome, Africa's International border as potential sources of conflict and future threats to peace and security, Institute for Security Studies (paper), May 2012 No. 233, p.3.. Accessed on 22/07/2013 from http://www.issafrica.org/uploads/paper_233.pdf

³ Ibid

⁴ Jadesola E.T. Babatola, Nigeria-Cameroon Boundary Dispute: The Quest for Bakassi Peninsular, International Affairs and Global Strategy, ISSN 2224-8951 (Online), Vol 4, 2012, p.83. Accessed on 20/08/2013 from www.iiste.org/journals/index.php/IAGS/article/download/3021306.

⁵ Ibid

⁶ Ibid

will of Africans.⁷ The colonialists had been vying between each other for more land and the conference helped them to stave off such conflict, continue occupation or sphere of influence.

Even though some scholars argue that colonialism has contributed to the expansion of infrastructure and modern education, the goal of European colonialism in Africa in the 19th and 20th centuries was conceived in order to expand European influence to other frontiers and develop their potential in a growing market and modernized world system.⁸ Before the colonialists occupied and divided Africa, traditional boundaries had existed though they were affected by the rise and fall of tribal leaders. Nevertheless, Europeans divided the African continent and its people by using artificial boundaries and without providing any regard for their traditional way of life and culture or existing traditional boundaries.⁹

By considering the fact that border problems constitute a grave and permanent factor of dissension, and given the necessity of proceeding within an African framework, the Organization of African Union (OAU) declared the importance of maintaining territorial integrity at independence in Art.3 of its Charter.¹⁰ The OAU also called upon member states “to respect the borders existing on their achievement of national independence” in its First Ordinary Session of the Assembly of Heads of State and Government held in Cairo in July 1964.¹¹

Even though some scholars have argued that the principle has helped the continent avoid various forms of disintegration, many others argue that the principle did not deter African countries from entering into border conflicts and thus the debate over maintaining or revising the principle, which supports the arbitrarily and poorly demarcated colonial border, has been attracting a lot of debate.¹² When OAU was replaced by the African Union, the principle was maintained as enshrined in Art. 3(b) of its Constitutive Act though the struggle against colonialism had been fully accomplished much earlier.¹³

Still now, African countries are applying the principle of territorial integrity in one way or the other by relying on colonial treaties and other historical documents in international courts and

⁷ Ibid

⁸ Ibid

⁹ Ibid,

¹⁰ The Charter of the Organization of African Unity, ratified 25th day of May, 1963 in the City of Addis Ababa, Ethiopia,

¹¹ See footnote No.1 above

¹², see footnote No.2. above

¹³ The Constitutive Act of the African Union: adopted in 2000 at the Lome Summit (Togo), entered into force in 2001, http://www.au.int/en/about/constitutive_act

arbitration tribunals. The issue of border dispute has become more complex due to the surfacing of new concepts and implementation related problems. John Campbell, for instance, has commented that South Sudan's independence may inspire a quest for sovereignty in other fractious sub-Saharan countries, but it also passes a message to Africa to reconsider its seemingly irrational colonial borders and its opposition to territorial secession.¹⁴

1.2. Statement of the Problem

The meaning of the principle of territorial integrity incorporated in the Charter of OAU has been differently interpreted by scholars. There are some scholars who refer to the principle as an African initiative developed to solve African border problems with their own unique features. Others, argue that the principle is taken from Latin American countries and is similar to the principle of *uti possidetis*. There are also scholars who generally oppose the incorporation of the principle in the Charter while others strongly support and argue that Africa has no option other than maintaining colonial boundaries using the principle.

There is a strong argument that the OAU had no alternative other than to accept colonial boundaries during independence in order to avoid clashes caused by the effects of colonial boundaries which will lead to the disintegration of Africa. As a counter argument, the colonial boundary treaties were generally entered into by European colonialists in Africa to satisfy their interests without any consideration or participation by Africans; and using such treaties is immoral and also against the principles of the Vienna Convention on the Law of Treaties(VCLT).¹⁵

Colonialists were removed from Africa many decades ago and the African Union (AU) replaced the OAU in 2002 but the principle of the territorial integrity of boundaries inherited at independence is also enshrined in Art.3 of its Constitutive Act(CA). On the other hand, the Union seems to be gauging some mechanisms which will reduce border conflicts by implementing the African border program, a new initiative. The border matter is now becoming more sophisticated through the claim of secession which the continent initially tried to partly suppress through the incorporation of the principle of territorial integrity.

¹⁴John Campbell, South Sudan's Challenge to Africa's Colonial Borders(expert brief), Council on Foreign Relations, July 7, 2011. Accessed on 29/08/2013 from <http://www.cfr.org/sudan/south-sudans-challenge-african-colonial-borders/p25439>

¹⁵ United Nations, Vienna Convention on the Law of Treaties, 1969. Done at Vienna on 23 May 1969, entered into force on 27 January 1980. United Nations, Treaty series, vol.1155, p.331. Accessed on 10/09/2013 from http://untreaty.un.org/ilc/texts/instruments/English/conventions/1_1_1969.pdf

Many economic, social, political changes have occurred in border areas since independence and not all borders areas are vacant. Such matters complicate the acceptance and implementation of judgements of International Court of Justice (ICJ) and awards of arbitration tribunals rendered mostly on the bases of colonial treaties. The people around the border in conflict did not get the say in the last decisions and awards. The paper therefore endeavors to unpack the confusion over the above issues.

1.3. Objective of the paper

The paper has general and specific objectives. The general objective of the paper is that of examining the challenges pertaining to border disputes in the African continent and to forward possible remedies. As specific objectives, the paper tries:

1. To show the challenges, moral, and legal complexity of applying the colonial treaties for border conflicts occurred many decades after independence.
2. To show the problem of the application of *uti possidetis*
3. To show how secession/the new state formation such as Southern Sudan and Eritrea will pose new African border problem
4. To show that the border problem will not be solved by applying a single principle (i.e., *uti possidetis* at independence) or only through ICJ or arbitration tribunal judgements.
5. To show that failing to address the root cause of border conflict and ignoring the people living in conflict area will not bring lasting solution.

1.4. Research questions

The paper will try to address the following questions:

1. Should African countries accept and implement colonial treaties related to boundaries as they are today?
2. Does the principle of *uti possidetis*/territorial integrity address the border issues raised between the mother state and the newly formed state?
3. Should Africans who live around disputed borders have some say in border demarcation or related border decision?
4. How long can Africa stick to the principle of *uti possidetis*/territorial integrity as the only solution to border conflicts?

1.5. Importance of the study

In Africa, border conflicts are a potential danger and that is why some writers refer to it as a time bomb which may erupt at any time. Countries like Ethiopia and Eritrea have gone through a deadly and tragic war due to border claims. The situation between Cameroon and Nigeria seems not yet resolved, though the Bakassi peninsula has already been given to Cameroon by the decision of the ICJ. Mali and Burkina Faso have gone to war for a border dispute and getting a solution has taken years. In recent times, giving up border area through court judgement or arbitral tribunal awards seems to be difficult.

While the borders of many African countries are not yet properly demarcated and delimited, new issues like state formation are being witnessed in Africa. Colonial treaties divided ethnic groups and placed them in different countries and such actions coupled with recent international human right issues made border conflicts more complex. The newly seceding countries were administrative regions of mother states and bringing the countries together and resolving border issues is becoming complex. Various conventions which try to protect the rights of minorities and indigenous people were ratified and widely referred. In such situations ignoring the people living in disputed lands will obscure the matter and fail to bring lasting solutions.

The paper will therefore serve as an input to appreciate the problem of sticking to the principle of *uti possidetis*. The African Union seems to be looking into more viable border conflict resolution mechanisms by implementing border programs and also building one regional economic community. I believe the paper will also contribute in this regard. I have a feeling that the issue of border conflicts, particularly the recent developments, were addressed in the form of a criticism and this paper will try to present the problem in a detailed and comprehensive manner. By doing this, the paper will have an immense contribution in addressing the issue properly and filling the existing gaps in the academic sphere.

1.6. Scope and limitations of the study

The scope of the study is limited in terms of time, content and place. The research mostly focuses on discovering the problems and challenges of the border dispute resolving mechanisms of Africa, the application of the *uti possidetis* principle at independence. The title is broad which requires presenting general as well as specific evidences which is difficult

in terms of time. However, it will be tried to address it by making extensive references. The issue is now being complicated by political, economic and security matters and the solution will not be viable if it depends solely on law. Consequently, some of the arguments may not be directly supported by convention, protocol, treaties, custom and this can be seen as other limitation.

1.7. Methodology of the study

The paper will be mainly done on the basis of desk research. The research will involve examining a variety of sources, including publications, academic literatures, commentaries, court judgements and arbitration tribunal awards (cases) and some relevant conventions.

1.8. Structure of the paper

The paper will have five chapters where Chapter One introduces the research by outlining the proposal. Chapter Two mainly discusses the purpose of colonialism and its relation with the boundaries of Africa, the nature of formation of boundary treaties by colonialists, the adoption of territorial integrity by the OAU and its relation with *uti possidetis* principle, notions and criticisms on the application of the principle and the legal validity of the African boundary treaties.

Chapter Three of the paper will discuss the new emerging problems in relation to boundary matters in Africa. The discussion of the paper in this Chapter focuses on the border impact of newly seceding countries and the adequacy of *uti possidetis principle* in resolving such issues. In the same chapter, efforts are made to show how border disputes are interwoven with various changes and interests occurred after independence.

Chapter Four discusses some relevant court or arbitration tribunal decisions. In the chapter the application of the principle is assessed in relation to the Award of the Boundary Commission on Eritrea and Ethiopia boundary dispute and Judgment on Nigeria Cameroon Boundary dispute. In the final chapter, Chapter Five contains the conclusion(summary)and recommendations.

Chapter 2-The evolvement of African boundary treaties and the adoption of *Uti possidetis*

2.1. General Introduction

2.1.1. The Development of boundaries and boundary treaties

Boundaries are one of the factors that ensure the sovereignty and statehood of a country. Article 1 of the 1934 Montevideo Convention on the Rights and Duties of States¹⁶ sets out the key attributes of sovereignty: “[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”¹⁷ It is difficult to conceive of a state in international law without a territory or geographic base.¹⁸ Territory is one of the manifestations of power of a particular state and criteria of providing international recognition by other state since statehood is measured based on the ability to control and secure its territory and population.¹⁹ Territorial sovereignty, in turn, implies boundaries.²⁰

Like many other social science concepts, the notion of boundaries or borders has historically shifted in definition and function. Generally, boundaries are lines which show the extent of exercise of sovereignty between neighboring states. The making of a boundary usually starts from treaties, followed by their actual drawing and they are very much associated with sovereignty. They may also be defined based on arbitration awards or by boundary commissions. Boundaries are human constructs built through an amalgamation of geography, cartography, theories of sovereignty, and prevailing constellations of power.²¹ From the legal

¹⁶The Montevideo Convention on the Rights and Duties of States at Montevideo, Uruguay, on December 26, 1933. Accessed on 15/11/2013 from <http://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml>

¹⁷Joshua Castellino, Territorial Integrity and the “Right” to Self-determination: An Examination of the Conceptual Tools, *BROOK. J. INT’L L.* Vol. 33:2. Accessed on 15/11/2013 from <https://eprints.mdx.ac.uk/1500/1/Castellino.pdf>

¹⁸ Shaw, M. (1986), Title to Territory in Africa—International Legal Issues, p. 1.

¹⁹ *ibid*

²⁰ *Ibid*

²¹Tayyab Mahmud, Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier, *BROOK. J. INT’L L.* [Vol. 36:1,2010. Accessed on 15/11/2013 from www.brooklaw.edu/~media/PDF/LawJournals/BJI.../bji_vol36i.ashx

perspective, international boundaries are the sharp edge of the territories within which states exercise their jurisdictions.²²

Borders take different forms in different historical and political circumstances since ancient Greece and Rome. The Romans, who took the idea from the delimitation of private property under domestic law, used monuments to differentiate their provinces or administrative units while Greek used them as international boundaries separating Greek city-states.²³ In the Middle Ages, a feudal system prevailed and the nature of human relationships differed and, at this stage, natural features usually rivers like 'Tweed' between Scotland and England started to be utilized as borders.²⁴ However, the first boundary related treaty, the Treaty of Tordesillas, was signed between Portugal and Spain in 1494.²⁵ Boundaries continue to develop together with the changes of society and state formation

Creating and attributing of states to territories began in 1648 in relation to the Peace of Westphalia, Spanish-Dutch Treaty of Westphalia, the treaty that established boundaries for the territorial possessions of England, France, Dutch-land, the German principedoms, the Muscovy, Poland, Turkey, Spain, and Sweden.²⁶ In 1795, the Treaty of the Pyrenees worked out in modern fashion which stated that the Pyrenees Mountains divides the two kingdoms of France and Spain.²⁷

The two countries established a commission which defines the mountain, what it should divide in the future and specified the boundaries of the two countries. Another, more recent, example is the Treaty of Paris, which reviewed the borders of most states at the end of the First World War through the participation state representatives.²⁸ With colonialism, maps became a weapon of state forming boundaries which were drawn to manipulate distribution of power among colonial powers, thereby creating a direct connection between colonialism and borders later inherited by postcolonial states.²⁹

²² See footnote above No.2, Ch.1,

²³ Omar AbubakarBakhashab, the Legal Concept of International Boundary, JKAU: Econ. & Adm., Vol. □ 9, pp. 29-66 (1416 A.H./1996 A.D.)). Accessed on 28/11/2013 from http://www.kau.edu.sa/Files/320/Researches/51560_21695.pdf

²⁴Ibid

²⁵ibid

²⁶Emmanuel Brunet-Jailly, the State of Borders and Borderlands Studies 2009: A Historical View and a View from the Journal of Borderlands Studies. Accessed on 14/11/2013 from http://srch.slav.hokudai.ac.jp/publicitn/eurasia_border_review/n01/01_Brunet.pdf, p.2

²⁷See foot note No. 21 above

²⁸See foot note No. 24 above

²⁹See foot note No..2 above

2.1.2 Types of boundaries and boundary making process

2.1.2.1 Types of boundaries

Although complete distinction is not made yet, boundaries are divided into natural and artificial ones. They also appear to be treated in national and international contexts. The important factor in the classifications of boundaries is the advantages and the disadvantages of natural and artificial boundaries and the difference in the role and sources between the national and international boundaries. Natural lines are boundaries where a nation's territory extends across a designated river, mountain, lake, desert or some other natural barrier to population movement.³⁰ It is clear that natural creation which found between states serve as boundary. Artificial boundary lines are defined in terms of straight lines, parallels of latitude, meridians of longitude, straight lines between fixed points and boundaries defined by reference to existing conditions, such as those following existing provincial, tribal or local government boundaries, or roads, and those defined passing within a certain distance of a town or a village.³¹ These boundaries are created by humans. They are drawn geographic lines, latitudinal or longitudinal lines which never existed naturally.

Artificial boundaries have been fixed in advance of the movement of colonizing population where the boundary line was devised and agreed upon in the absence of accurate geographical information and knowledge with reference to the territory through which that boundary line passes.³² In terms of advantage, natural boundaries are more conspicuous and therefore less mistakable than artificial ones. Whereas artificial boundaries are straight lines ruled in maps or treaties and are difficult to describe precisely on earth and are likely to result an ill-defined or irrational boundary.³³

Similarly, national and international boundaries have different sources and purposes. National boundaries are internal or administrative borders created for domestic purposes and may alter widely over time for centralizing power or in order to promote national unity. They are established by domestic law and are tied deeply with domestic considerations and are not intended to constitute permanent boundaries nor are they protected as such under

³⁰See foot note No.21 above

³¹ Ibid,

³² Ibid.

³³ Ibid

international law.³⁴ They generally separate administrative units such as provinces or federal states within a country.

International boundaries are however established in order to mark the limits of sovereignty and territorial jurisdiction. They fix permanent lines, both geographically and legally, with full effect within the international system, and can only be changed through the consent of the relevant states.³⁵ An “upgrade” of internal boundaries to international borders can be problematic because internal boundaries are not established for the same purposes as international borders.³⁶ They seem to have opposite purposes. International boundaries are created to separate states and people while the internal boundaries are created to unify and effectively govern polity.³⁷

2.2.2 Boundary making process

There are two major boundary making processes of international boundaries based on treaties; the first is delimitation and, the second, demarcation. The delimitation of a boundary refers to all the proceedings connected with the determination of a boundary line in a treaty, an arbitral award or a boundary commission's report as the case may be.³⁸ Though it is not reality in many of the international boundaries, ideally, delimitation should be as unambiguous as possible in order to avoid disagreement over where the boundary is located. The delimitation of international boundaries is normally a diplomatic procedure, the business of treaty-makers, who should decide on trustworthy evidence the line which will be acceptable to both high contracting parties even at times when judicial or arbitration decisions are needed.³⁹ But delimitation alone may not bring stability and actual division may be required.

The demarcation of a boundary line, therefore, amounts to laying it down, as mutually defined, by means of boundary pillars, monuments and buoys, and permanent erections of

³⁴Malcolm N. Shaw, Peoples, Territorialism and Boundaries, 3 EJIL (1997) 478-507, p. 489. Accessed on 24/02/2014 from <http://www.ejil.org/pdfs/8/3/1457.pdf>

³⁵ Ibid

³⁶Jure Vidmar, Confining New International Borders in the Practice of Post-1990 State Creations, *ZaöRV* 70(2010), 319-356, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, p.327. Accessed on 08/1/2013 http://www.zaoerv.de/70_2010/70_2010_2_a_319_356.pdf

³⁷ Ibid

³⁸ A.O. Cukwurah, *the Settlement of Boundary Disputes in international Law*, University of Manchester, University Press, 1967, USA p.41. Accessed from

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=5024696>

³⁹ Ibid,

other kinds, along the topographic conformations of the territories to be separated by it.⁴⁰ Demarcation is crux of all boundary making and requires a team of experts comprising a mixed boundary commission of the Contracting Parties or neutrals respectively appointed by each side, in order, to carry out this spadework of boundary construction.⁴¹ In demarcation, the demarcating experts or boundary commission need to be given some freedom to make delimitation sensible by making some minor adjustments.⁴²

Challenges can arise when the demarcated boundary on the ground does not reflect the delimited line, or when historic delimitation sources conflict with present-day realities on the ground.⁴³ In general, a good international boundary, takes into consideration political, economic, social, interests as well as the populations it separates.⁴⁴ But boundary-making efforts require a wide range of expertise, which many States around the world do not possess. Negotiation, is the therefore the best method of boundary making⁴⁵ even though the skill, knowledge and expertise to negotiate is still needed.

As depicted by Emmanuel Brunet-Jailly citing the works of different scholars, boundaries have attracted different views in relation to their purpose.⁴⁶ Thomas Holdich and William Lyde, basing their argument on their merits, state that boundaries as being either good or bad, depending on their intrinsic merit in fostering or limiting tensions, and possibly wars, between states. Similarly, Albert Brigham argued that boundaries should provide economic equilibrium while Whittermore Boggs suggested that boundaries have specific functions that vary in time and space in that they may also interact to lessen intra-state tensions.

⁴⁰ Ibid

⁴¹ Ibid,

⁴² ---Applied Issues in International Land Boundary Delimitation/Demarcation Practices, Organization for Security and Co-operation in Europe (OSCE), 31 May to 1 June 2011. Accessed on 06/03/2014 from <http://www.osce.org/cpc/85263?download=true>

⁴³ See footnote No. 23 above

⁴⁴ See foot note No.38 above

⁴⁵ See footnote No. 28 above

⁴⁶ See foot note No. 26 above (see Thomas Holdich and William Lyde, (Political Frontiers and Boundary Making, 1916 and Some Frontiers of Tomorrow: An Aspiration for Europe, 1916 respectively), Albert Brigham (Principles in the Determination of Boundaries," Geographical Review 7 (1919), Whittermore Boggs (International Boundaries, A Study of Boundary Functions and Problems, 1940), Nicholas Spykman (Frontiers, Security and International Organization," Geographical Review 32 (1942),

2.2. African colonialism and the creation of African boundaries

2.2.1. Purpose of colonialism in Africa

In order to appreciate the issues of boundaries in Africa, considering the purpose of colonialism in the continent will be necessary and cannot be taken as part of history only. The colonialism in Africa has strong relation with the boundary making of the continent. In order to fully appreciate the purposes and functions of African boundaries, it is instructive to reflect on their characteristics, history, and classifications since they are the products and reflections of the rivalries between the imperial powers in the late nineteenth and early twentieth centuries.⁴⁷ Having some understanding about the past of the continent not only helps to know the causes of boundary problems, it also helps find solutions for similar issues in the future. Africa's institutional crises in the 1990s are to be found in the colonial period.⁴⁸

For the purposes of this paper, focus will be given on two series of events of colonialism, the scrambling and partition processes, though they are sometimes utilized interchangeably by scholars. As it will also be seen in the later development of the paper, these two major processes have direct consequences in the boundary formation of African states. Almost all the current African boundaries were established beginning in 1885 as “a rational response by the colonialists” to “their political needs.”⁴⁹ Putting clear demarcation between the two events in terms of time and role appear to be difficult. In terms of role, this paper shares the assertion “the scrambling as well as the partition events are two phases of the same process of expansion leading to full-scale 'colonization’”.⁵⁰ In terms of the beginning of the two events, the scrambling is the first whereas the partition follows. Though there are some scholars who trace the start of the scramble back to the 1850s, it seems that there is consensus that it started in the 1870s.

⁴⁷ See footnote No.1 above

⁴⁸David Neillson, Sweden-Norway at the Berlin Conference 1884–85 History, national identity-making and Sweden's relations with Africa, *Current African Issues* 53, NordiskaAfrikaInstitutet, Uppsala 2013, p.6. Accessed on 18/11/2013 from <http://www.diva-portal.org/smash/get/diva2:650999/FULLTEXT01.pdf>

⁴⁹Herbst, J. (1989), *The Creation and Maintenance of National Boundaries in Africa* Vol. 43, No. 4, Autumn, 198 published by MIT Press. Accessed on 29/11/2013 from <http://www.jstor.org/discover/10.2307/2706803?uid=3737960&uid=2129&uid=2&uid=70&uid=4&sid=21103080593983>, p.692 (taken footnote of book *Delimitation and Demarcation*, above foot note no.44, p.37)

⁵⁰Juhani Koponen, the Partition of Africa: A Scramble for a Mirage? *Nordic Journal of African Studies* 2(1): 117–135 (1993), p. 131. Accessed on 29/11/2013 from <http://www.njas.helsinki.fi/pdf-files/vol2num1/koponen.pdf>

The scrambling started through private or local official or semiofficial ventures in Africa itself in 1876, when African adventure *Conférence de Géographie* convened by King Leopold II of Belgium in 1879, when the French drive from Senegal to Western Sudan considered as the start of the scrambling of the continent and the occupation of Egypt by the British in 1892 shows the full blow of the start of scramble of Africa.⁵¹ In terms of sequence and general role of the two events, the 'scramble' can be seen as the earlier competitive phase in which various Europeans carved out widening spheres of interests for themselves in Africa; whereas, on the other hand, the 'partition'(Berlin Africa Conference held from November 1884 to February 1885) was the negotiated solution of their governments to the danger of the scramble getting out of control.⁵²

Other scholars also state that the period in particular has registered major change in the continent though they did not refer to the usual terms scramble and partition as such. For instance, A. Adu Boahen, in a work entitled “Africa and the Colonial Challenge” refers to the changes that occurred in Africa between 1880 and 1935 as multifaceted, fundamental, dramatic and so speedy; where nearly the whole of Africa, except Ethiopia and Liberia, was conquered and occupied between 1890 and 1914 by Europeans who virtually established their own colonial system.⁵³

Similarly, G.N Uzoigwe, under a title “European Partition and Conquest in Africa: an overview”, has stated that in 1880 and the following years the most significant historical movement of modern times occurred when most of Africa was effectively partitioned, conquered and occupied by the industrialized nations of Europe.⁵⁴ Initially, most of Africa was led by their own kings, queen, clan and lineages heads in empires, kingdoms, communities and politics of various sizes and shapes and thus the overwhelming majority of them opposed, resisted and expressed their determination to regain their sovereignty from colonialists.⁵⁵

The question is therefore why did the colonialists rush for lands in Africa and what were the consequences of those scrambling and partitioning? Scholars characterize the reasons for

⁵¹ Ibid

⁵² Ibid,

⁵³ A. Adu Boahen (ed), General History of Africa. IV, UNESCO, University of California Press, 1984,p.1-4. Accessed on 15/11/2013 from <http://unesdoc.unesco.org/images/0018/001842/184296eo.pdf>

⁵⁴ G. N. Uzoigwe, European partition and conquest of Africa: an overview, General History of Africa. IV, UNESCO, University of California Press, 1984, p. 26. Accessed on 25/13/2013 from <http://unesdoc.unesco.org/images/0018/001842/184296eo.pdf>

⁵⁵ Ibid

colonial ventures of Africa as economic, political and cultural. However, its major ends sometimes put scholars in different perspectives, European and African. For instance, Uzoigwe depicts, by citing scholars with different view from the European perspective, the purpose of partition is economical, psychological or diplomatic. Those who argue that the colonization is motivated by economic interests try to relate with the then overproduction, surplus capital, and under-consumption in European nations which inevitably have forced them to occupy new area, Africa.⁵⁶

Others who do not accept such arguments argue that the reason to the occupation of Africa is psychological where the Europeans considered themselves as master races who have the duty to civilize backward races, Africans, where Evangelical Christianity was also used to regenerate Africa.⁵⁷ The diplomatic motive is expressed either in terms of national prestige, balance of power and global strategic interest. In relation to building national prestige, France, for instance, was encouraged to regain the national pride it lost in the war with Germany while England was trying to glorify its empire by occupying lands in Africa. Similarly, Italy and Germany show interest to continue and widen their prestige by occupying Africa whereas Portugal and Holland were interested to revive their pride in the empire they have already possessed.⁵⁸

However, according to Uzoigwe, others who consider it from an African historical perspective challenge the completeness of the aforementioned factors and conclude that the major reason for partition were the excessive economic motives of European nations attracted to Africa's abundant resources . Europeans have been exploiting Africans since much earlier times and they decided to occupy and partition Africa because Africans had started to resist the exploitation started earlier such as in a form of slave trade.⁵⁹

Scholars like Koponen, who understand the existence of divergent views, underline that the economic as well as non-economic factors interplay with each other and state that it is difficult to put fine distinction as such. However, as to him, the causes of the scramble and partition of Africa has been made in terms of the relative weight of 'economic' and 'non-economic' motives(strategic, political, social and psychological), the economic needs(such as

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸G. N. Uzoigwe, *European partition and conquest of Africa: an overview*, General History of Africa. IV, UNESCO, University of California Press, 1984, p. 26. Accessed on 25/13/2013 from <http://unesdoc.unesco.org/images/0018/001842/184296eo.pdf>

⁵⁹ ibid

the need for new markets or, at a later stage, for sources of raw materials) of European capitalism is the main reason.⁶⁰

Earlier missions in the name of humanitarian activities(like the abolishing of slavery)and geographical searches including those carried out by association established in London, Paris and Berlin around 1830s sent to the continent in various forms like adventurers, explorers to gather information to draw maps of Africa by their respective geographers paves ways or serve for their economic exploitation.⁶¹ Adu also argue that the colonialists have one principal end in view, namely, the exploitation of resources of Africa for the sole benefit of colonial powers and their mercantile, mining and financial companies.⁶² Khapoya also categorized the motives as political/strategic, cultural, and economic but the economic motivation for colonization has probably received the greatest amount of attention⁶³.

What is more important in relation to the purpose of this paper is that none of the motives for colonization took into account the interests of Africans. Although there is no discernible consensus concerning the motives of European colonization of Africa as a historical process or its driving forces, all agree that the partition was an extraordinary surge of European imperialism.⁶⁴ Looking what has occurred around Congo would give some picture of the motive, rivalry and competition of European colonialists. Since the 16th century, Portugal was claiming superior power in the coastal area of Congo while Britain had established trade relations with West African countries.⁶⁵

To return the pride it lost with Germany's defeat in 1871, France pursued active role of colonization policy in West Africa and became the UK's primary competitor in the region.⁶⁶ The Netherlands also had interests around West Africa where its manufacturers and traders were around Congo as early as 1858 and dominated trade around the area; while Belgium was playing political maneuvers in Congo where the then King, Leopold , called on a conference of geographers, scientists and explorers in 1878 and made a speech claiming that he was planning to civilize Africa by opening up Central Africa.

⁶⁰ See foot note No 50 above

⁶¹ Ibid

⁶² See foot note No. 53 above

⁶³ Vincent B. Khapoya, *Colonialism and the African Experience* e, 2012, p.104. Accessed on 12/11/2013 from www.paperbackswap.com/Settlement-Boundary-Disputes.

⁶⁴ Ibid

⁶⁵ See footnote No. 21 above

⁶⁶ Ibid

In reality, his interests were economic as he himself expressed it in one of his letters addressed to his London ambassador saying not to miss a slice of the magnificent African cake.⁶⁷ At the same time he continued forming an association in the name Congo to portray himself as a philanthropist and a promoter of science and to cover his excessive economic interest until he acquired tighter control. Thus, between 1882 and 1884, Leopold drew up treaties with local chiefs around the Congo through Stanley, his representative in Congo. The French were also putting in place similar arrangements in the north bank of Congo, and with the intention of curbing the moves of Belgium and France, Britain struck a deal with Portugal and supported the claim of Portugal around the Congo.⁶⁸

All these competitions resulted for the calling of the Berlin Conference. France not only lost its interest in West Africa, it tried to negotiate with Germany which entered late into colonial of Africa, being pushed by local traders who were aware of other European countries would take the entire Africa where the then leader Bismarck soon claimed the territory of Namibia, Togo, and Cameroon and free access to the Niger and Congo River in August 1884.⁶⁹ Having such a proposal of trade and claim of sovereignty in West Africa, France and Germany together called on the Berlin Conference.⁷⁰

2.2.2. Colonial treaties as the source of African Boundaries

One of the major consequences of colonialism in Africa is reflected in the borders of the continent. The colonialists have created and recreated the borders in a way to satisfy their economical and other related interests mentioned earlier. They basically create boundaries to protect their respective interests from their fellow colonizers or promote their collective interests. The Berlin Conference is frequently described as the occasion where the European powers divided the African continent among themselves with the help of a map and ruler.⁷¹ These maps, however, have past and future considerations of partitioning which directly or indirectly related to boundary making.

During the Conference the previous undertakings of lands or indirect occupation including through explorers, missionaries, commercial agents were negotiated and blessed and, at the same time, principles and rules of partitioning or grabbing of more land (mostly hinterlands

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ See foot note No. 63 above

⁷¹ See footnote No. 21 above

were laid down). As to the impacts on the scrambling, it is necessary to mention the annexes given effect or endorsed by the conference. In the partition act (Berlin Act), which was the result of the conference, two major previous acts known as Association Intemationule du Congo (AIC), and Conventional Free Trade Area were annexed. The former was a private organization led by Belgium's leader Leopold II who mainly intended to obtain sovereign rights over an area as large as possible in the Congo Basin, while the latter consisted of a map showing the Conventional Free Trade Area, the territories of France, Germany, Portugal, as well as the territory of the new state.⁷² Annexing the two, meant recognizing the sovereign power of AIC and that the process of the partition of this part of Africa had come to an end.⁷³

The delegates in the Berlin Conference divided amongst themselves, spheres of influence in Africa and effectively constituted a drawing of borders and boundaries within the continent without any input from Africans and without any thought of the interests of the people living within these newly partitioned lands.⁷⁴ According to Ahmad, Former Consultant to the African Union Border Program, the Berlin Conference served to regulate the imperial process of claiming territory because more than ever before, the concept of effective occupation had been added to the game⁷⁵. The countries were vying for more lands mostly to the interior part of the continent which led them for confrontation and, in the conference, the principle of effective occupation was set for future creation or proving of having of new sphere of influence to stave off conflicts among them.

2.2.3. Nature of the Treaties and their Legal effects

2.2.3.1. Nature of the Treaties (General Reflections)

The possessing of lands and the creating of boundaries has different forms. The colonialists signed treaties and agreements themselves in bilateral way or multilaterally like the Berlin conference. The bilateral treaties are further divided into two forms i.e agreements reached between colonialists and local leaders and treaties signed between colonialists themselves.

⁷²Dick Foeken, On the causes of the partition of Central Africa 1875-85, *Political Geography* V, o l. 14, No. 1, Januaty 1995, 80-100, 1995 Butterworth-Heinemann Ltd. Accessed on 27/12/2013 from <https://openaccess.leidenuniv.nl/bitstream/handle/1887/4663/ASC-1241504-010.pdf?sequence=1>

⁷³Ibid

⁷⁴ ---History of Governance in Africa(Chapter 2), University of Pretoria , P.37 accessed on 06/11/2013

⁷⁵ See footnote No. 2 above

Expansion of colonialism triggered a search for a legal framework that could legitimize the securing of a range of rights and privileges from colonized and dominated polities.⁷⁶ According to Uzoigwe, prior to the Berlin Act, European powers had acquired spheres of influence through settlement, exploration, the establishment of commercial posts, missionary settlements, the occupation of strategic areas, and by making treaties with African rulers.⁷⁷ The treaties that have been made to claim rights in the Congo Basin represent the general situation of the scrambling. There is a complete competition among colonialists to establish possession or rights through treaties. At the intensifying stages of the scrambling, Stanley for Belgium while Braza for France were striving to secure rights in the Congo Basin who were later on countered by the conflicting interest of Portugal and Britain.

To clarify, at least four of the colonial countries had their own interests around the Basin be the political, strategic or economical depending on their respective decision or analysis of colonization. To prove his right, between 1879 and 1884, Stanley and his many collaborators founded some 35 posts and concluded over 400 treaties in which more than 2000 African leaders ceded their sovereign rights to the AIC in exchange for protection by the AIC.⁷⁸ Here, it is important to remind that the then Africa has been organized itself under different kingdoms, kings, local leaders, chieftains or so. Thus, the number of treaties may not be of surprise, but rather pushes us to raise a question about the certainty of such treaties. Later on in the rivalry, Pierre Savorgnan de Brazza, French Naval Officer concluded two famous treaties with the Makoko (King) of the Bateke and, based on these treaties, he claimed French sovereign rights over an area bordering the north (right) bank of the Congo in the same period.

Initially, France hesitated to accept the treaty but gradually it was ratified by French parliament in November 1882.⁷⁹ Although it is not clear whether it involved local leaders or not, Britain and Portugal who were claiming the area in the Basin signed treaties known as Anglo-Portuguese treaty of 26 February 1884 in which Britain recognized the Portuguese claims on both the south and the north banks of the Lower Congo to curve up the interest of France which itself was against the treaty of Stanley.⁸⁰ There were concessions between

⁷⁶ See foot note No 26 above

⁷⁷ See footnote No.58 above

⁷⁸ See foot note No.72 above

⁷⁹ Ibid

⁸⁰ Ibid

France and Belgium though which part really went to either of the countries is not clear. There were also concessions between Portugal and Britain.

It is also important that these were some of the areas negotiated and agreed upon during the conference. But, the issue is that such kind of competition, mistrust among colonialists and different interests would leave a clear limit on rights. Some of the contracts or agreements involve cession of lands prior to the intensification of the scrambling includes the 1823 treaty of cession of land between Gambia Region and England; the Treaty of Cession of 1840 between Great Britain and Gombo; the 1807 treaty between two kings of Sierra Leone and the Royal N'IJCI Company; the British and Ethiopian treaty of 1849; the treaty of 1850 between Great Britain and Demba Sonko, king of Barra; the treaty between Britain and the ruler of Lagos in 1861; the 1865 treaty between Queen of MM5I8"-CICand the British; the 1840 treaty between the English East India Company (acting in Africa) and Sultan of Tujouralill..⁸¹

Following the conference, influence by means of treaty became the most important method of effectuating the paper partition of the continent.⁸² Thus, there will be changes of title through new bilateral agreements or agreements with local leaders which in turn affect the certainty of titles of lands and boundaries established through sphere of influences. After the Conference, the encroachment of the continent through chartered international companies which were empowered to enter to treaty with local leaders and acquire land on behalf of their respective country was a rampant phenomenon.

In this regard, companies such as the Royal Niger Company of 1886; the British East African Company of 1888; the British South Africa Company of 1889; the German South West African Company; the Portuguese Nyasaland Company; the International Congo Association of 1886; and the Italian East Africa Company signed hundreds of treaties between 1885 and 1945 where cession of lands and protectorates were extensive in the treaties.⁸³ If treaties are not contested by other European powers, the treaty forming country will unilaterally claim sovereignty and thus form a sphere of influence. But, if contested the difficulties of territories

⁸¹ See foot note No. 2 above

⁸² See foot note No 58 above

⁸³ See foot note No. 2 above

and boundary disputes were eventually settled and ratified by two or more colonial powers operating in the same region.⁸⁴

Some of the major bilateral treaties made after the conference including the Anglo-German delimitation treaty of 29 April (and 7 May) 1885 is the first treaty which applies sphere of influence of the two countries in certain areas after which other treaties, conventions, agreements were made and the partition concluded. But this treaty was revised at first in 1887 where the two countries agreed not to annex any territory falling under the sphere of the other country. German and Britain were not satisfied by their sphere of influences mostly in the East Africa and they entered into another treaty in 1890 and 1893. In the East Africa, other major treaty, the Anglo-Italian Agreement, was also signed in 1891 between Britain and Italy.

To the south, the Franco-Portuguese Treaty (1886), the German-Portuguese Treaty (1886), and the Anglo-Portuguese Treaty (1891) both recognized Portugal's influence in Angola and Mozambique as well as delimiting the British sphere in Central Africa. The Anglo-Congo Free State Treaty (1894) is also important. In West Africa, the most important arrangements were the Say-Barruwa Agreement (1890) and the Niger Convention (1898) by which Britain and France concluded the partition of that region. Finally, the Anglo-French Convention of 21 March 1899 settled the Egyptian question while the Peace of Vereeniging (1902), which ended the Anglo-Boer war - confirmed, temporarily, at any rate, British supremacy in South Africa.⁸⁵

Generally, the sphere of influence established through treaty was the major governing rule employed to acquire acquisition of land and stave off conflicting interests of other colonial countries. But the effect or permanency of the rule seems to have been determined by the political notions of whether willing or friendly countries will accept or unfriendly country to oppose it.⁸⁶ It is a matter of superiority of power, interest, and friendliness which determines opposing or accepting a particular sphere of influence. This coupled with the wider possibilities to establish agreements with local leaders increase the volatile situation of changing of treaties and passing of lands from one colonialist to the other. All of these will permanently complicate the endeavor to establish the exact title holders which will be important in establishing boundaries in case differences arise.

⁸⁴ See foot note No. 58 above

⁸⁵ *ibid*

⁸⁶ *ibid*

2.2.3.2. Arbitrariness of the boundaries

While they satisfy the interest of the colonialists, the boundaries have been criticized as having had profound effects on the people, statehood and the nature of territory or boundary of the continent. In the conference, the European countries divided and drew maps without taking into account local geographic conditions and ethnic composition of residents without even waiting for the information from explorers, geographers and missionaries.⁸⁷ Thus, information needed for delimitation or demarcation of boundaries was not sufficiently or accurately gathered. In most cases, the boundaries/borders were in large measure determined by geopolitical, economic, and administrative policies of colonial powers that had occupied these territories.⁸⁸

Although some authors argue that borders are made arbitrarily and it will not be unique to Africa, many writers agree that boundaries of African states are, as a result of their largely colonial origins, particularly and unusually arbitrary and artificial in comparison with elsewhere and political culture of Africa.⁸⁹ As indicated by many writers like Asiwaju, 1984; Bentsi-Enchill, 1976, Davidson, 1992; Jackson & Rosberg, 1985, though significant variance exists across the continent in the degree of arbitrariness, in many cases, colonial borders were created without knowledge or interest of local territories and populations.⁹⁰

The speech of the then British Prime Minister Lord Salisbury in relation to Anglo-French Convention on the Nigeria-Niger boundary signed in 1906 is cited as an evidence to show the extent of arbitrary nature of the border lining and dividing of the continent. As he puts it:

We have been engaged in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were.⁹¹

⁸⁷Stelios Michalopoulos, Elias Papaioannou, the Long-Run Effects of the Scramble for Africa, November, 2011 National Bureau of Economic Research, Working Paper Series, Working Paper 17620, 1050 Massachusetts Avenue, Cambridge MA 02138. Accessed on 11/11/2013 from <http://www.iae.csic.es/investigatorsMaterial/a12261116283138993.pdf>.

⁸⁸ note See foot note No.21 above

⁸⁹Pierre Englebert, Stacy Tarrango Matthew Carter, Dismemberment and Suffocation a Contribution to the Debate on African Boundaries, Comparative Political Studies Vol. 35 No. 10, December 2002 1093-1118. Accessed on 06/03/2014 from <http://users.polisci.wisc.edu/schatzberg/ps362/Englebert2002.pdf>

⁹⁰ Ibid

⁹¹ See foot note No. 87 above

Similarly, regarding Nigeria's eastern border with Cameroon, a British Colonial officer says:

In those days, we just took a blue pencil and a ruler and we put it down at Old Calabar, and drew that blue line to Yola. I recollect thinking when I was sitting, having an audience with the Emir (of Adamawa), surrounded by his tribe, that it was a very good thing that he did not know, that I, with a blue pencil, had drawn a line through his territory.⁹²

These are reality and testimonials from the actors of the partition process who testifies that borders are indeed arbitrarily drawn and artificial.

Generally, Africans were not invited and had no say and there is little disagreement among African scholars on the artificiality of the designed borders⁹³. The boundaries were colonial constructs imposed on unwilling and unparticipating African peoples who have either suffered dearly from their impact, or simply ignored them.⁹⁴ Boundaries such as those imposed by colonial administrations to serve the interests of Europeans profoundly affected identities of ethnic groups that were divided between colonies.⁹⁵ They pay little regard to the coherence of historic, cultural, and ethnic zones, and consequently historical and cultural units were split and incorporated within territorial units⁹⁶ different cultures, religions, languages, identities, and affiliations.⁹⁷

The scholars concluded that the result which was common to all Africans was a division of peoples, bifurcated political and social systems, and fractured cultural areas which eventually led to further dislocations and disorientation mainly the border people.⁹⁸ Due to the disrespect of social, political, or cultural characteristics of the people they partitioned, 177 cultural areas or groups were dissected in 1984 and 1985, among others.⁹⁹ Borders were also not uniformly drawn and in some instances unity of cultural groups was taken into account while in other instances borders were made based on treaties with local chiefs or based on *ex post facto* to

⁹² See foot note No. 2 above

⁹³ See foot note No.87 above

⁹⁴ See foot note No. 2 above

⁹⁵ Wafula Okumu, *The Purpose and Functions of International Boundaries: With Specific Reference to Africa*, Delimitation and Demarcation of Boundaries in Africa: General Issues and Case Studies, Commission of the African Union, Department of Peace and Security, Addis Ababa, September 2013, p.35 (IBID). Accessed on 15/11/2013 from <http://www.peaceau.org/uploads/au2013-en-delim-a-demar-of-bound-gen-iss-a-studies-elec2.pdf>

⁹⁶ Ibid,

⁹⁷ Ibid

⁹⁸ See foot note No. 2 above

⁹⁹ Ibid,

take account of partitioned groups and migration.¹⁰⁰ There is no doubt that many of the boundaries were artificial constructs bound to bedevil the future development of the continent.¹⁰¹

Some of these boundaries cut across pre-existing ethnic groups, states and kingdoms include the Bakongo divided by the boundaries of Angola, Belgian Congo (now Zaire), French Congo (now Congo) and Gabon; some of the Ewe live in Ghana, some in Togo and some in Benin; the Somali are shared among Ethiopia, Kenya, Somalia and Djibouti; the Senufo are found in Mali, Ivory Coast and Upper Volta, etc.¹⁰² One of the consequences of such division has been the border disputes that have plagued the relations between some African states.¹⁰³

2.2.3.2. Legal effects of the treaties (General Reflection)

Although boundary treaties seem to have received acceptance by Africans when they agreed to apply the principle of *uti possidetis* (territorial integrity) the legal status of the treaties have been questioned by scholars. Scholars seem to have the view that the legal consequences will not vary as such whether the treaties or agreements are entered into between Europeans or with local leaders. The treaties were made to satisfy the economic, strategic and political interest of colonials against the interests of Africans. Whether the agreements initially signed by explorers, individuals or companies, the final authority and the ultimate goal is the same. The men who made the ultimate historical decisions on the partition of Africa were neither industrial or other capitalists, nor lobbyists, but holders of state power. Thus, it was essentially a state action, not a private undertaking

According to Uzogwe, both bilateral agreements between Europeans as well as those signed between European and African leaders are indefensible, except some which are only defensible under a positivist approach which accepts the use of force as the basis of all law. However, for Africans their decisions were invariably based on their perceptions of European strength and there are clear occasions during which the leaders opposed the treaties knowing the motives of Europeans but induced them with unbearable pressure to sign.¹⁰⁴

There was also a problem with the arrangements of treaties in that indigenous leaders were unaware that they meant led to the loss of sovereignty, as they were made to believe that

¹⁰⁰ Ibid

¹⁰¹ See footnote No.53 above

¹⁰² Ibid

¹⁰³ ibid

¹⁰⁴ Ibid

they were mutually advantageous.¹⁰⁵ Similarly, Nguengi indicates that the contracts and treaties were uniform in their content, initiated by Europeans and given to the local leaders simply to express their will; the local leaders did not know the language of the contracts or treaties; the interpreters were those Europeans who initiated the contract; the local leaders signed the treaties believing that they will be protected and by assuming that they still held final rights to the land ceded; clearly fraud had been practiced.

Thus, the treaty practices between European powers and African states from and, indeed, the Berlin Conference until the Second World War was highly unequal where the requirements for international engagements such as capacity, equality and consent were lacking in a majority of treaties.¹⁰⁶ Such treaties said to be gained through various illegal means such as lies, threats, murder, or under camouflage of friendship in the name of commerce are therefore illegal.¹⁰⁷

Disregarding treaties signed through the use of illegal means started much earlier before the approving of VCLT. The historical development of VCLT will give us a clue. In 1949 when drafting of VCLT was initiated, the validities of treaties procured through threat or use of force and those substantively in conflict with certain norms of international law were the two distinctive issues.¹⁰⁸ What this entails is that, there was a tendency or a trend to reject treaties signed in the 19th and 20th using force or against international principles. To further consider the importance of consent and other factors mentioned in the arguments and the legal effects of those treaties in general, it is necessary to see the international principle towards agreements during the time and later developments.

In this regard, it is important to see the work of Omar M. Dajani, Professor of Law, University of the Pacific, McGeorge School of Law, entitled 'Contractualism in the Law of Treaties' as the scholar considers the background of the convention, the importance of consent and its contemporary application. Citing Max Weber, he argues that in no legal order is freedom of contract unlimited in the sense that the law would place its guaranty of coercion at the disposal of all and every agreement regardless of its terms.¹⁰⁹

¹⁰⁵ Ibid

¹⁰⁶ See foot note No.1 above,

¹⁰⁷ See footnote No 74 above

¹⁰⁸ Omar M. Dajani, Contractualism in the Law of Treaties, 12/19/2012, Michigan Journal of International Law [Vol. 34:1 Fall 2012, p.3, Accessed on 02/12/2013 from

<http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1011&context=mjil>

¹⁰⁹ Ibid

There are some mandatory rules of agreements such as Art 52 and 53 of VCLT, public law, jus cogens, which neither waived nor changed by parties which are also justified by courts, legislators, legal scholars believing that regarding these mandatory rules would help to avoid three inherent problems of contract: the possibility that an agreement would have adverse effects on the protected rights of third parties; differences in capacity, knowledge, and power between contracting parties that undermine the voluntariness and fairness of their agreements; and the need to protect the legitimacy and efficiency of the legal system when it is called on to enforce or invalidate an agreement between its subjects.¹¹⁰

Dajani indicates that similar restriction is put on sovereign state agreement since VCLT provides that “[a] treaty is void” if it has been “procured by the threat or use of force in violation of the principles embodied in the Charter of the United Nations (UN)” or if it “conflicts with a peremptory norm of general international law”.¹¹¹ As it is implied in the Charter of the UN and recognized in the VCLT, under contemporary international law an agreement concluded using a threat or force is void.¹¹² According to Dajani, constraints on contractual freedoms serve as important to the law of treaties as they are to the law of contracts in domestic legal systems.¹¹³

Since the earlier times, like contract law, natural law has been imposing limit on states on their power to change the law of nations by their special agreement and the possibility to challenge the validity of treaties.¹¹⁴ As quoted from the sixteenth-century Italian Protestant jurist Alberto Gentili on the practice of natural law and the law of Nations as subjects may not make a contract to the prejudice of their superior, so as rulers may not form one to the prejudice of his subjects, since in this respect they are on equal and are bound by mutual obligations.¹¹⁵ Gentili’s contemporary, Spanish Jurist Balthazar Ayala, regarded treaties that prejudiced the property of subjects without their consent as violations of natural law, but he was more concerned about the instability they produced and most effective treaties (with the greatest prospects of ‘longevity’ are those which are entered into on both sides by both king and people.¹¹⁶ Later on, as positivism prevailed, states’ consent and practice—as expressed in

¹¹⁰ Ibid

¹¹¹ Ibid

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Ibid

treaty and practices the exclusive basis for international legal obligation but regarded most mandatory rules as an illegitimate infringement on party autonomy.¹¹⁷

In the 19th century, mandatory rules of treaties were reflected in two attempts at codifying treaties, by Kaspar Bluntschli and Pasquale Fiore where the former argues that treaties which infringe on general human rights (like introducing and protecting slavery) or the necessary principles of international law (such as contradicting with freedom of the sea) shall be null and void while the latter argues that states may not engage to treaty against moral or universal justice and treaties between states must be freely assented and sets out mandatory rule which prohibits coercion.¹¹⁸ Both codes were taken into consideration in the codification of the VCLT.

The other mandatory rule propelled by Vendros which is directly taken from contract law is that the general principle of law recognized by civilized nations as binding and treaties as being contrary to the morals or ethics of the international community are invalid. During the time, as per the law of civilized countries, treaties were considered as *contra bonos more s* (contrary to moral and ethics) if they restricted the liberty of one contracting party in an excessive or unworthy manner or in a way which endangered its most important rights.¹¹⁹ According to Diang, during the codification of the VCLT commenced by the International Law Commission in 1949 the main issues were the validity of treaties procured through the threat or use of force and of those substantively in conflict with certain norms of international law and that is why consent became the central element of treaty as stipulated in Art 52 of the Convention.¹²⁰ What is also important in Art 52 of the convention is its interpretation. As Diang stated, citing the interpretation of the words ‘a treaty is void’ meant that if the nullity was established the effect of that nullity related to the treaty itself, the treaty could not subsequently be affirmed by the coerced state; it was void ab initio.¹²¹

At the conference of VCLT, the threat or use of pressure in any form, military, political, or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty was condemned.¹²² VCLT addresses the issue through articles 51 and 52—making coercion and threat or use of force “in violation of the principles of international

¹¹⁷ *ibid*

¹¹⁸ *Ibid*

¹¹⁹ *ibid*

¹²⁰ *Ibid*

¹²¹ *Ibid*

¹²² *Ibid*

law in the Charter of the United Nations” grounds for voiding a treaty.¹²³ In the context of colonization, colonial powers could argue that the entity coming under colonization was not a state, and therefore beyond the remit of such protection. However, as mentioned above, this defense, and the argument that the 1969 VCLT differs from the standard prevailing at the time of colonization, remain unconvincing in light of the intent of the drafters.¹²⁴

In addition to the above arguments, boundary treaties signed by two or more colonialist countries against the interest of third countries are objected based on the principle *pacta tertiinocent necpro sunt*. African countries cannot, therefore, be obliged to perform the obligations therein stipulated since this would be in violation of the principle *pacta tertiinocent necpro sunt*, that is, that a party may not be bound by an agreement to which it was not a party.¹²⁵ This is the principle of the relation of third parties and treaties established and a fundamental one recognized by state practices.¹²⁶ It may not impose obligations upon a state which is not a party thereto.

If it contains a stipulation beneficial to a third state which is not a signatory or party to the treaty that state can only claim as per the stipulation so long as the stipulation remain in effect between the two parties.¹²⁷ Two States cannot impose obligations on third States in a treaty which is not a signatory. The principle has been utilized in various cases by the Permanent Court of International Justice. Although the definition of a State to a party is confusing, third states are defined as non-party to a treaty in the 1969 and 1986 Vienna conventions. Generally as per Art.34 of VCLT, rights and obligations of third parties may be created by other parties if the third party consented.¹²⁸

2.3. The principle of *uti possidetis* and the adoption by OAU

2.3.1. The development and notion of *uti possidetis*

Generally, in the past many decades, the principle has been applied to decide or grant boundaries of states seceded from colonial states and, through this principle, the colonial

¹²³ See footnote No.21 above

¹²⁴ See foot note No 17 above

¹²⁵ Malgosia Fitzmaurice, third parties and the Law of Treaties, Max Planck Yearbook of United Nations Law, Volume 6, 2002, 37-137, Kluwer Law International, printed in the Netherlands. See also Lord McNair, the Law of treaties, 1961, 309. Accessed on 04/02/2014 on from http://www.mpil.de/files/pdf1/mpunyb_fitzmaurice_6.pdf

¹²⁶ Ibid

¹²⁷ ibid

¹²⁸ ibid

administrative lines are upgraded and transformed into international frontiers in the full sense of the term.¹²⁹ The principle has, however, evolved gradually and has been applied in determining boundaries when countries gain their independence in different continents changing its initial meaning and emphasis. Its application and interpretation also seems to be difficult and less uniformly presented though the ICJ. The complications appear to be more serious in the case of Africa as it will be seen later on.

As indicated by many scholars, like many other principles, it developed from Roman Law with a purpose of governing individual rights on immovable property. The principle was derived from the Roman maxim, Latin phrase “*uti possidetis, ita possideatis*,” or “as you possess, so may you possess, which was utilized to maintain order between two individuals by preventing the disturbance of the existing state of possession of immovable, as between two individuals without regard to the merits of the dispute.”¹³⁰ Thus, it is a challengeable protection once after status quo was maintained particularly if the property is possessed by force, secrecy or permission.¹³¹

Together with its evolvement, the principle appeared to have branched in to two referred as *uti possidetis de facto* and *uti possidetis juris* with different meanings. Shaw, in his publication entitled, ‘Peoples, Territorialism and Boundaries’ uses the original principle, *uti possidetis*, in explaining its application in Latin America, Africa, and recently Yugoslavia. However, he shows that for Brazil and the rest of Latin America, the principle is dissected. The Brazilian view of *uti possidetis* was to emphasize that it applied de facto, which favors actual possession rather than de jure that basis right to legal lines founded upon legal title.¹³²

Similarly, the Washington University Global Studies Law Review states that they emerged together with border disputes of Latin American countries where those who thought that “administrative possession” of an area warranted absorption into the state regardless of colonial boundaries used the term *uti possidetis de facto* whereas those who restricted territory to legally-titled colonial borders, in contrast, used the term *uti possidetis juris*.¹³³ The

¹²⁹ See foot note No. 21 above

¹³⁰ Paul R. Hensel, Michael E. Allison Ahmed Khanani, Territorial Integrity Treaties, *Uti Possidetis*, and Armed Conflict over Territory, Paper presented at the 2006 Shambaugh Conference "Building Synergies: Institutions and Cooperation in World Politics," University of Iowa, 13 October 2006. Accessed on 20/11/2013 <http://saramitchell.org/Hensel.pdf>

¹³¹ See foot note No. 17 above

¹³² See foot note No. 18 above

¹³³ Michael Farrell, Manufacturing Territorial Integrity with the International Court of Justice: The Somaliland-Punt land Dispute and *Uti possidetis*, Washington University, Global Studies Law Review [VOL. 11:817, 2012.

dispute was over whether territory should be decided with physical possession (de facto) which was promoted by the Portuguese in Brazil or legal title (de jure) which was promoted by Spanish republics in their border disputes because there were no legal treaties in effect to reference which supported Brazil's de facto form of administering.

As to their current application, the Review indicates that it is the *uti possidetis juris* exists now though there are confusions in its meaning among scholars.¹³⁴ Similarly, Enver Hasni states that *uti possidetis* has evolved historically and had two forms *uti possidetis juris*, and *uti possidetis de facto* where the former applies to presently and former colonized countries in Latin America, Africa, and Asia which claimed their borders after independence while the latter applied to post-medieval Europe.¹³⁵ On the other hand, Castellino states that the branching of the principle and their dissimilar meanings have vanished since its application started in Latin America when Creoles, and peoples of European descent, first demanded their independence.¹³⁶ It seems that *uti possidetis* and *uti possidetis juris* are utilized interchangeably once they started to be applied to colonial boundaries.

The doctrine of *uti possidetis* started to be applied in connection with the de-colonialism process in Latin America in the early nineteenth century when Spanish colonies agreed to apply the principle both in their frontier disputes with each other and in those with Brazil and later on applied in the decolonization era of Asia and Africa.¹³⁷ According to Hasni, the territorial delimitation of new sovereignties was based on *uti possidetis juris* which means that national borders of newly independent countries coincided with the former colonial borders.¹³⁸

Similarly, Castellini states that *uti possidetis juris* became cornerstone of the right to self-determination following the decolonization of Latin American countries. Answering how it became a cornerstone, unlike other types of self-determination which had been raised during that period, the claim for independence is based on territory.¹³⁹ Postcolonial states stem from

accessed on 04/02/2014

from <http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1420&context=globalstudies>

¹³⁴ Ibid (see footnote 78 within the Review)

¹³⁵ Enver Hasani, Self-determination, territorial integrity and international stability: the case of Yugoslavia, National Defence Academy Institute for Peace Support and Conflict Management Vienna in co-operation with: PfP-Consortium of Defence Academies and Security Studies Institutes. Accessed on 04/12/2013 from http://www.bmlv.gv.at/pdf_pool/publikationen/hasa03.pdf

¹³⁶ See foot note No. 17 above

¹³⁷ See foot note No. 21 above

¹³⁸ Ibid

¹³⁹ See foot note No. 17 above

artificial boundaries adopted and retained the construct of a territoriality based independence by forming state-nations instead of nation-state formation, the usual convention.¹⁴⁰ The claim for self-determination or the independence basis colonial boundary but not based on ethnic, language, culture and other basis of nationalism issues resulted from colonialism. Thus, the principle of *uti possidetis* is concerned with the territorial aspect of the move to independence and is one aspect of the process of the creation of statehood.¹⁴¹

ICJ has also designated the doctrine (*uti possidetis*) a status of general principle which is logically connected with the phenomenon of obtaining independence wherever it occurs.¹⁴² As to ICJ the obvious purpose of *uti possidetis juris* is preventing the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.¹⁴³

As to what boundaries are the bases of claiming of independence, in the case of Latin American countries the administrative lines of Spain while for African states the colonial frontiers or artificial lines and, though it is dubious, in the case of Yugoslavia, the border of its former republicans.¹⁴⁴ Generally, new States will come to independence with the same boundaries that they had when they were administrative units within the territory or territories of a colonial power.¹⁴⁵

In order to decide the colonial boundary or administrative line based on *uti possidetis*, there is a notion referred as critical-date. Identifying this critical-date not only determines the border and the possessor but also determines the legal consequence a change made on the boundary after that critical date. Critical date...cut-off point that crystallized possession of a territory and determined the identity of its de jure possessor...a central feature in territorial disputes

¹⁴⁰ See foot note No. 21 above

¹⁴¹ See foot note No. 34 above

¹⁴² See foot note No. 21 above

¹⁴³ See foot note No. 130 above

¹⁴⁴ John McHugo, How to Prove Title to Territory: A Brief, Practical Introduction to the Law and Evidence, Boundary & Territory Briefing, International Boundaries Research Unit, Volume 2 Number 4, 1998, Department of Geography University of Durham, UK. Accessed on 15/11/2013 from <https://www.dur.ac.uk/ibru/publications/download/>

¹⁴⁵ Malcolm N. Shaw, The Heritage of States: The Principle of *Uti Possidetis Juris* Today, 67 BRIT. Y.B. INT'L L. 97, 97101 (1996).p.50
http://www.researchgate.net/publication/247895399_The_Heritage_of_States_The_Principle_of_Uti_Possidet_Juris_Today

between states.¹⁴⁶ By providing the exact answer, the critical-date is the date of departure of the colonial rule.¹⁴⁷

It is on that date that the colonial power left the people in that territory and the people inherited the colonial border/line and became an independent state. The new sovereign exercised over the territory, and the claim of any aspirant sovereign was dismissed as being disruptive of the peace.¹⁴⁸ Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign.¹⁴⁹

The application of the principle freeze-framing of boundaries on the date of decolonization by one definitive gesture renders the issue of the history of these boundaries moot.¹⁵⁰ The doctrine of *uti possidetis* combined with the critical date prevails over post-colonial assertions and the principle of effectivity claimed based on the exercise of effective authority unless colonial practice fails to furnish definitive demarcations and thus triggers application of *uti posseditis*.¹⁵¹ But the principle has no ruling retroactive effects. The main purpose is maintaining order after independence. But scholars such as Shaw state the dubious nature of determining the line and date of independence when there are differences between states and question on self-sufficiency in all disputes. Although the principle itself is one of international law, recourse to other matters may become necessary in order to determine, if possible, the *utipossidetis* line.¹⁵²

2.3.1.1. Notion of *uti possidetis* in Latin America decolonization

The decolonized Latin American countries preferred to use the principle and declare colonial administrative lines as their boundary for at least two reasons. Firstly, during their decolonization many areas in Latin America were unoccupied or uninhabited or unexplored and feared that European countries may reoccupy and claim effective control and to stave off such a potential threat they agreed to the need following of assertion of constructive possession.¹⁵³

¹⁴⁶ See foot note No. 17 above

¹⁴⁷ Ibid

¹⁴⁸ Ibid

¹⁴⁹ See foot note No. 34 above

¹⁵⁰ See foot note No. 21 above

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ Ibid

There were lands which were vacant or uninhabited or controlled in a manner recognized by the law and thus by their consensus these vacant areas will be considered as occupied and administered irrespective of their actual holdings. Therefore, there will be no vacant areas. Based on the principle each state was to be recognized as possessing all territories that were presumed to be possessed by its colonial predecessors, unchallenged Spanish rule (and thus the last times that borders could be considered to have been under Spanish authority).¹⁵⁴ By the application of the principle, there would be no possibility of new claims based on *terra nullius* (territory belonging to no state) or of claims by extra-regional states and there should be little or no conflict among the bordering states themselves because of the clear identification of each border's location based on colonial-era administrative lines.¹⁵⁵ Secondly, *uti possidetis* was chosen to prevent boundary conflicts as between the successor states of the Spanish Empire.¹⁵⁶

In addition to these reasons, by the time, there was attempts to create confederations in the Latin American countries and some scholars argue that local leaders, who had received acceptance, rejected confederation and resort to *uti possidetis*, which facilitates individual state independence, for their personal interest and gain.¹⁵⁷ According to Shaw preventing conflict continued to develop and the principle served as international law in Latin American countries except Brazil, which understood the principle applies to *de facto* (factual possession) rather than *de jure* (legal lines founded upon legal title).¹⁵⁸

2.3.2. The adoption of *uti possidetis* by OAU

As far as the adoption of a boundary is concerned, there appears to be a slight difference in the interpretation of the position of the OAU during its formation in 1963 reflected in its Charter and then in 1964. Both the Charter of the OAU (Resolution AHG/R.S. 16(1)) and the Constitutive Act (Article 4b) of the African Union (AU) enshrined territorial integrity principles in relation to the boundary of the countries of the continent but not the principle of *uti possidetis* directly.

Judge Yusuf, in the case of Burkina Faso and Republic of Mali which was adjudicated by ICJ in 1986, in his separate opinion has reflected that *uti possidetis juris* and the OAU principle

¹⁵⁴ See foot note No. 130 above

¹⁵⁵ Ibid

¹⁵⁶ See foot note No. 21 above

¹⁵⁷ See footnote No. 135 above

¹⁵⁸ See foot note No. 34 above

on respect of borders are neither identical nor equivalent.¹⁵⁹ According to the judge *uti possidetis juris* principle, whereby the title, if it exists, will trump the effectivités or the effective possession of the territory where as the OAU/AU principle of respect for boundaries is broader principle which calls for the respect of the post-independence frontiers of African States, pending the resolution of any bilateral disputes and it does not rely on, or refer to, the distinction between title and effectivités, nor does it confer preference on one over the other.¹⁶⁰ According to the judge, the Cairo Resolution and founding instruments of the OAU do not refer to *uti possidetis juris* that the Organization of African Unity has adopted territorial integrity principle but not the *uti possideti juris* principle and cannot be implicitly contain it.

Even though publications reviewed for this work did not dwell in such a manner, the judge's opinion gives way that two principles exist in relation to the adoption of boundary. Similar views seem to be reflected in the paper produced by three scholars. In the paper entitled 'Territorial Integrity Treaties, *uti possidetis*, and Armed Conflict over Territory', after citing the works of Zacher the scholars have indicated that there are two norms in the formation of boundary, territorial integrity, and *uti possidetis*. According to these writers territorial integrity norm was started to spread in the 19th century and encapsulated in the Charter of League of Nations, UN Charter and in the numerous treaties of other regional organizations as rejecting attempts to change the territorial status quo through the threat or use of force.¹⁶¹ Article 2(4) of the United Nations Charter explicitly proscribed the threat or use of force against the territorial integrity of any state. Similar principles soon began to be included in the charters of regional organizations.

As to this paper the OAU charter accepts territorial integrity in general sense next to Locarno Pact by explicitly supporting for territorial integrity in this general sense, rather than simply preventing the violent transfer of leaders in the region chose to avoid uncertainty and conflict by preserving their existing colonial boundaries from any kind of illegitimacy challenges. As to the scholars in cases such as Locarno and the OAU, though, even peaceful change was seen as a serious threat, and the existing borders (whether created through Versailles or through colonization) were not to be challenged through either peaceful or military means. The other norm, *uti possidetis de jure* or *uti possideti juris*, appeared earlier the 20th century

¹⁵⁹Separate opinion of Judge Yusuf. Accessed on 29/03/2014 from <http://www.icj-cij.org/docket/files/141/16005.pdf>

¹⁶⁰ Ibid

¹⁶¹ See foot note No. 130 above

period however allows peaceful territorial change by mutual agreement, only prohibits the use or threat of the use of force for the acquisition of territory.¹⁶² Nevertheless, the scholars have indicated that the doctrine has gone through changes sometimes difficult to trace, and, at the same time, they believed that *ut ipossidetisis* a precursor over territorial integrity and dictated over it.¹⁶³

Different from the mentioned scholars and the judge many argue that the OAU has adopted the principle of *uti possidetis* in its Charter and in other subsequent documents though it refers it as territorial integrity. For instance EnverHasni, indicates that Africans claimed their border after independence based on *uti possidetis juris* following the example of Latin America by respecting pre-existing colonial administrative lines or borders. However, he stresses the differences in the sources of borders in Latin American and African decolonized countries, specifically the effects of Berlin Conference.¹⁶⁴

Similarly, Ambassador Ramtane Lamamra, formerly African Union Commissioner for Peace and Security and presently Algeria's Minister of Foreign Affairs, indicates that the principle of intangibility of borders, *uti possidetis*, applies within the framework of the Organization of African Unity.¹⁶⁵ Wafula Okuma, also confirms the interpretation of the OAU Charter of territorial integrity following the principle stating that---the negative attitude towards colonial treaties is balanced by the *uti possidetis* principle.¹⁶⁶ The explanations proves that acceptance of the principle *uti possidetis* by OAU boundary making though the principle is not explicitly found in the OAU Charter and other resolutions.

The territorial integrity norm defends the boundary formed by the principle of *uti possidetis*. It helps to respect or protect but does not grant boundary. Shaw's expression will express the distinction more vividly stating that the reaffirmation by international bodies of the territorial integrity of the states in question also marked acceptance of *uti possidetis*, since the principle of territorial integrity operates after independence and in order to safeguard the territorial framework of independence.¹⁶⁷ Libarona, for instance, states that the principle of territorial integrity is traditionally interwoven with the fundamental principle of the prohibition of the

¹⁶² Ibid

¹⁶³ Ibid

¹⁶⁴ Ibid, p.23

¹⁶⁵ See foot note No.1 above

¹⁶⁶ Wafula Okumu*, Resources and border disputes in Eastern Africa, Journal of Eastern African Studies Vol. 4, No. 2, July 2010, 279_297. Accessed from http://www.researchgate.net/publication/233144816_Resources_and_border_disputes_in_Eastern_Africa

¹⁶⁷ See footnote No 34 above

threat or use of force and it was assumed in many texts of international law including the Art 2 of UN Charter that territorial integrity which requires the very territorial structure and configuration of a State be respected and ensures predictability in international legal system.¹⁶⁸

Similarly, Enver Hasani states that territorial principle developed together with juridical state in that it utilized to crystallize anti-colonial self-determination of former colonies.¹⁶⁹ At the same time it also utilized to prohibit secession based on ethnic, religious or linguistic groups or communities living within newly independent states.¹⁷⁰ If their ultimate goal is concerned, the norm territorial integrity and the doctrine (principle of *uti possidetis* appear to converge mainly in rejecting of self- determination/secession. Though they may have the same role in relation to self-determination *uti possidetis* grants independence and the territorial integrity norm protects this new acquired or independent states. The application of *uti possidetis* precedes and the norm territorial integrity follows it.

2.3.2. The reasons why the OAU opts for *uti possidetis*

So, the next question is why and which lines became boundary of African countries as the colonial situation in Africa and elsewhere were not identical. Before the adoption of the principle, there were differences among African leaders in the adoption or accepting of colonial boundaries as national boundaries of Africa's newly independent countries. Earlier in 1945, the pan-African Congress condemned the artificial boundaries saying that they were created by imperialist powers to obstruct the political unity of West Africa Conferences on the administration of borders and territories.¹⁷¹

In 1958, the All-Africa People's Conference specifically rejected colonial boundaries in favor of ethnically divided territories with its resolution, "Frontiers, Boundaries, and Federations."¹⁷² Nevertheless, later on, when they formed OAU, they realized the need to accept colonial boundaries as boundaries of new countries. As to the reason of adopting *uti possidetis* by the African continent, it appears that much difference does not exist with Latin American countries. Since Africa was arbitrarily divided by colonialists, the tendency or

¹⁶⁸ Inigo Urrutia Libarona, Territorial Integrity and Self-Determination: The Approach of the International Court of Justice in the Advisory Opinion on Kosovo, REAF, núm. 16, octubre 2012, p. 107-140, p.109. Accessed on 04/12/2013 from <http://www.raco.cat/index.php/REAF/article/viewFile/262496/349668>

¹⁶⁹ See foot note No.135 above

¹⁷⁰ Ibid

¹⁷¹ See foot note No. 133 above

¹⁷² Ibid

move for ethnic gatherings or ethnic based independence and quest for border revision, the leaders feared that the question will be endless and lead to have various small states and disintegration of the continent. To control such issues once and for all, the African leaders have primarily chosen the *uti possidetis* principle to determine boundary of new states.

Like the Latin Americans, they also feared the revival and manipulation of colonialism in different forms and the principle also sought by them to give them strength to defend newly independent states and the continent from continuous disintegration. The social make-up of African societies, weak state structures, and ethnic diversity, as well as international rules on juridical statehood and equal sovereignty of colonial peoples and their territories better explain the acceptance of *utipossideti juris*.¹⁷³ This problem and the military weakness of many states in the continent have caused the acceptance of *uti possidetis*.¹⁷⁴

Though it seems a weak reason, governments and elites have also played a role in the adaption of the principle.¹⁷⁵ African leaders decided to maintain colonial boundaries and enshrined in the charter territorial integrity principle with a believe that they are tangible; nation building will also gradually side line ethnic divisions by allowing free movement of citizens along the borders.¹⁷⁶ In addition, leaving colonialists were also avoiding such issue to maintain their special rights and corporate deals with their former colonies.¹⁷⁷

However, the situation of colonialism in Africa and Latin America was different. In the case of Africa, the principle of *uti possidetis juris* cannot be properly understood without some comprehension of history related to the Berlin Conference (1884-1885)¹⁷⁸ In Latin America administrative boundaries transformed into international frontiers between states which had previously been different provinces (or groups of provinces) all under one sovereignty, Spanish Empire.”¹⁷⁹

According to Shaw, unlike from Latin America, the colonialists in Africa were nearly seven which exposed the colonies to different colonialists at different times and majority of the frontiers were geometrical lines drawn by the colonialists without taking ethnic or economic consideration. With the collapse of colonial rule, most of the abstract lines running along

¹⁷³ See foot note No. 135 above

¹⁷⁴ Ibid

¹⁷⁵ Ibid

¹⁷⁶ See foot note No. 87 above

¹⁷⁷ Ibid

¹⁷⁸ See foot note No. 135 above

¹⁷⁹ See foot note No. 144 above

given longitudes and latitudes, dividing the colonial 'spheres of influence', were converted into international boundaries based on the principle of *uti possidetis juris*.¹⁸⁰ These colonially defined territories were transferred to boundaries at independence.¹⁸¹ There were also buffer zones, neutral and protectorate areas.¹⁸²

As also mentioned earlier, since there were different colonizers competing for various interests sometimes conflicting one where the initial frontiers or boundaries were subject to frequent changes based on treaties. The colonial rule of sphere of influence was not followed by effective occupation of inhabitants and it had deficiency or failure to respect the conditions necessary to generate titular or possessory rights such as the Berlin West Africa Congress of 1899, which permitted claims to contiguous territories based on possession of the coast is dubious in this regard.¹⁸³

Very soon European states had to take full responsibility for the translation of the paper partition and 'spheres of influence' into effective colonization on the ground. In this process many of the resolutions of the Berlin Conference were violated.¹⁸⁴ There was a constant imperialist back and forth with European powers swapping pieces of land with no idea what they were worth of, there was an implicit agreement between Europeans that ethnicities could freely move across colonial borders that is why scholars like Aswaj refer to some boundaries as separating the French and English as opposed African indigenous people¹⁸⁵ International boundary may be also changed by agreement. If the parties later agree on a variation of the original boundaries set at independence, then a new critical date is established and, as such, any subsequent border disputes would be analyzed in relation to the previously agreed-upon borders.¹⁸⁶

What is important here is presenting and identifying the treaty which shows the last boundary when there is dispute would be extremely difficult. Although multiple types of evidences could be presented, Hugo argues that courts are more interested in the immediate past rather than remote past and that immediate past is the critical date where the dispute said to have been crystallized. Unless preexisting circumstances support it, acts, evidences or events after

¹⁸⁰See foot note No. 135 above

¹⁸¹ See foot note No. 34 above

¹⁸² Ibid

¹⁸³ See foot note No. 17 above

¹⁸⁴ See foot note No 50 above

¹⁸⁵See foot note No. 87 above.

¹⁸⁶See foot note No. 131 above

critical date is not useful.¹⁸⁷ However, the points at which the dispute may be said to have crystallized may not be readily apparent, and the parties may well disagree as to when this occurred.¹⁸⁸ Thus, the court may not restrict itself to surveying a point in time to clarify its position. Contrary to this, the law of evidence in international law is less developed and whatever it is original documents to the issue may be needed.¹⁸⁹

The origins of all borders in Africa trace back to colonialism during the late nineteenth and early twentieth centuries where the treaties, agreements and exchanges of notes and protocols between the various colonial powers provided the legal basis for the boundaries.¹⁹⁰ Although majority of the borders did not consider, ethnicities, culture, or languages, some take into account such facts and taking this into consideration will also be necessary.¹⁹¹

Thus, recourse to other matters may become necessary in order to determine, if possible, the *uti possidetis* line though the principle itself is one of the international law.¹⁹² Such other matters would include, for example, administrative practices, the actual exercise of authority and the conduct of the new states during the period immediately after independence.¹⁹³

In all these complex situations, looking into the norms of the ICJ is important as the principle gradually developed and clarified by its decisions. But, its decision varies case to case. As it was mentioned above on its practices and in the case of Burkina Faso and Mali, a case which referred in many instances as a clarification on the status and scope of the principle, the Court tried to dispel the case by equally dividing the disputed border, saying that the two countries have failed to submit convincing evidence based on French colonial law to support their claim though the two countries required the court to decide based on the principle.¹⁹⁴ In the case of Niger and Benin, in its decision in 2005, the court dispelled based on effective control and the principle of *uti possidetis*.¹⁹⁵ In the case of El Salvador and Honduras in their land,

¹⁸⁷See foot note No..144 above

¹⁸⁸Ibid

¹⁸⁹ Ibid

¹⁹⁰Muhammad B. Ahmad, *African Boundaries and the Imperative of Definition*, Delimitation and Demarcation of Boundaries in Africa: General Issues and Case Studies, Commission of the African Union, Department of Peace and Security, Addis Ababa, September 2013. Accessed on 22/07/2013 from <http://www.peaceau.org/uploads/au-2-en-2013-delim-a-demar-user-guide.pdf>.

¹⁹¹See foot note No..144 above

¹⁹² Ibid

¹⁹³ See foot note No.34 above

¹⁹⁴ Ibid

¹⁹⁵ Ibid

maritime and Island dispute, it decided in favor of El Salvador which was arguing based on *uti possidetis de facto* while Honduras relied upon the theory of *uti possidetis juris*.¹⁹⁶

2.4. Critics on *uti possidetis*

The first criticism relates with the final effect of applying the principle. The acceptances of the application of the principle furnish legitimacy over the colonial disposition of territories by sidestepping the origins of these dispositions.¹⁹⁷ As disputes arise about the validity of these borders, questions about the legal status of the treaties that determined these borders surface and modern international law has similarly resisted confronting the question of unequal treaties for the same purpose.¹⁹⁸ Thus, the principle is blamed for recognizing illegal acts since colonialists have acquired lands and boundaries using threats and other unacceptable mechanisms. The principle even at the Roman Law was subject to good faith possession and to vindication if it is possessed by force, deceitful acts. However, modern international law conveniently eludes this critical limitation, perhaps because given the colonial modes of acquisition of territory; colonial boundaries run afoul of it.¹⁹⁹

The second criticism relates with the weakness of the principle to give priority to ethnics forcefully joined. The principle assumes the existence of a state within predefined territory or boundary. Usually, nations come first and states follow. In the decolonization, based on territorial state-nation formation, the State precedes the establishment of nationhood. Nevertheless, building such state-nations generates conflicts among minorities, ethnicities, and can engender ethno-nationalism, separatism, and sub-state nationalism and it is the cause of crisis of security and identity.²⁰⁰ Fearing the disintegration that may follow, claims of state formation based on ethnicity or other similar mechanism, except based on territory, were not allowed and the principle is criticized as it is anti-self-determination rights.²⁰¹

The fourth criticism is related with its weakness to bring peace and stability within and among countries. There are scholars who argue that the principle has neither prevented the occurrence of conflict nor served for settlement of boundary disputes as often claimed to

¹⁹⁶ *ibid*

¹⁹⁷ See footnote No. 21, above

¹⁹⁸ *Ibid*

¹⁹⁹ See foot note No. 21 above

²⁰⁰ Mark Simpson, the Experience of Nation-Building: Some Lessons for South Africa, 20 (3) J. S. AFRICAN STUD. 463, 363 (1994). Accessed on from

<http://www.jstor.org/discover/10.2307/2636939?uid=2129&uid=2&uid=70&uid=4&sid=21104027880627>

²⁰¹ See foot note No. 21 above

justify its application.²⁰²This is due to near-total ignorance of factors such as cultural, historical and geographic associated with the disputed territories.²⁰³Boundaries received through the principle can be modified only through consent and that consent only accepted if it is given by states. The principle fails or disadvantages cross-border communities who are often unrepresented by the governments on both sides of the frontier. It also fails to provide any remedy to border people, many of whom are not in strong enough political positions to mobilize support for their causes.²⁰⁴

In addition to this the principle, does not allow the support of other principles. This is due to the fact that the doctrine presupposes the existence of a certain boundary line, which in actual circumstances may not be ascertained no matter what, owing to lack of evidence or other factors.²⁰⁵The doctrine should have been supplemented by or substituted for other legal principles.²⁰⁶

²⁰²Canbidate 5, *UtiPossidetis*and the Ethiopia-Eritrea Boundary Dispute, 27 November 2006. Accessed on – from <https://www.duo.uio.no/bitstream/handle/10852/20947/49319.pdf?sequence=1>

²⁰³Ibid

²⁰⁴See foot note No. 17above

²⁰⁵See foot note No.202 above

²⁰⁶Ibid

Chapter 3- Emerging Challenges of African Boundaries

3.1. The Challenges of External Self-determination/Secession

3.1.1. The development of external self-determination

The legal concept of self-determination is very wide and may require separate treatment. In this chapter, however, self-determination will be considered in relation to its impact on the boundaries of African states. Although there are differences in the scope of self-determination, there are scholars who argue that it includes external self-determination, “the one associated with the establishment of independent states”²⁰⁷ meaning secession. According to these scholars secession is a legitimate exercise of self-determination particularly in response to gross and systematic violations of human rights.²⁰⁸

Thus, before directly considering the threat of secession/external determination to the boundaries African countries, it will be necessary to see the general concept or application of external self-determination or secession. Whatever arguments to be raised in the successive parts of this topic, they are meant to show external self-determination or secession contradicts with the principles of territorial integrity and *uti possidetis*. Thus, it does not intend to address the other political sides of secession or self-determination.

Most documents and literature refereed, though they highly favor internal self-determination over external self-determination, classify self-determination as internal self-determination and external self-determination. Internal self-determination means the right to authentic self-government, that is the right for a people really and freely to choose their own political and economic regime, while 'external' self-determination defined as “the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people.”²⁰⁹ It may be exercised

²⁰⁷ Patricia Carley, Self-determination Sovereignty, Territorial Integrity, and the Right to Secession, United States Institute of Peace, Peaceworks No. 7, Washington, DC 20005, p.3. Accessed on 21/02/2014
<http://www.usip.org/sites/default/files/pwks7.pdf>

²⁰⁸ Ibid

²⁰⁹ Dajena Kumbaro, The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention, Final Report, for North Atlantic Treaty Organization. Office of Information and Press 16 JUNE 2001. Accessed on from <http://www.nato.int/acad/fellow/99-01/kumbaro.pdf>, p.24

when internal self-determination is denied by a government that does not represent the people it governs.²¹⁰

Self-determination was considered by some scholars as a onetime event whose appeal would diminish over time i.e., after the completion of decolonization. However, it became one of the cornerstones of the international system which is considered to occur at any time like dynamite.²¹¹ Carley, for instance, points out that the issue of self-determination is becoming a serious challenge for US foreign policy makers and the international community as well.²¹²

Two general factors may serve as a reason for the rise of self-determination mainly external self-determination which are pursued by secessionists. One of the aggravating factors is that international borders are arbitrary, artificial and accidental which brought people together arbitrarily often against their will. The other factor is the spread of western ideals such as democracy and human rights.²¹³ It is less questionable that the right to self-determination is continuing to be claimed since international awareness and identity groups discover that they no longer have to endure intolerable forms of government.²¹⁴

The issue was continuously picked by various international human right related documents but with less clear definition on the scope and title holders. Redie states that self-determination was declared as the right of a nation to statehood and sovereignty in the French Revolution, the principle became universal when it was declared by UN Charter which is a political and legal instrument in 1945.²¹⁵

The principle of self-determination is expressly mentioned for the first time in Articles 1(2) and 55 of the UN Charter.²¹⁶ These two articles are complemented by Art. 73 of the Charter though it does not specifically mention the principle self-determination. In Art. 1(2) the world leaders declared that their commitment to develop friendly relations among nations based on equal rights and self-determination of peoples. Similarly, in Art 55, the Charter promotes

²¹⁰ Ibid

²¹¹ Aleksandar Pavkovic and Peter Radan in pursuit of sovereignty and self-determination: peoples, states and secession in the international order, *Macquarie Law Journal* (2003) Vol. 3. Accessed on 24/2/2014 from www.law.mq.edu.au/public/download/?id=16205

²¹² See foot note No. 208 above

²¹³ Ibid

²¹⁴ Ibid

²¹⁵ Redie Bereketeab, *Self-determination and Secession: A 21st Century Challenge to the Post-colonial State in Africa*, Policy Notes 2012/5, the Nordic Africa Institute. Accessed on 30/1/2014 from <http://nai.diva-portal.org/smash/get/diva2:567296/FULLTEXT01.pdf>

²¹⁶ See foot note No. 209 above

higher standards of living necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.²¹⁷

According to Kumbaro, the Charter does not help in the application of either internal or external self-determination in that it refers to self-determination as a right without providing additional details as to the scope and manner of implementation. However as per the scholar, the inclusion in the Charter has provided it the status of international law, positive international law.²¹⁸ Forsyth also argues that Art.1(2) of the UN Charter only provide limited rights to people, in the early days of the UN, the right to self-determination was quite limited and seemed to simply the right of peoples to self-government and thus , after citing Cassese, the Charter neither provided political independence, secession, formation of representative government nor the merging of two independent states.²¹⁹

Nevertheless, according to Redie, though the charter failed to define the term people, it grants the right of self-determination to two groups: colonized people and, people subjected to foreign domination. Pentiguslania, points out that, within the broad interpretation of Art. 73 of the Charter, the right to self-determination is linked with the process of decolonization and it began to be recognized as a legal right in this context.²²⁰

However, as to Kumbaro and Forsyth, in relation to the scope and the right holders and position of UN to self-determination, some clues began to emerge in UN documents since 1960, together with the passing of resolution 1514 (XV), known as the Declaration on the Granting of Independence to Colonial Countries and Peoples (DGICCP) by the United Nations General Assembly (UNGA) which expanded the concept of self-determination of peoples. According to Forsyth, the Declaration acknowledges people's internal and external rights which contrast with the initial limited meaning of self-determination, thus marking an evolution of the self-determination.²²¹

DGICCP deals with decolonization and the right of self-determination of peoples in non-self-governing territories which is a result of a struggle of socialist countries for complete

²¹⁷ Ibid

²¹⁸ Ibid

²¹⁹ Jack Holmberg Forsyth, *Self-Determination, Secession, and State Recognition A comparative study of Kosovo, Abkhazia and South Ossetia*, Faculty of Lund University, 2012. Accessed from <http://www.vfrbooks.com/secession-statehood-and-the-recognition-of-kosovo-PDF-29299795/>

²²⁰ Gaetano Pentassuglia, *state sovereignty, minorities and self-determination: A comprehensive legal view*, international journal or minority and group rights, Kluwe Law International, Netherlands 2002, international Journal on Minority and Group Rights. 9, 303-324. <http://oppenheimer.mcgill.ca/IMG/pdf/pentassuglia.pdf>

²²¹ See foot note No. 219 above

decolonization.²²² Kumbaro also states that the declaration interprets the UN Charter of self-determination and indicates that independence within the colonial context, as the principal means through which self-determination is implemented.²²³ Since the DGICCP states people in association to colonialism, the right holders are people under colonialism and the declaration is considered by Africans and Asian countries as sacred document with nearly equal weight as the UN Charter.²²⁴

The aforementioned scholars agree that self-determination provides for the right of independence for people who are under colonization and foreign administration. The UN Charter conferring the right of self-determination to people but it did not clearly define who these people are. Similarly, the declaration did not define people though the scholars like Forsyth seem to argue that it relates to territorial people.

3.1.2. External-self-determination as human right Issue

Self-determination, however, continues to develop as a political, human right and legal concept which has its own peculiar features of application. According to Shaw, the political expression has more influence over the legal rights; while the legal concepts have their own binding nature, different from political rights.²²⁵

The UN Covenants on Human Rights – the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, the Helsinki Final Act, both include an article on self-determination with exactly the same wording.²²⁶ The two UN Covenants state in their first Article, Art.1 that all peoples have the right “to freely determine their political status and...cultural and economic development” which proves that self-determination is part of human right, universality(mentioned as all people) and its importance, as it is placed initially, to exercise other rights.²²⁷ However, according to Carley, these and other documents failed to define exactly who is entitled to claim this right—a group, a people, or a nation—and what exactly the right confers.²²⁸

²²² Ibid

²²³ See foot note No. 209 above

²²⁴ Ibid

²²⁵ See foot note No. 34 above

²²⁶ Ibid

²²⁷ ibid

²²⁸ See foot note No. 207 above

A major complication started to surface in the scope of self-determination together with the approval of the Declaration of Friendly Relations and Cooperation among States (DFRCS) by the UN General Assembly (UNGA) in its resolution 2625 (XXV) of 24 October 1970. According to Kumbaro, the Declaration contains two fundamental principles of self-determination which are said to have achieved customary law status. These are 1) peoples under colonial or alien domination have a right to self-determination, i.e. to attain the status of sovereign states or any other political status freely determined by themselves; and 2) peoples under racist regimes have the right to internal and external self-determination either by achieving self-governing or seceding from the racist state.²²⁹ As the previous declaration and the UN Charter, DFRCS also did not define the people who are allowed to secede. But, as per the second principle of DFRCS, unlike the Charter and the DGICP, people who are victims of a racist regime can claim secession.

As per the third principle derived from DFRCS, even if it is debatable and open for interpretation, peoples within existing States can claim self-determination without concern about territorial integrity if they are treated in a grossly discriminatory fashion by an unrepresentative government. But, such right could be exercised as a last resort if they are blocked to be attained by internal self-determination.²³⁰ Similarly Forsyth argues that the declaration, particularly the fifth principle which deals with the importance of safeguarding territorial principle, does not deny governmental representation to racial and religious groups; and if it does in fact discriminate against said groups, its right to territorial integrity might be compromised.²³¹

Generally, scholars argue that the DFRCS can be interpreted as incorporating internal self-determination and external self-determination where the latter is used as a remedy when the former is not met. But such remedies are limited to religious and racial groups, and not applicable for linguistic or other national groups.²³² But, still the declaration upholds territorial integrity.

Since the adoption of DFRCS, the scope of self-determination generally seems continue expanding in its meaning. For instance, while the Vienna Declaration refers to the DFRCS on its adopting conference and the final version, it does not mention the racial and religious

²²⁹See foot note No. 209 above

²³⁰Ibid

²³¹See foot note No. 219 above

²³²ibid

requirements for self-determination and this may be interpreted as a bid to remove such limitations and include all categories of peoples in sovereign states.²³³ The Helsinki Act, the Security and Cooperation Act of Europe approved in 1975, acknowledges internal self-determination and external self-determination though its focus is on internal self-determination expressed by granting people the right to choose a new social or political regime, to adapt the social or political structure to meet new demands, so that its voice be reflected in the policy of its government.²³⁴

3.1.3. The practice of Secession/external self-determination (ESD)

Considering the practice may also be necessary to see the scope as well as the application of self-determination mainly secession in relation to territorial integrity principle. The decision of the Canadian Supreme Court is one of the evidences of the application of internal self-determination and external self-determination. The Court indicated that the people of Quebec had the right to self-determination but that external determination can only be exercised under circumstances where internal self-determination is denied. But not all type of government can deny external self-determination using internal self-determination as a defense or territorial integrity. The government has to govern in a manner representative of the whole of the people or peoples resident within its territory, equally and without discrimination and respect the principles of self-determination as part of its own internal arrangements.²³⁵

As far as the practices of ICJ are concerned, it is possible to reservedly say ICJ recognizes the developmental (expanded meaning) and the decolonization concepts of self-determination. In the case of Namibia, for instance, the right to self-determination was decided based on the Charter and subsequent declarations while in the case of Western Sahara, in its advisory opinion, it extended the definition provided in the 1960 UN declaration by indicating that the right requires the free and genuine expression of the will of the people, which means the need to have a plebiscite or referendum, and granted the right of the Western Sahara to have self-determination.²³⁶ As per the ICJ, even if Morocco has been claiming Western Sahara as part of it and allowing to separate would amount as violating territorial integrity principle, the Court reject and allowed Western Sahara to exercise self-determination. Forsyth refers to the

²³³ Ibid

²³⁴ See foot note No. 209 above

²³⁵ Ibid

²³⁶ Ibid

opinion as an indication that self-determination prevails over territorial integrity as Morocco has been claiming Western Sahara on its part. In the case of East Timor ICJ decided based on a contemporary definition of self-determination²³⁷; i.e to secede.

On the other hand UNGA assembly seems to favor the decolonization meaning of self-determination. Morocco rejected the right of Western Sahara and continued claiming part of it. UNGA knowing that Western Sahara has the right to self-determination, kept silent when Morocco defies the right of Western Sahara since 1976 which amounts as the Assembly accepts the prevalence of territorial integrity over the right to self-determination.²³⁸ Similarly, in the case of East Timor which was suffered with the competing interests of Portugal and Indonesia where the respective countries were trying to make one of their province, the United Nations Security Council decided through Resolution 1272 (1999) to create the UN Transitional Administration in East Timor (UNTAET) with full responsibilities for the administration of the territory of East Timor based on their will.²³⁹ Nevertheless, it does not assist the East Timor to realize as per the resolution by freeing them from Indonesia by refraining from putting any sanction on Indonesia.²⁴⁰

The recognized sources of international law uphold that the right to self-determination of a people (political, economic, social and cultural) is normally fulfilled through internal self-determination within the framework of an existing state. A right to external self-determination arises in extreme cases and under carefully defined circumstances.²⁴¹ The international acts quoted above grant the right to self-determination of ‘peoples’, and despite their large number, no precise meaning of the term “people” has been construed. Two possibilities have emerged - that ‘peoples’ means the entire people of a State, or it means all persons comprising distinctive groupings on the basis of race, ethnicity and perhaps religion. Based on the decision of the Supreme Court of Canada in relation to Quebec’s claim of secession acceptably indicated that people could point to other groups of individuals other than the entirety of the population of a state,²⁴² others however define people differently and no conclusive definition was set forth yet.

²³⁷ *ibid*

²³⁸ *ibid*

²³⁹ *Ibid*

²⁴⁰ See foot note No.219 above

²⁴¹ *ibid*

²⁴² *ibid*

Despite this progressive jurisprudence, however, there is, in fact, little direct evidence that customary international law supports the right to secession. Thus, it must be necessary to look into also State practices in the last decade, which seem to suggest the emergence of secession as a recognizable right including the forceful secession of component parts of the USSR and Yugoslavia. It should be noted, therefore, that the successes of the claims for secession are in large part attributable to the international community's willingness to extend recognition to them.²⁴³

Forsyth argues that out of the 15 states separated from the USSR, 12 have no the right to self-determination of contemporary meaning let alone secession, but they unilaterally sought independence and get recognition by the international community which show evidence of surprising flexibility of law.²⁴⁴ However, it is possible to understand from Forsyth argument that the countries get recognition with the interpretation of self-determination that such countries had the right to external self-determination though the claim may not fall within contemporary (racial or religious governmental discrimination) or initial meaning of self-determination. Thus, the recognition could also significantly matters on the exercise of secession.

3.1.4. The tension between ESD (secession) and territorial integrity

Different scholars have argued that secession is inconsistent with the principle of territorial integrity. Secession is generally interpreted as splitting from an existing state and involves separation of a part of that state from the rest of its territory. What has to be understood is that secession results in border changes since there will be the creation of new states separated from old states.²⁴⁵ It is also a much more far-reaching act of separation than a demand for self-determination that does not alter the boundaries of particular states such as a call for power sharing between federal government and sub-regional political entities (eg federalism, decentralization, regional autonomy).²⁴⁶

The problematic situation or the inconsistency between territorial integrity (*utipossidetis*) and secession begins from the purpose in that the former disallows further separation after

²⁴³See foot note No. 209

²⁴⁴See foot note No. 219 above

²⁴⁵ See foot note No. 215 above

²⁴⁶ Edmond J. Keller, Secession in Africa, the Journal of African Policy Studies Vol.13, No.1, 2007. Accessed on 30/01/2014 from <http://www.sscnet.ucla.edu/polisci/faculty/keller/papers/SelectedPub/AfricaSecessionism.pdf>

colonial independence because it creates cracks which allow continuous claims of secession while the latter occurs after independence and argued that it stops right related violation. Because once free from colonial rule, the newly established states become entitled to territorial sovereignty.²⁴⁷ It implies that no more claim of independence once independence was achieved from colonization or foreign administration.

Contrary to this, secession has the effect to the extent of redrawing the boundaries of existing sovereign states and it is considered to be inconsistent with territorial integrity. As summarized by Kumbaro, the principle of national unity and territorial integrity may have to yield if the state concerned is not possessed of a government 'representing the whole people,' and if a people are completely denied the right to effectively exercise its right to internal self-determination.²⁴⁸

Many issues can be raised in relation to the legality of secession and scope of self-determination in international law and constitutional law, however, the most significant issue arises when secession has actually taken place is the issue of the proposed borders of the new state.²⁴⁹ For instance in the case of the breakaway states of the Soviet Union, Yugoslavia, Czechoslovakia, a great number of issues were raised, however, the issue of boundaries was the most important and frequently raised issue.²⁵⁰ The problem is related with how and who will decide new boundaries. The law of territory governs the acquisition, territorial integrity and boundary stability and the problem arises in the legal basis of the transformation of internal or administrative borders into international boundaries upon independence in the light of territorial and human rights concerns and related issues of self-determination.²⁵¹

The boundary or territorial scope issues of newly formed state was more contesting one than the issue of the right of secession itself which certainly caused war in Yugoslavia.²⁵² Serbia (the remaining Yugoslavia) rejected the existing internal administrative lines as boundaries and promoted a new delimitation of boundaries among republics while the seceding

²⁴⁷ Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation" (1991). Faculty Scholarship Series. Paper 2434. http://digitalcommons.law.yale.edu/fss_papers/2434. Accessed on 06/03/2014
http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3429&context=fss_papers

²⁴⁸ See foot note No. 209 above

²⁴⁹ See foot note No. 211 above

²⁵⁰ Mladen Klemencic, Boundary and Solutions Following the Breakdown of Yugoslavia, Articles Section, IBRU Boundary and Security Bulletin April, 1993. Accessed on 21/02/2014
from <https://www.dur.ac.uk/ibru/publications/download/>

²⁵¹ See foot note No. 34 above

²⁵² See foot note No. 211 above

Republics claim for the recognition of the former republics within the existing boundaries based on historical development and Federal Constitution.

The differences could not be resolved through negotiation and an Arbitration Commission was established which lastly recommended the application of the *uti possidetis* to serve as basis for the demarcation boundaries.²⁵³ The Commission in its third opinion has stated that all external boundaries of the former Yugoslavia must be respected become boundaries protected by international law following the principle of *uti possidetis* unless changed on the basis of free and mutual agreement²⁵⁴

As indicated by different scholars the international community seems still to rely on *uti possidetis* to solve the boundary issues of seceding states following the suggestion of the border commission, Badinter Arbitration Commission. The international community, following the opinion of the Commission, ordered that the existing internal borders of Republics were transformed to international borders based on *uti possidetis* that had applied to cases of decolonization.²⁵⁵ After citing different authors who argued that the principle has been applied to demarcate borders of seceding states, Jure Vidmar also states that without any reference to *uti possidetis* in the underlying legal instruments, such practice was developed in the territories of the Soviet Union, Czechoslovakia, Ethiopia/Eritrea, Indonesia/East Timor, Serbia/Montenegro, and Serbia/Kosovo.²⁵⁶

Its application have received a mixed criticism as it will be discusses after considering whether secession is a threat to the boundaries of African states.

3.1.4. Secession as an emerging challenge to African boundaries

As indicated in Chapter 2 of the study, the major reason for adopting the principle of *uti possidetis* by African countries in 1963 was to tackle the claim of secession or self-determination and other border conflicts which will threaten the territorial integrity of newly decolonized states. The leaders were aware that independence claims other than those based on colonial territory would result in the disintegration of the continent and they suppressed the issues of claims based on culture, language, and ethnicity though it was clear that most of the borders or boundaries were created without consideration of such matters.

²⁵³See foot note No. 250 above

²⁵⁴See foot note No. 211 above

²⁵⁵Ibid

²⁵⁶See foot note No. 36 above

During independence, the issue of territorial integrity was widely accepted though self-determination was being raised and this has also helped the continent to strengthen its position. According to T.O. Elias the principle is related with non-interference and respect sovereignty of countries enshrined in the purpose and principles(Art.3) of the OAU Charter which themselves are derived from Art. 2(7) of the UN Charter.²⁵⁷

This is because partly the goal of world (and regional) peace had been protecting territorial integrity of decolonized states.²⁵⁸ The African Union has also explicitly reaffirmed its adherence to this norm of territorial integrity when it replaced OAU in 2000.²⁵⁹ Respect for colonial borders did not spare the continent from festering conflict and Africa has faced challenges from secessionist movements that invoked the right to self-determination.²⁶⁰

As mentioned in the earlier topics though there is still a strong argument that the right to secession is not protected by international law, the development of human right issues and the end of socialist and capitalist camp have created room for secession. According to Katz in the past, empire building has remained unaffected however after the end of cold war and demands for democracy in Africa are challenging the legacy.²⁶¹

As indicated earlier, African and Asian countries particularly consider the 1960 declaration as a sacred document. Until now, the kind of independence claim (right of self-determination) accepted by all scholars is the independence claim from colonization and foreign administration. Therefore, is unclear whether Africans accept the other international human right treaties and declarations particularly DFRCS though some of its principles are argued to have achieved the status of customary law. The “people” who are entitled to claim new territories or secede and the exercising mechanisms are not clearly defined and indicated in conventions, declaration or treaties. It is rather open to interpretation and a matter of practices. On the other hand, even if the practices of state recognition of seceding state

²⁵⁷T.O. Elias, “the Charter of the Organization of African Unity.” *The American Journal of International Law* 59:2, 243-267. Accessed from www.jstor.org/stable/2199687

²⁵⁸ See foot note No. 207 above

²⁵⁹ See footnote no. 1 above

²⁶⁰ See foot note No. 215 above

²⁶¹ Mark N. Katz, *Africa's Dilemma: European Borders, Contested Rule, Current History*; Apr 1995; 94, 591; Research Library Core pg. 182). Accessed on 30/01/2014 from <http://digilib.gmu.edu/jspui/bitstream/1920/3112/1/Africa%27s%20dilemma%20European%20borders,%20contested%20rule.pdf>

matters, the right to unilaterally establish a new state based on the principle of self-determination outside the colonial context is not recognized in international law.²⁶²

Some new commitments and principles, different from the Charter of the OAU, included in the new AU Constitutive Act will add to the aforementioned complexity of the issue. In the Act, the leaders have expressed their determination to take up the multifaceted challenges that confront the continent and peoples in the light of political changes taking place in the world.²⁶³ Most importantly, in the same preamble, the leaders declare their determination to promote and protect human and peoples' rights, consolidate democratic institutions...²⁶⁴ As per Art.3(h) of the Act, one of the new objectives of the leaders is promoting and protecting human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.

In Art. 20(1) of the African (Banjul) Charter on Human and Peoples ' Rights entered into force in 1986, all peoples shall have unquestionable and inalienable right to self-determination to freely determine their political status.²⁶⁵ As stated above respect for borders existing on achievement of independence is one of its cardinal principles. In contrast to this, considerable emphasis is given to self-determination including the determination of political status. In all these situations, like the previous declaration and convention, the term people is not defined. Thus, the purposes of these new additions will remain unclear and may serve as a ground for secession using different interpretations, as mentioned earlier. It will be subject to recognition.

According to Mhango there are two positions to the definition of people in the African Human Rights Charter. One of the positions follows the thought that decolonization stands that people is defined within territory, not each ethnics separately, while the other argue that the term could refer to members of ethnic groups or even other social groups.²⁶⁶ The African Peoples' Human Right Commission has interpreted the definition of peoples and self-

²⁶² Terence McNamee, The first crack in Africa's map? Secession and Self-Determination after South Sudan, Discussion Paper 2012/01, the Brenthurst Foundation). Accessed on 30/01/2014 from <http://issat.dcaf.ch/fre/content/download/6238/54041/file/Brenthurst+paper+2012-01.pdf>

²⁶³ See foot note No. 13 above

²⁶⁴ Ibid

²⁶⁵ Organization of African Union, African Banjul Charter on Human Peoples Rights , adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986. Accessed on http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf

²⁶⁶ Mtendeweka Owen Mhango, Recognizing a Right to Autonomy for Ethnic Groups under the African Charter on Human and Peoples' Rights: *Katangese Peoples Congress v. Zaire* *Katangese Peoples Congress v. Zaire*. Accessed on 30/01/2014 from <http://www.wcl.american.edu/hrbrief/14/2mhango.pdf>

determination in a way that applied during colonialism when it decided a claim of Katanga's ethnic group demanded secession through liberation front in 1992.²⁶⁷ Thus, the challenges of self-determination in relation to scope and the determination of people will also apply in Africa.

Practically, Eritrea and South Sudan exercised the right to secede. There are scholars who also include Somaliland though it has not received recognition from the rest of the world nor has it received acquiescence from the larger Somalia Republic like South Sudan and Eritrea. However, the spillover effects of these secessions have received two opposing views between those who argue that the case of these three African countries mainly Eritrea, South Sudan is an exception and rare occurrence while others argue that these are signs that the principle territorial integrity might be disregarded by more secession claims.

For instance, a recent gathering organized by the African Peace and Security Institute at the Addis Ababa University entitled on "Border Governance for African Integration: Progress and Challenges" has depicted that the continental-level consensus for retaining inter-colonial boundaries as independent Africa's international boundaries or borders has not stopped agitations for change.²⁶⁸ To the report what is more worrisome is the secession witnessed by Eritrea and Somalia.²⁶⁹

The trend of the past secession attempts which do not succeed will not give a good lesson for future action due to the changing nature of international relations and records of democracy. Controlling previous secession attempts does not guarantee that they will not revive. John G. Hund, argues that tribalism and ethnicity is rising in the 21 century and they are not about to disappear in a few generations.²⁷⁰ Kartz indicates that the aborting of greatest secession attempts such as Ebo ethnics in Nigeria (1967), Cabinda (Angola), Casamance (Senegal), and, Zululand (South Africa) ²⁷¹do not mean the end of secession. According to Katz even though they did not amount to changing the legacy, the recent Coup attempts and ethnic

²⁶⁷ Ibid

²⁶⁸ -----Border Governance for African Integration: Progress and Challenges, Institute for Peace and Security Studies' Africa Peace and Security Program (APSP), Addis Ababa University, November 26 – December 1, 2012, p.9

²⁶⁹ ibid

²⁷⁰ John G. Hund, Reflections on the Roots of War, Politics of Identity and Exclusion in Africa: From Violent Confrontation, 25–26 July 2001, University of Pretoria to Peaceful Cooperation

²⁷¹ See foot note No.261 above

tensions, exacerbated by the process of democratization, such as the case of assassinations of leaders in Rwanda and Burundi are not considered as encouraging trends.²⁷²

Though they are not the obvious type of secessionist struggle, recent coup attempts and civil wars such as civil wars in Liberia, Southern Somalia, and Angola took place with the ambition to replace the one ethnic or tribal group by the other; after controlling certain parts of the country by ethnically homogeneous people in a form of de facto state.²⁷³ According to Khapoya interstate and intrastate wars occurred in Africa since independence though African leaders were hesitant to reconsider the issue of colonial borders fearing that it would open a Pandora's box.²⁷⁴ For instance, there had been intrastate war in Nigeria, Sudan, Somalia, Sierra Leone, Democratic Republic of Congo, and Côte d'Ivoire though such wars did not result in separation and subsided at some point. But such wars will not guarantee that there will not be similar wars in the future.²⁷⁵

Failing to fulfill the promise of development, to rule in behalf of all and end of cold war more favor the challenges of the legacy of empires at the same time leaders are better armed to resist changes and the result of this will be either voluntary integration, involuntary integration, secession, or chaos.²⁷⁶ International law also provides few pointers in deciding on future independence movements in Africa as elsewhere but there will be more cases where the principles of 'self-determination' and 'territorial integrity' collide, with no clear track to reconcile the two.²⁷⁷

In a discussion focusing on the complex issues surrounding self-determination and secession organized by the United States Institute of Peace in conjunction with the Policy Planning Staff at the U.S. Department of State in 1995 where government policymakers and outside experts were also participants, the views of two participants are also indicative and need weighting for future action. One of the participant, Graham Fuller of the RAND Corporation, argued that the continent of Africa is feared likely to be a "staggering mess" as the concepts of ethnicity and borders enter future debates over identity while the other participant, Scott Thompson of the Fletcher School of Law and Diplomacy, countered by arguing that since

²⁷² *ibid*

²⁷³ *Ibid*

²⁷⁴ See foot note No. 63 above

²⁷⁵ *Ibid*

²⁷⁶ See foot note No.261 above

²⁷⁷ *ibid*

there have not been major challenges to the colonial borders and for many Africans colonial borders are basis for their identities.²⁷⁸

McNamee who deals on this controversial issue under a title the First Crack in Africa's Map? Secession and Self-determination after South Sudan, states that although the South Sudan case is likely to remain an exception rather than a precedent, the Arab Spring is a salutary reminder, if any was needed, that events have a way of building on themselves.²⁷⁹ According to McNamee, let alone what we fear, the Arab Spring which no one has expected to occur has happened and thus the likelihood of occurring of claims which have colonial grounds is very high.

According to McNamee in nearly all states, ethnic divisions have arguably become more pronounced.²⁸⁰ It is for this reason that some have questioned whether Africa's tensions between secession and territorial integrity self-determination project has failed, or at the very least is still straining to 'create' Nigerians, Congolese and so on.²⁸¹

3.1.4.1 Causes and remedies of secession in Africa

The colonial boundaries in Africa are believed to be the causes of many problems in the continent. Nevertheless, the states have also been able to continue as sovereign and to bring together different ethnics with all the problems. As it was also discussed earlier, secession may be admitted if the internal self-determination is denied or failed to rectify it. It is thus possible to point that such colonial related problems could also be reduced through internal governmental frameworks such as the prevalence of democracy including the exercise of internal self-determination. Thus, identifying the root causes would help to foresee the right solution before secession and demarcation of boundaries became a challenge or reality.

Ikome has stated that African state, composed of several seemingly incompatible nationalities, forcefully held together by imposed colonial boundaries and autocratic governments, the advent of democratization provided the impetus for various marginalized groups to begin to seek redress, which included demands for separate statehood.²⁸² Samarasinghe, after assessing different definitions of Democracy and the

²⁷⁸See foot note No. 207 above

²⁷⁹See foot note No. 262 above

²⁸⁰ibid

²⁸¹ibid

²⁸²See footnote No. 2 above

differences in the concept of democracy between western and developing countries, democratization is defined as a process of political change that moves the political system of any given society towards a system of government that ensures peaceful competitive political participation in an environment that guarantees political and civil liberties.²⁸³

According to Ikome secession becomes an alternative remedy when there is force used to maintain colonial boundaries and autocratic governments. Thus, if there is competitive political participation that guarantees political and civil liberties, the chance of claiming secession will be reduced as there will not be autocratic government.²⁸⁴

As indicated by Redie, based on the conference held for two days on 13 and 14 August 2012 in Juba University where scholars, politicians and activists gathered to discuss and analyze the challenges of self-determination and secession on the African continent, have identified four types of self-determination movement in Africa since independence:²⁸⁵

- Cases that were created by colonialism but where there was forcible annexation by neighboring countries following the end of colonialism,
- Cases of non-colonial creation involving secession from the postcolonial state,
- Cases created by colonialism whereby states voluntarily join a union, but later wished to rescind the union,
- A case that was not a colonial creation involving the right to self-determination and the achievement of independence.

While elaborating the problem, the conference has indicated that cases that were created by colonialism but where there was forcible annexation by neighboring countries following the end of colonialism, includes Eritrea, Namibia, and Western Sahara with understanding their own respective unique features of annexation.²⁸⁶ Eritrea's problem begins with the creation of Italian colonialism. When Italy was defeated, the area was federated with Ethiopia by the decision of UN in 1952 but Ethiopia arbitrarily and formally dismantled the federation

²⁸³S.W.R. de A. Samarasinghe, *Democracy and Democratization in Developing Countries*, The American University & Institute for International Research Washington, DC and International Centre for Ethnic Studies, July, 1994. Accessed on 03-02-2014 from <http://www.hsph.harvard.edu/ihsig/publications/pdf/No-7-1.PDF>
Kandy, Sri Lanka. Accessed from <http://www.hsph.harvard.edu/ihsig/publications/pdf/No-7-1.PDF>

²⁸⁴See foot note No.2 above

²⁸⁵See footnote No. 215 above

²⁸⁶ *ibid*

and annexed and made Eritrea province of Ethiopia which however compelled Eritrean to launch quest for independence.²⁸⁷

A more or less similar incident has occurred for Namibia. It was initially part of the colony of Germany but later on given to trusteeship of South Africa in 1945. In 1965 the UN granted Namibia the right of self-determination but South Africa did not accept such right and thus considered as it annexed Namibia.²⁸⁸ Western Sahara was considered the colony of Spain but later on annexed by Morocco.²⁸⁹ The history of these colonization and way of annexation may attract opposing views. For instance, in the case of Eritrea, there is the argument that Eritrea was reunited with Ethiopia through the will of Eritrean people but not by the forceful annexation of Ethiopia. There are also arguments that Eritrea was a colony of Ethiopia while others vehemently disagree and say such arguments will contradict the objective and effect colonialism in Africa. Nevertheless, the important issue here is that the problem started to exist in association with colonialism of Italy, Germany, and Spain respectively.

The conference classified secession struggle based on identity such as Biafra in Nigeria and Katanga in the republic of Congo has no bases of colonial engineering rather associated with resource control and differential identity and thus they do not have legal grounds to claim secession as the UN charter supports secession for people who are under colony or foreign domination.²⁹⁰ Although it is difficult to conclude that all secession movements are the result of colonialism or have sufficient causes for secession, the influence of colonialism around Congo and Nigeria was very high and the interests were conflicting one. In the case of the Congo it is possible to conclude all western colonial countries have been involved due to strategic importance of Congo River and resource richness of the region and the contribution of colonial debris should not be undermined.

Nigeria, which is an extremely ethnically diversified country was predominantly colonized by British until 1960. When it gets its independence it brought together three independently administered or relatively separate states, Ibo, Yourba, and Hausa-Fulna with different treatment and governance of Yuruba and Ibo during colonial period.²⁹¹ And the motivation of

²⁸⁷ Ibid

²⁸⁸ Ibid

²⁸⁹ Ibid

²⁹⁰ Ibid

²⁹¹ See foot note No. 247 above

secession was economical, cultural and linguistic where the majority elite were attracted by the former while average Ibo were attracted by the latter two.²⁹²

Similarly Fuller, as depicted by Carley, states that four reasons have attributed for the rise of self-determination (secession) in recent times:

- Firstly, the existing of borders between internationally recognized nation-states are artificial, arbitrary, accidental, and, furthermore, not permanent;
- Secondly, most states, except in the West, are not a reflection of the congruence of ethnic and territorial boundaries which are typically “mini-empires” of ethnically distinct peoples who find themselves arbitrarily forced to live within the same borders;
- Third, most people going through self-discovery originated from identity groups who discover that they no longer have to endure intolerable forms of government. Such attitudes have been aggravated by principles of western democracy and economical marginalization where some who are disadvantaged as a result of rapid global economic changes are turning to ethnicity, religion and nationalism to address their grievances.²⁹³

The causes as well as the facts indicate that secession is a threat to Africa. the argument that Eritrea and South Sudan are exceptions seem less convincing and appear to be a type of argument that some other secession has to occur to justify it. The effect of colonial boundaries coupled by weak democratization process in Africa in contrast to development of democratic principles elsewhere mainly in the west and human rights achievement may exacerbate the issue of secession.

3.1.4.1.1. Remedies

Some of the remedies seem to be important to reduce the complex situation which may surface in relation to boundary dispute between seceding and mother state. The scholars similarly argue that seceding by itself will not bring peace and stability rather the result is unpredictable and unsure that seceding states may not even further divided. Carley, for instance, argues that encouraging democracy, respect for human rights and granting local

²⁹²Ibid

²⁹³See foot note No. 207 above

autonomy might be the answer to the self-determination dilemma.²⁹⁴ The desire among identity groups to seek self-determination is not a simple matter with a single cause rather it gradually develops until secession became a last resort and thus attentive analyzing and addressing the causes of the claim before they escalate to violence and secession are the only means of achieving them.²⁹⁵

Kartz recommends exercising of voluntary integration because ethnics resolve their dispute peacefully by leaving aside identifying based on respective ethnicity and look as nation as a whole where no one ethnic group would dominate the government or the military.²⁹⁶ When voluntary and involuntary integration (achieved through force which is undemocratic and less sustainable) is not possible, secession occurs but it is highly problematic to determine where the new border should be drawn, since ethnic groups do not live in neatly segregated areas.²⁹⁷ Raedi, who concludes that Africa is at a crossroad either to maintain or revise territories, argues, among others, that the continent has to boost integration, ensure inclusive and equal participation by identity groups in the national polity.²⁹⁸

McNamee also points out that the status of borders of the new states will always carry grave risks, as it triggers for violence as attested in the Sudan and South Sudan case.²⁹⁹ Drawing a new international border will never be a panacea – it certainly didn't prevent Eritrea and Ethiopia from waging all-out war for intractable intra-state conflicts.³⁰⁰ Nevertheless, he accepts the formation of new states could be part of the solution in very specific cases where the interests of national and international security are best served by changes to the territorial status quo.³⁰¹

They argue addressing the causes such as ensuring internal self-determination, peaceful integration will help to avoid secession. Secession, they argue, do not ensure peace and stability. As clearly indicated by McNamee in particular, resolving the boundary issue is very difficult. Eritrea has seceded and the border issue, coupled with other reasons, has dragged the two countries to a very costly war. The boundary of Sudan and South Sudan has not yet started to be demarcated though the two countries signed agreement to peacefully demarcate

²⁹⁴Ibid

²⁹⁵ Ibid

²⁹⁶See foot note No. 261 above

²⁹⁷ ibid

²⁹⁸See foot note No. 216 above

²⁹⁹ See foot note No. 262 above

³⁰⁰ Ibid

³⁰¹ Ibid

their border. Thus, the question is that how the border will be demarcated in case all efforts and such remedies failed and secession occurs?

3.1.5. Controversy in the application of *uti possidetis* in secession

As it was touched in the previous topic, presently, as it used to be during decolonization, the only readily available solution addressing border issues of seceding state is the principle of *ut ipossidetis juris*. Nevertheless, it is being criticized from various perspectives. Shaw, states that the acceptance of *ut ipossidetis* as a principle of general applicability going beyond the purely decolonization scenario has been challenged.³⁰² Firstly, the application of the principle to boundary demarcation of seceding and remaining state as a law is wrong and, secondly, the principle is criticized as it is against the norm of self-determination and human rights.³⁰³

The first criticism is that the Arbitration Commission of Yugoslavia reached a conclusion with a wrong interpretation of ICJ's justification in the application of the principle in relation to the 1986 boundary decision of Burkina Faso and Mali in which the Court affirmed that the doctrine of what was a "rule of general scope" and a "general principle."³⁰⁴ Although the expression is misleading one, ICJ has been referring to the general application of the principles for countries which claim independence from colonization but not other types of independence or secession by countries which were not colonized. However, the Commission had taken it to mean that the principle applies to all kinds of independence including secession which is an error committed in interpreting the explanation of the Court.³⁰⁵

As to the second challenge, the principle is against the norm of self-determination and the seceding people territories have to be determined by considering human rights and thus the people concerned. However, there are scholars who counter argue that the right to self-determination will not go beyond internal solution like autonomous right and would not include territorial challenge.³⁰⁶

As per the second challenge, the boundary has to be demarcated based on the claim of a seceding state but such arguments have not yet conventionally settled and if the case of Yugoslavia is taken into consideration it will be more difficult to Africa. The challenge to Africa will be in to two aspects. Firstly, in case a group tries to secede, the issue as to who

³⁰² See foot note No.34 above

³⁰³ Ibid

³⁰⁴ See footnote No. 34 above

³⁰⁵ Ibid

³⁰⁶ Ibid

will finally vote whether the whole people or the group who claims secession will be a problem. The second and the most important one is the historical background and status of Yugoslavian and African state is not similar.

In the case of Yugoslavia, the six countries which make up Yugoslavia Federation though they sometimes break up while they unite in other times, they were historically considered as entities with boundaries. Besides to this, the 1974 Yugoslavs' Constitution declares that Yugoslavia is federation of republics whose status amounts to a state and declares the inviolability of boundary of each republic without the consent of the republic concerned, among others.³⁰⁷

According to Shaw if the newly seceded and existing did not agree on the border situation or on the new arrangements of border lines then failing to apply *uti possidetis* will cause immense problems.³⁰⁸ However, presumption of the state formation should be considered. The more unitary the state, the weaker the presumption³⁰⁹ i.e the application of the principle is less likely. On the other hand, the more entrenched a particular administrative line may be, the stronger the presumption and in the case of federal states where the component units have meaningful jurisdictional powers and indeed may even have the right of secession domestically proclaimed (as in the Former Yugoslavia and the Former USSR), the presumption would be at its least assailable.³¹⁰

Applying other methods particularly in ethnically intermingled situation is difficult as claims could be based on religion, culture, etc which will be difficult to determine in that claims could be by groups within a group.³¹¹ While showing the shortcoming of other possibilities, in the absence of applying *uti possidetis* the other factor will be effective control, but determining border based on such rules invites force which is contrary to all rights.³¹² This argument seem to show the challenges that may emerge if a seceding group controls certain regions, succeeds in its secession and claimed that the internal lines which show their effective control would be transferred to external or international boundary, the other will be encouraged to do so.

³⁰⁷ See foot note No 250

³⁰⁸ See foot note No. 34 above

³⁰⁹ *ibid*

³¹⁰ *ibid*

³¹¹ *ibid*

³¹² *ibid*

On the other hand, Brilmayer, points out that three factors have to be taken into consideration in relation to boundary demarcations. If the land claim is based on historical injustice since such claim has no end, it is better to maintain the status quo if the historical injustice has occurred in past historical claims otherwise it will cause adverse possession.³¹³ The second factor is related to settlement. Although they have negative implication, to what extent the majority ethnic have settled the member of his group in the current boundary on the territories secessionist claim must be taken in to consideration.³¹⁴ Such consideration may result displacing of other ethnic groups by secessionist in order to avoid such consideration. The third factor is the extent to which secessionists keep alive their historical rights because this type of striving will show that the secessionist never acquiesced to in the loss of its claimed territory.³¹⁵

The factors may not seem clear as to whether demarcation made and on what basis. However, if the first factor, past history and the second factor, the settlement of people of majority settled in the area of seceding group, the very concern is the stability and it seems demarcation should not be made indirectly secession should be suppressed. Otherwise, in the first case the historical claim may be challenged by counter claims and in the second case, the other ethnic groups or people of a majority group in the seceding area may claim other secession or may fall victim to human rights violations. Generally, it is not clear as such how those factors will be applied.

The argument of Marvic and Vidamirmay give an answer to the problems of the application of the principle and gives sound arguments. Marvic argues that in the case of post-colonial independence by using the principle, the internal boundaries will assume external or international boundaries, which is highly problematic, since they do not have a separating function but unifying function which means they do not assume separation or secession in mind.³¹⁶

According to him, the uniform application of the principle does not take into account differences among cases neither with regard to equality nor fairness; and thus deconstructing the principle and looking at the actual situation and applying norms determining boundaries

³¹³See foot note No. 247 above

³¹⁴ibid

³¹⁵ Ibid

³¹⁶Urska Mavric, Equal Treatment of Secession Claims: Slovenia, Croatia and Kosovo. Mistakes of the Past and Mistakes of the Future? Master' thesis, submitted to Central European University, Budapest, Hungary, 2007. Accessed from http://www.etd.ceu/2007/mavric_urska.pdf

in accordance with the situation³¹⁷ as necessary. Even referendums may ultimately place people in territories away from their interest.³¹⁸ As cited by Vidmar, Ratner states that the application of *uti possidetis* principle outside of colonialism will remain doctrinally controversial and is not generally accepted outside the process of decolonization.³¹⁹ According to Vidmar, though the practice of this kind has yet to develop, international law does not preclude agreements on territorial rearrangements as an outcome of negotiations on consensual secession.³²⁰

Generally, if peace and stability is the goal, secession appears to be less guarantying rather exposed to endless conflicts. Once it occurs, determining borders between the remaining and seceding states is a very complex issue. This begins from the principle itself. In the case of colonialism the boundaries whatever effect they have their purpose is to divide whether it could be among ethnics or colonialists. In the case of secession in whatever way the mother state was formed or came to exist irrespective of the government system is united(unitary) or federated, the internal administrative lines or boundaries are generally established to unite the federated units or provinces. Thus, applying the same principle for secession contradicts this purpose.

3.2. The challenges of delimitation and of demarcation

When starting to discuss the challenges of border demarcation and delimitation, it is necessary to raise what Bujira, said when he tries to summarize the types and causes of conflicts in Africa. Referring to the difficulties of the topic, he cautiously indicated that Africa is a vast and varied continent made up of countries with specific histories and geographical conditions as well as uneven levels of economic development where the causes of conflicts also reflect the continent's diversity and complexity.³²¹ The expression appears to be relevant to this sub-topic because the cause of the border disputes which lead to border demarcations may not be identical.

The African Union in its Constitutive Act reiterates that it will abide by the territorial integrity principle. On the other hand, it has established the African Border Commission in

³¹⁷ Ibid

³¹⁸ Ibid

³¹⁹ See foot note No. 36 above

³²⁰ Ibid

³²¹ Abdalla Bujira, African Conflicts: Their Causes and Their Political and Social Environment, Development Policy Management Forum, Occasional Paper, No. 4, 2002, Addis Ababa, 2002 Ethiopia.<http://dpmf.org/Publications/Occasional%20Papers/occasionalpaper4.pdf>

order to undertake the demarcation and delimitation of boundaries and develop cross-border integration dynamics among others. Both duties seem to be uneasy one. The integration may connote the use of boundaries as a bridge while the demarcation process may connote physical separation. According to Ikome, border delimitation and demarcation is seen as a precondition for successful integration, because a non-defined border is susceptible to resources of contention.³²² Thus, delineation and demarcation will be the first or initial action. In this sub-topic, major challenges which may hamper future delimitation and demarcation processes will be investigated.

3.2.1. Vagueness of colonial boundary treaties

Today only about a quarter of the borders in Africa are said to be clearly defined (delimited) and physically marked (demarcated).³²³ While borders are a common conflict trigger, only 20 per cent of African boundaries are demarcated.³²⁴ The facts seem to be acceptable as they are nearly similar though there is a tendency that the Berlin Conference is generally considered as delimitation and the delimitation process is over.

A border dispute is understood as resolved by agreement if there is consensus among the parties about the delimitation of the border. African states only formally approved *uti possidetis* in 1964, the principle was applied in retrospect, taking boundary disputes back to the affairs of former colonial powers.³²⁵ As a consequence, ICJ and international arbitrations were focusing on the interpretation of colonial treaties, maps and other related documents³²⁶ to rest the boundary disputes by establishing the last colonial administrative lines as boundaries.

The issue is that since the nature of the principle relies on historical treaties to exactly identify as to who is the title holder, there will be references to different past treaties to get the consensus of the parties during delimitation. For instance, in a recent ICJ court case concerning the boundary dispute between Botswana and Namibia in 1999, much of the court's proceedings dealt with the interpretation of an Anglo-German treaty of 1890, which

³²² See footnote No. 2 above

³²³ -----Support to the African Union for the Establishment of an African Peace and Security Architecture (APSA))

³²⁴ Annette Weber, Boundaries with Issues: Soft Border Management as a solution? Perspective, January 2012, Friedrich Ebert Stiftung.

³²⁵ Jędrzej George Frynas, Foreign Investment and International Boundary dispute in Africa: Evidence from Oil Industry, African Studies Centre School of International Studies and Law Coventry University, Occasional Papers Series No 9, p

³²⁶ *ibid*

both states acknowledged to be binding on them... a treaty which is 100 years old.³²⁷ It is true for Eritrea and Ethiopia. They went back to the treaties signed in the first of the 19th century between Ethiopia and Italy.

Such delimitation processes were made to divide colonial occupation and ensure their respective interests. Except for their approval in 1963 and 1964, they are criticized in their objectives, content, purpose and for the way in which they were signed. The consent of Africans was not there when the boundaries were created, discussed and approved. They reflect the political process and consensuses of European colonialists.

The moral and the legal issue is that should they be provided life after several decades, even a century, without due consideration for the realities that have transpired throughout the years? As a principle, in order for demarcation to be effective, some adjustment has to be allowed during the actual demarcation. On average, most African countries have got their independence over half a century ago and various changes have certainly occurred around the borders.

The process of decolonization or dissolution of a state may have festered over several years, during which time boundaries may have changed significantly.³²⁸ A recent study conducted to see challenges and opportunities of cross border cooperation mainly in West Africa, have generally indicated that borders are only poorly (and arbitrarily) controlled while national governments are in favor of implementation of sensitive projects in borders which are among the threats for future cooperation.³²⁹ The principle is, however, very rigid to accommodate changes once a critical date is established unless there is consent between states.

Moreover, boundaries indicated in colonial treaties, agreements and documents are criticized as they are artificial and arbitrary which means they are not easy to perceive and relate with the situation on the ground unless some modifications are made. They were crafted based on latitudes and longitudes without necessarily considering the surface of the continent. Demarcation, by contrast, is mainly the process of physically marking the border on the ground. Since they are straight lines and abstracts where fitting them to different border features of countries would be difficult.

³²⁷ *ibid*

³²⁸ *ibid*

³²⁹ -----Opportunities for cross-border Cooperation in West Africa: A Contribution to the regional integration process((Reference No 2010CE160AT057) Association of European Border Regions (AEBR) 22nd January 2012

The treaties were subject to various changes as discussed in Chapter 2 and at the same time establishing critical date is sometimes difficult. Locating, understanding the treaties and conferring titles or proving effective possession when it is needed will be very complex. That was the reality in the adjudication of Burkina Faso and Mali in 1986. The court has tried to go back and refer to treaties signed or actions done by France back in 1932 but could not support it factually. On the other hand, lacking knowledge and capacity at regional and local levels³³⁰ also aggravates the situation. In relation to the vagueness of territories left to be demarcated, the experiences of ICJ implementing land territories is limited in that ICJ has more experience in settling marine related dispute and has limited experience of adjudicating territorial dispute.³³¹

The ICJ witnessed more litigation on maritime boundaries than on any other single subject and it nearly twenty disputes relating to maritime boundaries alone between 1946 and 1990.³³² In the case of Africa, since the 1946, it adjudicated five cases involving boundary disputes³³³ and if the case of Nigeria and Cameroon included it will be raised to six. These were, Kasikili/Sedudu Island (Botswana/Namibia); judgment of 13 December 1999; Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), judgment of 3 February 1994; Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), judgment of 12 November 1991; Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), judgment of 22 December 1986; Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), judgment of 10 December 1985 African states.³³⁴

3.2.2. The discovery of new natural resources around borders

According to Bujura who divided conflicts in Africa in to interstate and internal conflicts, all the causes of interstate conflicts are results of colonial boundaries caused by claim of border.³³⁵ While expressing the important features of the borders which caused for claim of change and led to conflict, many of the borders were imprecise; some borders were straddled by a large ethnic group considered strategic by one side of the border; some borders passed

³³⁰ *ibid*

³³¹ Carter Center, Approaches to Solving Territorial Conflicts: Sources, Situations, Scenarios, and Suggestions May 2010.

http://www.cartercenter.org/resources/pdfs/news/peace_publications/conflict_resolution/Solving_Territorial_Conflicts.pdf

³³² *ibid*

³³³ *ibid*

³³⁴ *Ibid*

³³⁵ See footnote No. 321 above

through strategic terrain desired by countries on both sides of the border; some borders passed by areas rich with mineral resources all of which fell on one side of the border, thus excluding the other country.³³⁶ Inevitably, one or a combination of any of these factors became the bases of a claim by one country or another to change the border or to claim territory which fell on the other side of the colonial border.³³⁷

The first modern border conflict in Africa is that between Algeria and Morocco (1964/65, immediately after independence) while the most recent is that of Ethiopia and Eritrea. Many of the border conflicts that had occurred in between these two conflicts have not escalated to war and were easily resolved due to mainly the basis for the claims to change the borders were very weak and that the states concerned did not have sufficient resources to conduct a sustained war.³³⁸ The causes of conflict in general may not be static at all times and this may include the border conflict. The political, economic and social forces together constitute or provide an environment within which conflicts occur; that these environments change according to a particular historical period thus affecting both the nature and extent of conflicts.³³⁹

Various scholars are indicating that African states are recently desperately looking to their borders and territories to ease the economic pressure and drying of foreign aid which may critically complicates both demarcation and maintaining as it was ever. According to Wafula, with unreliable foreign aid, most governments furiously sought other sources of income to meet the demands of their growing populations which inevitably increased the values of territories.³⁴⁰ Wafula whose study was concentrated in the situation of border conflicts in relation to resource utilization, indicates that there are heightened tensions and increasing potential for inter-state conflicts in Eastern Africa due to growing discoveries, or rumors of existence, of natural resources on borders or in borderlands.³⁴¹ This is not only limited to Horn of Africa only. All major oil producing nations in Africa are involved in some sort of boundary dispute with their neighbors. Nigeria is in boundary conflict with Cameroon over

³³⁶ Ibid

³³⁷ ibid

³³⁸ Ibid

³³⁹ See footnote No. 166 above

³⁴⁰ Ibid

³⁴¹ ibid

the vicinity of Lake Chad and over oil-rich areas in the Gulf of Guinea with Equatorial Guinea.³⁴²

Hensel, as cited by the study conducted by the Carter Center, has indicated that borders are most likely to be challenged when the territory in question has strategic location (access to the sea or route, high economic value such as strategic minerals, oil, fresh water, or fertile agricultural land)or shared linguistic/ethnic groups.³⁴³

The presence of valuable mineral resources, especially oil, along the maritime border between the two countries creates the potential for destabilizing great-power politics.³⁴⁴ Border disputes often flare up after they become linked with important economic or social interests.³⁴⁵ According to Ikome the Nigeria–Cameroon border conflict has not been one between incompatible border peoples, nor a challenge to the legitimacy of either state by partitioned groups; rather, it has been a conflict between sovereign states over border resources, national security and strategic concerns.³⁴⁶

The African leaders are aware that it will be new challenge though it is not clear how it will be sustainably addressed using colonial based border treaties. The African Union (AU) views these ill-defined borders as a potential source of conflict - particularly in regions with valuable mineral resources and thus a threat to peace and security.³⁴⁷

Although there are a number of cases like the case of Norway and Denmark in their dispute in the Jan Mayen where the court took into consideration in its 1993 decision non-geographic reasons or factors, ICJ generally reject social and economic considerations in their proceedings though such considerations may constitute important causes of the disputes ³⁴⁸ In the Guinea Bissau and Guinea case though socio economic issue was raised including oil license and was importantly cause of the dispute in that both states raised lack of resource including oil, the court rejected it saying that the claim would be neither just nor equitable to base a delimitation on ‘the evaluation of data which changes in relation to factors that are sometimes uncertain.

³⁴² See footnote No. 325 above

³⁴³ See footnote No. 331 above

³⁴⁴ Ibid

³⁴⁵ Ibid

³⁴⁶ See footnote No 2 above

³⁴⁷ See footnote No.324 above

³⁴⁸ See footnote No 2. Above

3.2.3. The issue of Peoples in border area

Scholars and some human rights conventions emphasize the rights of indigenous people, border people who may also be considered minorities in certain situations or people who should get priority in border demarcation. African boundary scholars have also insisted on the need to focus on the plight of border people who were most affected by the arbitrary ‘colonial surgery.’³⁴⁹ The previous border issues among neighboring states were related to reuniting of divided ethnics. Now it could be more complicated if the borders are mainly rich in resource in that the divided ethnics may disregard maintaining the status quo or reuniting. They may prefer to secede. If a border contains rich minerals or have strategic importance or accesses to other resources it is exposed to irredentist claim based on culture or self-determination.³⁵⁰

Demarcation will also cause nationality changes and disruption of ways of living or the entire living system. While borders demarcate a state’s territory borders, they also describe identities, belonging, and political affiliation.³⁵¹ This is a reality in the case of Abeiy and other mainly mineral rich boundary areas, which was claimed by both countries, Sudan and South Sudan, based on historical evidences where the Boundary Commission went on creating two northern and southern sovereign zones not yet accepted.³⁵² As per Ikome the previous experiences of dispute settling mechanisms including diplomatic, arbitration and judicial mechanisms only involve states not border people and this has to be changed.

Interstate dispute such as Cameroon-Nigeria is amenable to three solutions: a political solution through diplomacy a legal solution by recourse to a court of law, and a military solution by recourse to war but choosing which mechanism to be followed should have been a prerogative of border people and not states.³⁵³

The law as it stands suggests that *uti possidetis juris* lines may be modified by consent. However, this consent is restricted to that between sovereign states. This particularly disadvantages cross-border communities who are often unrepresented by the governments on both sides of the frontier. It also fails to provide any remedy to indigenous peoples, many of whom are not in strong enough political positions to mobilize support for their causes.

³⁴⁹ Francis Nguendi Ikome, the Inviolability of Africa’s Colonial Boundaries: Lessons from the Cameroon-Nigeria Border Conflict, Occasional paper no 47, November 2004, Institute for Global Dialogue Johannesburg South Africa. p. 9

³⁵⁰ See footnote No. 331 above

³⁵¹ See footnote No. 324 above

³⁵² See footnote No. 331 above

³⁵³ See footnote No. 351 above

3.2.4. Limitations on Mechanisms of resolving border disputes

There is no consensus as to which method of dispute resolution mechanism is the most effective one. Legal scholars tend to choose judicial and arbitration mechanism because their decision is binding one while social scientists prefer negotiation and mediation.³⁵⁴ WeBer, who has tried to see challenges of borders mainly in the Horn of Africa suggests that border issues such as oil, migration, pastoralists, citizenship, trade, and nationality must be negotiated and administered whether borders are demarcated or not.³⁵⁵ Negotiation by its feature does not involve a third party which has a power to enforce a law.

WeBer, who recommends soft boundaries than rigid ones, justifies that easy movement of goods and people, the prevention of crime and profitable cross-border trading are interests of both interstate, border peoples and are preconditions for more prosperity and more peaceful region.³⁵⁶ The suggestion seems to follow the notion that borders serve as a bridge and neighboring countries have more to gain through cooperation than separation by rigid type of boundary demarcation.

A study recently conducted by the Carter Center has acknowledged that territorial disputes are notoriously difficult to end peacefully and enduringly and thus there has to be devise “no lose” (non-zero sum) in territorial conflict.³⁵⁷ Conciliation and other forms of facilitation by third parties may be preferred other than judicial methods in that conciliators, facilitators, and often mediators have greater flexibility to design outcomes that might be satisfactory to both sides in a boundary dispute.³⁵⁸

It is difficult for courts and tribunals to achieve such a result, since they are usually required to take a legalistic approach and their outcome is unpredictable.³⁵⁹ Border conflicts related to economic competition or such stress are unlikely successfully resolved using traditional legal methods, particularly adjudication.³⁶⁰ According to T.O. Elias one of the most fundamental of all the seven principles of OAU charter is the peaceful settlement of disputes through negotiation, mediation, conciliation or arbitration which was uniquely enshrined in the

³⁵⁴ David M.Koinsky, the United Nations Dispute Settlement System and International Environment Disputes

³⁵⁵ See footnote No. 324 above

³⁵⁶ Ibid

³⁵⁷ See footnote No. 331 above

³⁵⁸ ibid

³⁵⁹ Ibid

³⁶⁰ See footnote No. 331 above

Charter.³⁶¹ Member countries have had decided to enshrine the principle after realizing that the peace the continent solely need was endangered by frontier and border disputes.³⁶²

³⁶¹See foot note No. 257 above

³⁶² Ibid

Chapter 4-Case Studies

4.1.The Award of Boundary Commission of Ethiopia and Eritrea

The case of Eritrea may be different in some aspects. Firstly, Ethiopia has been an independent state when nearly all other African countries have been colonized. So, one may argue that the treaties it signed during colonial time are carried out in equal status with colonialists in all aspect. However, the situations around it and in the region need to be taken into consideration. The current borders in the region (East Africa) were cartographic feats of the colonial powers Germany, Great Britain, Italy, France and Belgium whose main objective was to enhance their respective imperial interests played between 1885 and 1925.

Secondly, the historical background of the country is also complicated with a unique type of arguments. There are some who tries to relate Eritrea as colony of Ethiopia which is absolutely difficult to accept if the colonial situation of Europe in Africa is critically seen. Such arguments will only reduce the effort of the country which has contributed for Africa by boosting their moral by defending Italy and in coordinating and supporting any liberating struggle of Africans. The case of Eritrea is concerned with decolonisation, but it has a special nature so far as the State that has for a long time claimed territorial rights over it, Ethiopia, had itself been subjected to colonial 'rule' by Italy³⁶³

Thirdly, the secession of Eritrea was unusually accepted by the government of Ethiopia.The new government (Transitional Government of Ethiopia) approved the plan put forward by the Eritrean provisional government to hold a referendum to determine Eritrea's status, make observation of polling in Eritrea in the referendum held in 1993 and finally Ethiopia was among the first countries to recognize the new state of Eritrea.³⁶⁴Here, it is necessary to equally consider, the leading parties were fighting the then Ethiopian Government for decades and it is also unclear the two parties had adopted different position in relation to secession.

In May 1991, the anti-Derg alliance between the EPLF and the EPRDF finally gained control; first the ERPFD took Addis Ababa, then, a few days later, the EPLF won control of

³⁶³ See footnote No 210 above

³⁶⁴Human Rights Watch, the Horn of Africa War: Mass Expulsion and the Nationality Issue(June 1998-April 2002), Vol. 15, No.3(A), new York, January 2003, p.11. Accessed from <http://www.hrw.org/reports/2003/ethioerit0103/ethioerit0103.pdf>

Asmara.³⁶⁵ Secondly, the power and the laws to be considered by the Border Arbitration Commission was decided by the agreement of the two countries in the Algiers Agreement. Thirdly, the ruling parties and leaders were allies in the war waged against the Derg government³⁶⁶ and often blamed to be shrouded with secrecy. However, the issues and the decision still reflect some of the challenges mentioned in the previous chapters mainly Chapter 4, challenges of colonial treaties and the principle of *utipossidetis*. This part of the paper however has no purpose of evaluating the arguments of both parties.

4.1.1. Brief Background of the war

As to the eruption of the war between the two countries, reports and works of researcher refers it to May 1998, Eritrea moved its mechanized tanks, artillery fire and brigade and occupied Badme though there were skirmishes before it. In May 1998, heavily armed Eritrean troops arrived to the disputed area and Ethiopia has tried to repulse the Eritrean³⁶⁷. Nevertheless, after some days of artillery exchanges it subsided and mediating for peace settlement continued.

The joint US-Rwanda team shuttled from Asmara to Addis Ababa 15 times to quell down the looming fighting by demanding that the two countries pullback their troops and allow international observers for the area. OAU has also submitted a Framework Proposal which required the redeployment of forces to their former holdings(prior to May 6, 1998). The peace efforts were unsuccessful because both countries were attaching preconditions rejected by the other.³⁶⁸

After a lull period of nine months, but intense preparation, fighting erupted again in February, 1999 when Ethiopia tried to reclaim Badme. Ethiopia won the war and the two countries signed a peace agreement usually referred as the Algiers Agreement on 12 December 2000. By the agreement the two parties agreed to take their case to the independent body, Boundary Commission. On the 13th day of April 2002, the Commission (Ethiopia and Eritrea Boundary Commission) has passed its final decision on the delimitation of the border of the two countries.

³⁶⁵ Ibid

³⁶⁶ ibid

³⁶⁷ Kevin Hamilton, Beyond the Border War: The Ethio-Eritrean Conflict and the International Mediation Efforts. Accessed from www.princeton.edu/jpia/past-issues-1/2000/7.pdf

³⁶⁸ Ibid

4.1.2. Eritrea's secession and its spill over to the border war

Even though the Ethiopia and Ethiopia Boundary Commission (EEBC) has given its award over a decade ago, the tension still exists and the award of the Commission on the delimitation not yet followed by the demarcation process. The demarcation was originally scheduled in May 2003 and then postponed to October 2003.³⁶⁹ Nine years after the ruling of the border commission tension still exists between the two nations.³⁷⁰ There could be a simple argument that it is because the decision is not implemented by Ethiopia. Ethiopia rejected these findings and instead filed a 'Request for interpretation, correction and consultation', which essentially amounted to substantive challenge of the Boundary Commission's decision.³⁷¹ Nevertheless, the argument is beyond this and the underlined reasons are related with the challenges of secession, border delineation and demarcation. It also partly shows the rigidity of tribunals and courts to allow ways out in border disputes. From the current stalemate between these countries the workings of the Commission do not seem to have done much to resolve the territorial issue.³⁷²

Human Right Watch states that the Boundary Commission's ruling laid the foundation for lasting peace in the region but the limited scope of the ruling left out contentious issues that could in the future stoke renewed tensions.³⁷³ The causes of the bloody and deadly war which lastly led to border delineation and demarcation is associated with different factors though officials blamed each other and officially state border claim as a cause of war. Works referred in relation to the conflict or the causes of border war tend to conclude that the major causes of the war are economic, political, social, strategic symbolic while the border issue is secondary. The chief issues are political, economic tensions (like access to the sea) which had initially

³⁶⁹Nejib Jibril, The Binding Dilemma: From Bakassi to Badme - Making States Comply with Territorial Decisions of International Judicial Bodies, *American University International Law Review*, Review Volume 19 | Issue 3 Article 4. Accessed from

<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1170&context=auilr>

³⁷⁰Efem N. Ubi, Territorial Theory and The Resolution of African Territorial Conflicts: The Case of Ethiopia/Eritrea Boundary Conflict, Working paper No. 9, May 2010, *Journal of Alternative perspectives in the Social Science*

³⁷¹ Charles Riziki Majinge, Emergence of New States in Africa and Territorial Dispute Resolution: The Role of the International Court of Justice, *Melbourne Journal of International Law* [Vol 13 2012. Accessed from <http://www.law.unimelb.edu.au/files/dmfile/downloaddea461.pdf>

³⁷²See footnote No. 202 above

³⁷³See footnote No. 365 above

set the two former allies on a collision course and the human rights which are left unaddressed such as nationality including border people³⁷⁴

As per Uoi, Political and social factors coupled with imprecise and improperly delimited border have played their role for the eruption of the war.³⁷⁵ As to political and social issues, during independence in 1993, together with the undefined border, the two countries failed to negotiate on borders and decide the fate of citizenship like Ethiopian of Eritrean descent, ownership of citizens and resources around the border.³⁷⁶ As Gilbert rightly states it, the Ethiopia-Eritrea border conflict should be understood as a question of political identity and geographic certainty are compounded by the unique transition from a provincial boundary to an international one.³⁷⁷ The explanation very much relates with the process of Eritrean separation and its effects that has transferred the provincial internal boundary to the international boundary.

In the previous discussion it was noted that the mechanism and the group or people entitled to claim self-determination or secession are not clearly indicated by conventions or treaties and are open to interpretation and justifications of practices. This was the problem in Yugoslavia, Russia and Canada. If secession is waged as part of self-determination, it needs following the processes of exhaustion of all available internal remedies. After decades of war, the Eritrean Liberation Front controls Eritrea in 1991 and only in two years gap i.e in 1993 referendum was held. During the transition period, the leader of Ethiopia has declared that the Eritrean people have the right to hold referendum on their status.³⁷⁸ However, secession, which may apparently be invoked on the ground of self-governance, is mostly about territory and became a challenge when boundaries are delineated and demarcated.

Mediation (nonbinding arbitration) provides a more flexible and balanced way to reach a satisfactory outcome particularly in secession. Nevertheless, in the case of the two countries, mediation and negotiation came to forth after the war was broke out between the two countries. Demand for the return to the status quo ante bellum was the key component of the five-point peace proposal produced by the joint team of US and Rwanda and the OAU framework agreement.

³⁷⁴ Ibid

³⁷⁵ See footnote above No.370

³⁷⁶ Ibid

³⁷⁷ Gilbert M. Khadiagata, Reflections on the Ethiopia-Eritrea Border Conflict, VoL 23: 2 Fat 1999, the Fletcher Forum of World Affairs, p.40. Accessed on <http://heinonline.org/HOL/LandingPage?handle=hein.journals/forwa23&div=29&id=&page=>

³⁷⁸ See footnote No. 364 above

After the war, the two countries signed the Algiers Agreement to solve the border dispute by Boundary Commission based on 1900, 1902, 1908 colonial treaties, 1964 Cairo Declaration and applicable international law.³⁷⁹ The agreement of the two parties to use the 1964 Cairo declaration (the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964 as specified in Art. 4.2 of the Agreement prove the application of *uti possidetis* principle to fix their border problem. For better or worse, this same principle has been used for Eritrea-Ethiopia boundary dispute--a dispute that had already resulted in a territorial war between these countries.³⁸⁰

However, the principle is less appropriate to address such political issues like nationality, or economic and social issues which require various prior considerations before its application to decide boundary lines. On the other hand, as mentioned above by scholars key issues related to secession such as border, economic, social and political consequences including nationality were not discussed and agreed before or after Eritrea was seceded. Overselling the idea of an amicable split that created Eritrea invariably postponed serious reflection on the future institutional arrangements.³⁸¹ Eritrean Liberation Front Controls Eritrea followed by a referendum held in 1993 and then Eritrea officially seceded from Ethiopia. The political problem of the boundary of the two countries begins here.

As mentioned in the previous chapters, if agreement was reached between the two countries at independence over how their border has to be demarcated that is one thing, but if they disagreed, this has to be taken into account before the application of *uti possidetis* or transferring internal boundary to international boundary. The presumption is important since internal boundary transformed to international boundary, it starts to oppositely serve from bringing together to separate people of a country and lands which have effects on citizens who have been living in intermingled manner and sharing of resources as citizens of a country. Rigidly conceived, borders delineate territorial and political space, bestowing citizenship and responsibilities. Thus, if the seceding state is unitary type, determining boundaries using such principle would be challenging one.

³⁷⁹ Agreement between the Government of Democratic Republic of Ethiopia and the government of the state of Eritrea, 12th day of December, 2000, Algiers, Algeria

³⁸⁰ See footnote No. 202 above

³⁸¹ See footnote No. 377 above

Even if the liberation fronts of Eritrea shortly starts to oppose the becoming of Eritrea part of Ethiopia in 1952³⁸² which was initially under the colony of Italy and the protectorate of United Kingdom for some years, Eritrea continued as part and parcel or provinces of Ethiopia like other parts of the country. Eritreans were from that time declared to be Ethiopians: article 9 of the Order declared that “All inhabitants of the territory of Eritrea except persons possessing foreign nationality are hereby declared to be subjects of our Empire and Ethiopian nationals.”³⁸³ While boundaries require certainty, predictability, modicum of fixity in the special circumstance of a history of relatively unimpeded trans-border mobility and migration, clarity becomes even more critical.³⁸⁴ The border remained not demarcated for several decades and there was very high mobility of people. All these complicate the exact location of boundary, nationality and previous investments and links.

In addition to this, even if they are associated with the war, if some of the facts raised following the war are also considered, they tend to justify the unitary type of relation or the strength of the bond of people, high mobility of people and intermarriages. Eritrea has expelled nearly 250, 000 Ethiopians while it claims independence. Ethiopia has expelled 70,000 Eritrean after the war was broke out accusing them to be security threats.³⁸⁵ What is important here is the number of people who permanently moved to either of the two countries feeling it is their country or related reasons which may strengthen the unitary type or existence of strong people to people bond. This does not include the people who settle there or expelled or left by their own initiative after the war or before it.

On the other hand, if the treaties that the two parties agreed to solve the problem of the boundary are considered, they are remote past in such situation the adversary claims are also difficult to address. The further in the past the historical wrong occurred, the more likely that it is better now to let things remain as they are.³⁸⁶ The issue of historical colonial treaty related claim did not stop in the time Eritrea federated that in the 1950s or 1960 but it went as far as referring agreements of 1902, 1903, 1908 and even as far as 1886 which is well over a century.

³⁸²Reports of International Arbitral Awards, Decision regarding delimitation of the border between Eritrea and Ethiopia, 13 April 2002 Volume XXV pp. 83-195. Accessed from http://legal.un.org/riaa/cases/vol_XXV/83-195.pdf

³⁸³ See footnote No. 364 above

³⁸⁴ See footnote No. 377 above

³⁸⁵ See footnote No. 365 above

³⁸⁶ See footnote No. 249 above

The problems are therefore associated with the handling of secession and nature of the principle and application of treaties which are very much associated or entered during the high times of African colonization. Those treaties and the principle are less compatible with claims based on relatively recent administrative control and effective occupation which is source of instability like the case of Eritrea and Ethiopia whose border was very porous for centuries and arguable changes occur through time. The doctrine of *uti possidetis* heightens this sense of unfairness.³⁸⁷

Boundary disputes like the case of Eritrea and Ethiopia are complex and may not be solved only through the application of laws. They may require forwarding compromising solutions and front discussion. The overall mediation effort was also simplistic in the sense that it picked up the territorial incompatibilities as the only cause of the conflict³⁸⁸ Adjudication may decide the legal issues at stake but fail to address the underlying political problems which may render any outcome untenable. In addition, adjudication does not foster compromise, often crucial to the implementation of a decision and, perhaps more importantly, to future peaceful relations, since only one side will win, and any decision reached is imposed on the parties. Any adversarial proceeding may serve to exacerbate the dispute. Eritrea emerges as advantageous from the decision while Ethiopia is a loser though it was a winner of the war and victim of initial Eritrean aggression.

Scholars argue that demarcation will be successful if some kind of adjustment is allowed during its actual exercise. However, in the case of the two countries, the decision of the Commission is binding and it may complicate such adjustments. Ethiopia was demanding that the delimited course of the boundary line should be varied in manner to take into account human needs and geographical realities during demarcation. Eritrea, on the other hand, called the decision as “a gift to the present and future generations of Eritreans who will live with secure and recognized borders.”³⁸⁹ As the delimitation decision of the EEBC was final there was no room for material changes at the demarcation stage.³⁹⁰

³⁸⁷ See footnote No. 370 above

³⁸⁸ Kalewongel Minale Gedamu, Ethiopia and Eritrea: The Quest for Peace and Normalization, Thesis Submitted for the Degree of Master of Philosophy in Peace and Conflict Transformation MPCT 2006-2008 Faculty of Social Sciences University of Tromsø, Norway). Accessed from <http://munin.uit.no/bitstream/handle/10037/1605/Thesis.pdf?sequence=1>

³⁸⁹ Ibid, p.57

³⁹⁰ William Alexander Robertson, Challenges for Surveying in the Establishment of International Borders, FIG Congress 2010 Sydney, Australia, 11-16 April 2010. Accessed from http://www.fig.net/pub/fig2010/papers/ts02a%5Cts02a_robertson_3895.pdf

Delimitation claim based on Administrative or effective control claim mainly by Ethiopia's in certain parts of the three sectors was rejected and rarely considered. EEBC rejected Ethiopia's evidence of subsequent conduct demonstrating that it had exercised sovereignty over the disputed land.³⁹¹ Thus, this could not be seen only because Ethiopia might not submit evidence (beyond the scope of this topic), issues like administrative control, geography, history, security and strategic facts are less considered by such arbitral or judicial bodies. They prefer relying on colonial treaties and associated documents to other type of evidences even if their purposes were meant basically to serve colonialists. The fixing of critical date has also played its role in this regard as it will be seen below. The EEBC took the conduct of the parties into account only after the independence of Eritrea on April 27, 1993.³⁹²

4.1.3. The identification of critical date and application of *uti possidetis*

Before considering how the Commission addresses critical date, it worth to point the uniqueness of Ethiopia and the application of *uti possidetis*. Eritrea and Ethiopia agreed to apply the principle of the *uti possidetis*(1964 Cairo Declaration) which amounts to African custom.³⁹³ However, if the historical development of the principle is taken into consideration, its application on treaties signed between colonial and non-colonial countries like Italy, former colony and Ethiopia, an independent country is not clear. Unlike the documents used in most cases of *uti possidetis*, the treaties used for Ethiopia and Eritrea was not colonial...rather they were made between a colonial power and a country that was prey to the colonial aspiration-candidate.³⁹⁴ This was one of the challenges in the case of Libya and Chad in that ICJ has concluded the principle does not apply as Libya was an independent country when it signed the treaty of 1955 with France on which Chad claimed that the border of the two countries has to be decided based on *uti possidetis*.³⁹⁵

The principle generally applies to determine boundaries of countries or people liberated from colonialism and seceded states though it is not a settled issue. Failing to clearly establish the nature of separation of Eritrea as whether it is a type of self- determination/external/self-determination has impacted significantly on the process of the awarding of the decision. In addition, the perception to the application of *uti possidetis* seems to be unclear or may show

³⁹¹ Ibid

³⁹² See footnote No. 388 above

³⁹³ See footnote No. 202 above

³⁹⁴ Ibid

³⁹⁵ International Court of Justice Territorial Dispute Libya v. Chad Judgement 3 February 1994 General List No. 83. http://www.worldcourts.com/icj/eng/decisions/1994.02.03_jamahiriya.htm

the illusive nature of the principle. The precise contours and effects of *uti possidetis* remained unclear.³⁹⁶In this regard, the Commission consistently refers to Eritrea's independence but unclear which type of independence it is referring to.

One of the reflections of such challenge of the Commission is the establishment of the critical date, the date when Eritrea became independent. Again the Commission did not directly refer to the critical date but it is understandable from its award as it was referring to the critical date. The Commission's references utilized to decide the date of independence are the Framework Agreement submitted by OAU in May 1998, the Agreement of Cessation of Hostilities, Technical Arrangements submitted for the implementation of the Framework Agreement and the December 2000 Algiers Agreement.

As per the Award of the Commission indicated from paragraphs 3.1 to 3.36 , the three documents signed by the two countries, which show their agreement to be adjudged based on the colonial treaties, international principle particularly the Cairo Declaration, proves their commitment of accepting Eritrea's independence date to be on 27 April 2003. As specified in Paragraph 3.6, the Commission argues that Art. 4.1 of the Algiers Agreement signed in December 2000 has one consequence and this consequence is declaring "the parties have thereby accepted that the date as at which the borders between them are to be determined is that of the independence of Eritrea, that is to say, on 27 April 1993."

Art. 4.1 of the Agreement read as follow:

Consistent with the provisions of the Framework Agreement and the Agreement on Cessation of Hostilities, the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law.

The Commission understood that the above paragraph (Art 4.1) shall not alter the general direction given in paragraph 2(Art. 4.2) of the same article. Paragraph 2 (Art.4.2) also reads as follow:

³⁹⁶See footnote No. 326 above

The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902, and 1908) and applicable international law. The Commission shall not have the power to make decisions *ex aequo et bono*.³⁹⁷

The Commission's expression on the need to determine the independence date proves that it is trying to establish the critical date. It declares that developments subsequent to that date are not to be taken into account 'save...they can be seen as a continuance or confirmation of a line of conduct already clearly established, or take the form of express agreements between them.'³⁹⁸This is the purpose of identifying critical date. Once critical date was established, changes on boundary treaties will be accepted if there is only acceptance by conduct or other way of expressions.

As discussed in chapter 1 of this paper, determining critical date or date of independence is highly crucial at same time difficult to establish. The issue is that what is narrated and concluded by the Commission is unrelated. Agreeing to respect existing borders at independence or accepting the 1964 Cairo Declaration does not mean agreeing on the date of independence to be 27, April 1993. The Cairo Declaration (*uti possidetis*) does not establish independence date rather establishes boundaries or colonial administrative lines. The two countries could agree on its application but how it applies and establishing separation date is something else. This may be related to the unclear position on the type of independence of Eritrea. As raised earlier, the Commission's position on the type of independence of Eritrea is unclear whether it mean secession or not. The right secession grants and its effect in boundaries however may not be identical with that of independence from colonialists.

Determining the independent date or establishing critical date allow a retrospective claiming of rights. Treaties, acts, historical claims and agreements occurred until the critical date may be submitted to justify boundary claims whether they are consensual or not. To the contrary, claiming of colonial borders based on history or treaty or colonial law or acts will cease to be applied once critical date was established unless there is consent between the two states. The critical date usually refers to the year of independence of the states involved in a dispute, or a

³⁹⁷ See footnote No. 382 above

³⁹⁸ Ibid

date at which the independence process was well advanced so that changes by the colonial authorities would be considered irrelevant.³⁹⁹

In this regard, in the award of the Commission, there seem to be a lack of clarity on establishing the last boundary as per the principle of *uti possidetis* and based on a treaty which seems to be rigid in accepting changes in boundary even in situation fundamental principles of treaties are changed. In the case of establishing boundaries based on *uti possidetis*, it accepts changes until the real colonial boundaries are established despite the way they attained and in this case considering milestone facts such as the invasion of Italy, renunciations of Italy its colonies, the federating and becoming Eritrea part of Ethiopia would have been important until the right title is established.

The retrospective effect seems less exploited and, as mentioned above, the Commission seems to apply critical date only on subsequent conducts or acts of the two countries that have occurred after 27 April, 1993 which is practically less important. It is possible to guess the Commission utilized the principle to go in line with the claim of the two countries and mediation demands for the regard of status quo ante which was raised by the two countries once the war was erupted or to the nature of the principle. Demand for the return to the status quo ante bellum was the key component of the four-point peace proposal produced by the joint team of US and Rwanda and the OAU framework agreement.⁴⁰⁰ Nonetheless the Commission has the duty to apply the Cairo Declaration and international law.

The mandate of the Commission may also be partly complicated due to the application of principles or sources where their difference is not clear. Treaty, international law and the *uti possidetis* are related and may overlap since *uti possidetis* deals with title which emanates from treaty and at the same time international principle. For instance, the central element in the Commission's consideration of international law was the subsequent practice of the parties looked at maps; activity on the ground tending to show the exercise of sovereign authority (effectiveness), diplomatic exchanges and records and also even assertions of sovereignty before the commission⁴⁰¹

To the understanding of this writer, subsequent conduct was raised by the Commission only to find the purposes and objectives of the treaties, 1900, 1902 and 1908 but not to search

³⁹⁹ See footnote No. 325 above

⁴⁰⁰ See footnote No 388above

⁴⁰¹ Ibid

historical developments of the border as required by the principle of *uti possidetis*. In the first place it utilized subsequent act to search for the meaning of the treaties but not with the suspect of being replaced or modified by the acts of either party. In paragraph 3.6 it states that:

The role of the subsequent practice or conduct of the Parties has also played a major part in the arguments of both sides. The function of such practice is not, it must be emphasized, relevant exclusively to the interpretation of the Treaties. It is quite possible that practice or conduct may affect the legal relations of the parties even though it cannot be said to be practice in the application of the treaty or to constitute an agreement between them.⁴⁰²

Besides to this, its position on application of subsequent act on the case at hand appears to be unclear. It has mentioned the different interpretation of subsequent act by ICJ such as its advisory opinion in relation to loan agreement (par 3.6)., the effect of abstention in voting in the Security Council in relation to voting on Namibia in 1971(par.3.7) and in its adjudication in relation to the Temple Case (, the case of Taba between Israel and Egypt, *Kasikili/Sedudu Island* case. It is not clear whether it will abide by all, selectively adopt or reject all the interpretations by saying that “the nature and extent of the conduct effective to produce a variation of the treaty is, of course, a matter of appreciation by the tribunal in each case.”⁴⁰³

However, the circumstances occurring before, during the formation of agreement, and subsequent changes are important. The former two circumstances are needed to prove legality or equality of parties in forming the treaties while the latter is related with the status or existence of treaties and in line with the application of *uti possidetis* where treaties were subject for subsequent changes for different reasons.

In the case of subsequent act, crucial events have occurred as also mentioned by the Commission in the background part of its decision. They are important and the principle of *uti possidetis* allows the investigation. Italy has invaded Ethiopia in 1935, unilaterally renounced its holding in 1942, Ethiopia renounced the colonial treaties and Eritrea was federated with Ethiopia by the General Assembly. All these occurrences have their effects on the treaties formed before them. Therefore using those same treaties, which were nullified

⁴⁰²See footnote No.382 above

⁴⁰³ Ibid

long upon a time, would be contrary to reality and contrary to the life of treaties.⁴⁰⁴ Generally, their effect on the treaties should have been critically investigated and would have been important to rightly rest the case and get the colonial boundary between the two countries. Events before the critical date, which might have caused redrawing of territory such as cession or occupation, irrespective of their legal or political justification, shall not be challenged.⁴⁰⁵

The Commission mentions the incidents occur before and after 1935 but in nowhere it refers for the effect of the invasion. It rather focuses on maps drawn by Italy before 1935 and Ethiopian failure to object or to come up with other maps. In paragraph 5.88 it states that it has noted that three early Italian maps show the Ethiopian claim line, as does one Ethiopian map of 1923.⁴⁰⁶ However, all the other relevant maps show the Eritrean claim line in accordance. In the same paragraph it states that: there is no record of any timely Ethiopian objection to these maps and there is, moreover, a consistent record of Ethiopian maps showing the same boundary. These maps amount to subsequent conduct or practice of the parties evidencing their mutual acceptance of a boundary corresponding to the Eritrean claim line. With such facts and analysis it concludes that in 1935 the boundary between the Setit and the Mareb had crystallized and was binding on the Parties along the line and proves that Cunama belongs to Eritrea and 1902 treaty remain the same.⁴⁰⁷

While expressing the subsequent effects of the invasion it mentions all the critical issues like the Italian invasion of Ethiopia; the British protectorate over Eritrea; the treatment of the political future of Eritrea; the federation between Ethiopia and Eritrea; and its eventual termination but it concludes .on the same paragraph 5.91 that the Commission can perceive nothing in that chain of developments that has had the effect of altering the boundary between the Parties.⁴⁰⁸ The boundary of 1935 remains the boundary of today. In contrast to this as it indicates it in paragraph 5.95 it rejected Ethiopia's claim of west of Eritrea saying that the Commission does not find in them evidence of administration of the area sufficiently clear in location, substantial in scope or extensive in time to displace the title of Eritrea that

⁴⁰⁴ See footnote No. 202 above

⁴⁰⁵ *ibid*

⁴⁰⁶ See foot note No. 382 above

⁴⁰⁷ *Ibid*

⁴⁰⁸ *Ibid*

had crystallized as of 1935.⁴⁰⁹ Ethiopia's claim of administration extends to 1970s and even 1991 to 1994.⁴¹⁰

As to the Federation, some of the arguments or position taken by Ethiopia might have contributed. As shown in the annexes, A31 of the award, it is indicated that Ethiopia argued "..., the change in Eritrea's status to that of federation with Ethiopia could have no effect on the original colonial boundaries of Eritrea: the entity known as Eritrea remained within the same boundaries after the change as it had had before the change."⁴¹¹ Such reasons, the types of evidences submitted by the parties and the choice of treaties might have created their own gap. However, the nature of the principle and the tendency of the Arbitrary Commission and ICJ to rely on earlier colonial treaties and documents have also played their role.

4.1.4 The challenge of interpretation of treaties and the principle

Even though the two parties surprisingly agreed to be adjudged based on the three treaties without applying fairness and appropriateness (without *ex aequo et bono*), African colonial boundary treaties are questioned to their legal validity due to mainly lack of consent and uncertainty due to series of treaties and subsequent changes. Ethiopia, unlike other African countries, was independent with recognized government. Nevertheless, colonialists were partitioning East Africa including the Horn of Africa. For instance United Kingdom had interest in Nile River among other. Thus, in order to appreciate, the interpretation of the treaties by the boundary Commission, it is necessary to have some idea on the situations before, during and after the signing of the treaties.

Although it is very sensitive and much reading and looking into government archives is necessary as to the border of the two countries is concerned, most of the borders has not been explicitly demarcated and remain drawn in map following a series of agreement between Italy, colonial of Eritrea and Ethiopia between 1890 and 1941.⁴¹² According to M. Khadiagata, Associate Professor of Comparative Politics and African Studies at the Paul H. Nitze School of Advanced International Studies, the Johns Hopkins University, like other colonial treaties they were subject to changes particularly the changes of control of Eritrea. Some of the facts are already discussed.

⁴⁰⁹ Ibid

⁴¹⁰ Ibid

⁴¹¹ ibid

⁴¹² See footnote No. 377 above

Similarly, Efem N. Ubi, Institute of International Studies, Jilin University, China, on monthly Working Paper Series, scientific, on-line publication of the US-based Guild of Independent Scholars, states that the invasion of Ethiopia in 1935 by Italy automatically made all treaties and unilateral maps null and void.⁴¹³ Thus, when it became an international border in 1993, there were guaranteed to be genuine differences over delimitation⁴¹⁴ particularly 'Eritrea hinges on the defining of border ownership with its neighbors on the original Italian colonial treaties.'⁴¹⁵ The treaties entered into carried annexes with unclear maps where sketching none of them sketched on the ground. ⁴¹⁶ Italy also steadily encroached on the Ethiopian soil, and even marked up maps unilaterally without the consent of Ethiopia.⁴¹⁷

The selected backgrounds treated under paragraph 2.6 of the award of the Commission,⁴¹⁸ supports the above scholarly analysis though it is possible to conclude that it does not consider them in its award of the three sectors. As stated by the Commission under paragraph 2.7, the historical developments of the two countries starts from 1880 when Italy first shows interest at the Red Sea port of Assab and then in 1885 at Massawa and then tries to expand to control inland though it successfully defended by Ethiopia.⁴¹⁹

On January 1, 1890 Italy formally controlled Eritrea and continued inland control until 1896, the battle of Adwa took place and successfully repulsed Italy. After the war, first Ethiopia and Italy signed temporary agreement then subsequently signed boundary treaty in 1900, 1902 and 1908.⁴²⁰ In the introduction, it states that Ethiopia remained an independent country except for the Italian 'annexation' in 1935. These times were, however, the high times that colonialists were strengthening their sphere of influence and every African country including hinter lands were in the closer search of control.

The Commission also indicates that Ethiopia declared those treaties void and null on 11 September 1952 during which Eritrea was federated with Ethiopia based on the decision of UN that Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown.⁴²¹ At the same time, the Commission referred to

⁴¹³ See footnote No. 370

⁴¹⁴ See footnote No. 377

⁴¹⁵ *ibid*

⁴¹⁶ See footnote No. 371

⁴¹⁷ *Ibid*

⁴¹⁸ See footnote No. 382

⁴¹⁹ *Ibid*

⁴²⁰ *Ibid*

⁴²¹ *Ibid*

Ethiopia's declaring of the constitution of Eritrea void and shortly after, Eritrea incorporated with Ethiopia, an armed Eritrean resistance developed.⁴²² In the meantime by Article 23 of the Treaty of Peace with the Allied Powers of 1947, Italy renounced "all rights and title to the Italian territorial possessions in Africa"⁴²³

While all these facts are there in the background, in indicating its power of treaty interpretation, the Commission states that the treaties(1900, 1902 and 1908) should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose by sticking to reference to the circumstances prevailing when the treaty was concluded.⁴²⁴ It follows good faith, ordinary meaning of texts by the time, as per the objective and purpose of the treaties. "Getting the meaning of these treaties is thus a central feature of this dispute." Therefore, the likelihood of questioning the nature of the treaties, the circumstances and further developments which has influence on the entrance of the treaties appear very less from the interpretation. The parties reference to the treaties and disallowing of fairness and equity in interpretation may complicate issues but the other two principles, the Cairo Declaration and the applicable international law the parties have agreed to be equally applied should have restricted or direct the interpretation.

The interpretation or relying on the motives, objectives and purposes of colonialists seem the practice of the tribunal and ICJ. The Commission substantially relied on finding out the motives of the parties behind the signing of the treaty.⁴²⁵ As a result of this while it interprets the treaty of 1902 it understood that the purpose of the treaty was made to make 'Cunama' tribe to territory of Eritrea.⁴²⁶ The subsequent practice of the parties was also examined but did not change the original delimitation decisions made by the Commission from the interpretation of the 1902 treaty (Para.5.91).⁴²⁷ "...a line across the Badme plains... was related to the inclusion of a local tribe the extent of whose territory of which was very difficult to determine a century later."⁴²⁸

We also find similar interpretation of ICJ, in the case of Libya/ Chad dispute as it will partly serve to show their similarity. ICJ states that treaty must be interpreted in good faith in

⁴²² Ibid

⁴²³ Ibid

⁴²⁴ Ibid

⁴²⁵ See footnote No. 388

⁴²⁶ Ibid

⁴²⁷ Ibid

⁴²⁸ See footnote No. 388 above

accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose and interpretation must be based above all upon the text of the treaty.⁴²⁹ This does not mean that the Commission and ICJ follow similar investigations of the respective claims. In the case of Chad/Libya, the Court has at least considered whether the colonial treaties mentioned were border delineating treaty or not because Libya has been arguing that the treaties like 1889 French-British declaration are sphere of influence delineating which is distinct from territorial frontier delineation. The Court has checked all circumstances in light of this claim before it relies in the content.

The Commission highly focused on getting the common will of the two parties at the time from the treaties by relating ordinary meanings and contextual meanings in light of their purpose and object. As a conclusion it states that, in the interpretation it will follow the doctrine of contemporaneity which means that a “treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded.”⁴³⁰

All these lead to the conclusion that the Commission concentrates on the treaty or the situation at the signing of the treaties. Such analysis will extremely limit the application or the effects of subsequent act which are important to identify the real or the one which provides the last colonial boundary or the last title based on the application of *uti possidetis* particularly in Africa where changes of treaties were inevitable and real let alone the circumstances.

The interpretation highly emphasized on getting the motives, intention and purpose of the treaties of colonial time. The ‘circumstances’ as mentioned by the Commission is important but how the Commission defined its scope is very crucial. Issues like minutes or preparation work or earlier situation for instance the motive of Italy before the treaties, the pressure on the Ethiopian side and the equality of skill and knowledge of treaties during the time seem to be less considered. The Commission rather relies on different maps drawn by Italians and Italian acts of that time without giving reliable justification for their impartiality.

In this case it is relevant to mention what Libya comments on the treaty of 1955, which itself signed as independent state with France, while ICJ applies it in deciding its border dispute with Chad. It argued that since there was France military in Libya and only a handful Libyan lawyer during the signing and thus there was pressure and lack of equality in signing the

⁴²⁹ See footnote No. 395 above

⁴³⁰ See foot note No. 382 above

treaties.⁴³¹ The colonial treaties at their faces have no problem. The physical and moral pressure, the knowledge gap and the frauds are invisible and difficult to drive from the treaties themselves. Indicating the separate opinion of Judge Ajibola, who was a presiding judge in the Libya/Chad case is also revealing on the interpretation practices of treaties. He, who was disgusted on referring of the Court to seek the purpose and objective of colonial treaties to finally discharge the dispute of the countries, states that the interpretation is in line with Art.31 of the Vienna Convention on the Law of Treaties but they are unhelpful to African to forget unhealed wounds....⁴³²

The treaties signed during colonial times have no problem at their face. Rather they meet the standards. However, before and during they signed they utilized various unfair or illegal mechanisms which deny the local party to put himself at equal status in the treaty initiating, drafting, signing and implementing.

4.1.5. Vagueness

One of the features of colonial treaties is vagueness for various reasons. In the case of the two countries there are names of border references in the treaties which either does not exist these days, varies in Amharic and English version or difficult to support with evidences. For instance, in the case of the 1900 and 1902 treaties that covers the Western Sector, the official language of the treaty formation, Amharic and English/Italian version have differently show the name of the river the boundary that starts from Setit. It has caused a very serious contention between the two countries. As indicated in Paragraph 2.21 of the Award, this other river is named the “Maieteb” in the English version of the Treaty and “Maiten” in the Amharic version. It was also differently referred in maps of the time. The central question in this part of the case was, therefore, to what river the treaty refers to⁴³³ since the two countries contend its references differently.

The evidences taken into consideration to identify the right name and the river itself partly witness the one-sidedness of colonial treaties, the features of the Commission and the principle which recognize them. As indicated in paragraph 5.20 of the award, Emperor Minilik has left no records of the negotiation of 1902 treaties and the Commission heavily relies on maps and reports of Italians like Major Ciccodicola’s cabling and reports and carta

⁴³¹ See footnote No. 395 above

⁴³² See footnote No. 382 above

⁴³³ Ibid

demonstrative, “Ombrega” sheet of the Carta Dimostrativa produced by the Istituto Geografico Militare in 1903 who was governor of Eritrea without being worried on the partiality it may follow on the drawing of maps.⁴³⁴

In the Central Sector, the two parties start to differ as the line moves upstream the Belesa.⁴³⁵ What is interesting here is that the difference of the countries and the line of arguments practically show the problem of the principle and interpretation in addition to the vagueness of treaties. The countries differ in the scale and features of the 1900 treaty maps do not correspond exactly with the topography and topography appearing in modern maps.⁴³⁶ Eritrea demanded the Commission to refer earlier maps of 1894 and relate with that of 1900 and then decide the boundary while Ethiopia demanded for the consideration of de facto administration of the Italian administration rather than strictly interpreting the treaty, comparison between the map annexed to the 1900 treaty and a modern map based on satellite imaging, the names “Belesa” and “Muna” do not describe relevant rivers in the region.⁴³⁷

However, as shown in paragraph 4.6 and the following, the Commission heavily depended on colonial maps particularly that of an Italian individual published in 1894. The principal map was prepared by an Italian geographer, Captain Enrico de Chaurand, and published in 1894. The reason provided why it refers this map is that it was not the result of personal exploration and recording by de Chaurand, but it was rather a compilation of information from many sources.⁴³⁸ But, the Commission has not shown the evidences that led it to such a conclusion. During this period as mentioned earlier in Chapter 2, most explorers were gathering evidences and supporting and facilitating the interest of their respective countries.

As indicated in paragraph 3.17 of its award, the Commission was inundated by 281 colonial maps of which Eritrea presented around 199 while Ethiopia 82 at the different stages of the litigation. The Commission has dedicated 12 paragraphs on discussing nature and criteria of admissibility and other features of maps. On the role of effective control, as it indicated its position in paragraph 3.29, it will only have supplementing role stating that either as assertive of that State’s position or, expressly or impliedly, contradictory of the conduct of the opposing State. According to the Commission, it is influenced by many factors and it is not by itself produce an absolute and indefeasible title, but only a title relative to that of the

⁴³⁴ Ibid

⁴³⁵ Ibid,

⁴³⁶ ibid

⁴³⁷ Ibid

⁴³⁸ Ibid

competing State.⁴³⁹ On the other hand, as per Wiilliam, the maps attached to those treaties are not comprehensive. The delimitation wording (formula) was general in terminology with references to a map attached to one of the Treaties while details on this boundary are covered in the paper.⁴⁴⁰

4.1.6. Effect on people around the border

One of the negative effects on focusing on *uti possidetis*, colonial treaties, motives and purpose is displacement of people or changes of nationality around the border. Nowhere the people around the border are referred by the Commission while it awards readjustments of some places. Purely focusing on the border, the local people were simply treated as objects.⁴⁴¹ The Commission, established in line with the Algiers agreement, did not make any attempt to represent the views and the self-determination rights of the local people in its delimitation decision. There was no room given to the consideration of the views of the people regarding their identity and self-determination rights and one of the demands to be requested for consideration of the delimitation at the demarcation is that the decision divides communities.⁴⁴²

The Commission has awarded its decision without getting first-hand information, understand the local border practice and examine the views of the local people by visiting the area. Thus, the EEBC dispensed an important jurisprudential convention- the sentiments and the self-determination rights of the local people. These considerations may be related with the mandate of the Commission for the commission was prohibited from making decision on the basis of *ex aequo et bono*. They were precluded from considering current human geography.⁴⁴³

It is also due to the nature of the principle and also features of arbitrary tribunals and ICJ. ICJ did not make any consideration to the people mainly Nigerians who live in Bakassi as it will be seen in the discussions in the next paragraph. In the case of Burkina Faso and Niger, as indicated by Judge CançadoTrindade, ICJ did not make any consideration to the nomads and

⁴³⁹ Ibid

⁴⁴⁰ See footnote No. 390

⁴⁴¹ See footnote No. 388

⁴⁴² See footnote No. 370

⁴⁴³ See footnote No. 390

semi nomad people who have been settling around the disputed border of the two countries.⁴⁴⁴

4.2.1. The Judgment of ICJ on Boundary Dispute of Cameroon and Nigeria

4.2.1.1 Historical Background

Like the case of Ethiopia and Eritrea, the rulings in the case of the boundary dispute between Nigeria and Cameroon mostly referred as the Bakassi Peninsula dispute has not been completed in that the demarcation is not yet carried out. The dispute over Bakassi is often associated with the competition for natural oil which the area is said to be rich. Citing different authors like Sango, asserts that struggles over the ownership of Bakassi by Nigeria and Cameroon began immediately it was discovered in the eighties that the Peninsula was floating on reserves of crude oil.⁴⁴⁵

While the cause of the dispute may be caused by the interest over the crude oil, the challenges of the application of the principle, the effort to abide by colonial treaties, the counter argument and the complication arise in resolving border disputes is more visible in the case of Nigeria and Cameroon dispute over the Bakassi area. As to Ikome the two states have exploited the lapses to build convincing arguments either for a review of the border based on post-colonial agreements, historical developments, effectivities in the case of Nigeria, or the maintenance of the status quo colonial treaties, in the case of Cameroon.⁴⁴⁶

According to Nejib Jibril, after citing different authors, historically, today's Nigeria and Cameroon were controlled by three colonial powers: Germany, France, and Great Britain which entered in to a series of agreements dividing the territory amongst themselves.⁴⁴⁷ Thus, their boundary conflict is both a conflict over the proper location of the border fuelled by historical, geographical, ethno-cultural, economic, military, and strategic factors and the doctrine of *uti possidetis* heightens this sense of unfairness.⁴⁴⁸

Two sets of agreements, an agreement between Britain and the Kings and Chiefs of Old Calabar; and an agreement between Britain and Germany, are relevant to the Bakassi dispute.

⁴⁴⁴ Frontier Dispute (Burkina Faso/Niger) Summary of the Judgment of 16 April 2013. Accessed from <http://www.icj-cij.org/docket/files/149/17304.pdf>

⁴⁴⁵ Francis Menjo Baye, Implications of the Bakassi conflict resolution for Cameroon. Accessed from

⁴⁴⁶ See footnote No.2 above

⁴⁴⁷ See footnote No. 369 above

⁴⁴⁸ Ibid

Bu, the problem became more complicated after World War I.⁴⁴⁹ After World War I, Britain and France split Germany's territory in West Africa into French Cameroon and British Cameroon, further divided British Cameroon into Northern and Southern Cameroon for administrative purposes of which British Northern Cameroon voted to become a part of Nigeria while Southern Cameroon opted to become a part of French Cameroon one year after French Cameroon and Nigeria became independent in 1960.⁴⁵⁰

While Nigeria and Cameroon, as members of the OAU, agreed to maintain colonial boundaries, they could not reach an agreement on the demarcation of their border due to the vagueness of colonial era treaties and the resulting exchange of territory between the three colonial powers.⁴⁵¹ To have some idea on the complication resulted from different colonial treaties, it may be important to have the summary of the development of boundary related agreements around Bakassi peninsula before providing reflections on the decision.

A writing by Nowa Omoigui, a Nigerian Journalist, entitled “Bakassi Story” states that colonial treaties related to Bakassi traces back to September 10, 1884 when the Obong, the leader of Calabar province, signed a treaty, ‘Treaty of Protection’, with Great Britain where the latter agreed to extend its protection to the Obong and his Chiefs and Obong reciprocally agreed to refrain from entering into any agreements or treaties with foreign nations or powers without the prior approval of the British Government.⁴⁵² After nine years of the signing of protectorate treaties, Germany and Britain signed an agreement that defines their boundaries in Africa including areas around Bakassi. This agreement was supplemented by another agreement signed on March 19, 1906 and colonies of 'Northern Nigeria' and 'Southern Nigeria' were created without consulting Obong.⁴⁵³

Continuing signing of treaties, Britain - for the colonies of "Southern" and "Northern" Nigeria – and Germany - for "Kamerun" – signed two agreements on their border from Yola to the Sea in 1913.⁴⁵⁴ According to the writer there were eight maps following the agreements. The Germans were interested in shrimps and an undertaking that Britain would not seek to expand eastwards. The British were, on the other hand, interested in uninterrupted and secure sea lane access to Calabar, a key trading post. To secure its desire by getting

⁴⁴⁹ See footnote No. 369 above

⁴⁵⁰ Ibid

⁴⁵¹ Ibid

⁴⁵² Nowa Omiougi, The Bakassi Story PDF. Accessed from http://www.omoigui.com/files/the_bakassi_story.pdf.

⁴⁵³ Ibid

⁴⁵⁴ Ibid

Germany's cooperation not to threaten access to Calabar, Bakassi peninsula was conceded by Britain.⁴⁵⁵

In 1914 both Northern and Southern Nigeria were merged and Nigeria was created. Since then Bakassi was part of Kamerou as per the map of German and Britain.⁴⁵⁶ However, at the end of the World War I, all German territories were divided between France and Britain by the Treaty of Versailles (1919). In this agreement Bakassi and the rest of what became known as "British Cameroons" were placed under British mandate and administered with "Nigeria".⁴⁵⁷ Since then agreements were signed between Britain and France in different times such as in 1929, 1930 and 1931 in related to border areas around Bakassi.

In 1946 the protectorate administration changed to trusteeship and in the same year the British Cameroon divided into northern and southern Cameroon where they were administered for convenience from Nigeria. In 1954, the Secretary of State for the Colonies issued a legal order defining the border between Nigeria's "Eastern region" and the "Southern Cameroons". On January 1st, 1960 the French Cameroons became independent. On October 1st, 1960, Nigeria became independent. Northern Cameroons had earlier - in 1959 - decided to achieve independence by joining the independent Federation of Nigeria. In 1961 Southern Cameroon including the much 75% voted to join French Camerun instead of Nigerian Cameroon.

The colonialists around the present Nigeria and Cameroon; first Germany and Britain, and then France and Great Britain, have signed treaties several times. The summary also vividly show who was fighting for what and over whose territory they have been fighting; how the local people were sidelined and divided and re-divided on the basis of treaties.

As expected, both countries are said to have based their arguments on the colonial treaties. Nigeria rely in its argument largely on Anglo-German correspondence dating back to 1885 as well as treaties signed between the colonial powers and the indigenous rulers in the area, particularly the 1884 Treaty of Protection. Cameroon on the other hand relied on the Anglo-German treaty of 1913, and two agreements signed in the 1970s between Cameroon and Nigeria which the latter said it never ratified while the former argued that it was in force. The ICJ delivered its judgment on 10 October, 2002, principally on the basis of Anglo-

⁴⁵⁵Ibid

⁴⁵⁶Ibid

⁴⁵⁷Ibid

German agreements of 1913. In relation to the nature of the treaties it was commented to be extremely complex which required ICJ to review diplomatic exchanges dating back over 100 years. ICJ has finally disposed the case any way in favor of Cameroon, however, we can also see the paradox that both countries used to claim their right on what the colonialists have created it while competing to destroy Cameroon and Nigeria and permanently grab the two and other countries wealth.

Although the case has entertained important features of international judicial process such as the question of jurisdiction, state responsibility and intervention, they are not focus of this paper and are not dealt with. The dispute of the two countries also involve land and marine type of dispute, however, the reflection under this topic will not deal with the part of the decision dealing with the maritime part of the dispute as it is also governed by several conventions the paper has not covered on before.

4.2.2. Controversies over delimitation and demarcation roles of colonial treaties

Unlike the case of Ethiopia and Eritrea, one of the controversial issues in the case of Cameroon and Nigeria was whether some of the treaties have delimitation effects or not. In the case of Ethiopia and Eritrea while such issues are there and the delimitation and demarcation require different expertise and consideration, both mandates were given to the Commission. As raised by Cameroon and Nigeria, the issue of status and legal effects of treaties of colonialists mainly those signed towards the end of 19th century were a source of debate.

In the disputed areas of Lake Chad, Cameroon argues that the area does not suggest a frontier line and it is not fully delimited. It cited the treaties of Milner-Simon Declaration of 1919, the Thomson-March and Declaration of 1929-1930, and the 1931 Henderson-Fleuriau Exchange of Notes⁴⁵⁸ to justify its argument. Whereas Nigeria argues that treaties signed during colonial times are defective and do not fully delimit Lake Chad area it rather challenges based on its historical consolidation, occupation and control.

In this issue, the Court took two important steps which may show the influences of the principle of *uti possidetis* and the feature of ICJ. It preferred first to examine whether the 1919 Milner-Simon Declaration and the subsequent instruments have established a frontier or not. As indicated in the judgment, it subsequently addresses the argument of Nigeria based on

⁴⁵⁸ Ibid

the historical consolidation of its claimed title.⁴⁵⁹ Priority was given as to what these colonial treaties refer to. The issue is that what it will do on the claim of Nigeria based on historical consolidation/effectivities once it established facts about delimitation from the treaties.

The Court has reason why it first focuses on the 1919 treaty. It realized that a series of bilateral treaties were entered in the Lake Chad between Germany, France and Britain in the late 19th century. However, it relied on treaties between France and Britain after the World War I because Germany was defeated and forced to give up parts of its control. Its previous territories or control around the area were divided between Britain and France. It was thus necessary to re-establish a boundary, commencing in the lake itself, between the newly created British and French mandates which was achieved through the Milner-Simon Declaration of 1919.⁴⁶⁰

Though it is dubious from the point of consent from the African side, the Court considers the declaration as it is international agreement binding the disputant countries. France and UK signed the treaties for their purpose. Neither Nigeria nor Cameroon was there. The purpose of the treaty was made for the benefit of the two countries. It is due to the *uti possidetis* principle accepted by OAU and because the two countries are in dispute, the treaty was applied. On the other hand, the justification given in relation to Germany provides comparison to the Boundary Commission between Ethiopia and Eritrea which failed to consider the effect of Italy's withdrawal from its colony.

After considering the content of the Declaration like "delimitation on the spot of this line" France and Britain agreed to determine separating the territories⁴⁶¹ and subsequent agreements such as Thomson-Marchand Declaration of 1929-1930 referred as further described the frontiers separating the territories which were later on approved and incorporated in the Henderson-Fleuriu Exchange of Notes of 1931, the Court concludes as they have effect of delimitation sufficient for demarcation. Nigeria opposed the 1931 declaration saying it is a programmatic in nature but the Court rejected it saying it has international status to delimit Lake Chad and its vicinity.⁴⁶²

As argued by the Court the treaty testifies that France and Great Britain has made the delimitation though the Court also adds that Nigeria was consulted during the negotiation of

⁴⁵⁹ Ibid

⁴⁶⁰ Ibid

⁴⁶¹ Ibid

⁴⁶² Ibid

its independence and during the plebiscites of northern and southern Cameroon. It is difficult to imagine a country which was under colonialism would perceive the effect of plebiscites on its border which at the same time argues that it historically belongs to it.

What is more important here is the part of the judgment which shows the always divergent treatment of nearly two principles, historical consolidation/effective control and *uti possidetis*/legal title drawn from treaties and the position of ICJ. The basis of Nigeria's claim was summarized as: "(1) long occupation by Nigeria and by Nigerian nationals constituting an historical consolidation, one of title; (2) effective administration by Nigeria, acting as sovereign and an absence of protest; and (3) manifestations of sovereignty by Nigeria together with the acquiescence by Cameroon in Nigerian sovereignty over Darak and the associated Lake Chad villages".⁴⁶³ Cameroon on the other hand argues that as the holder of a conventional territorial title to the disputed areas, it does not have to demonstrate the effective exercise of its sovereignty over those areas, since a valid conventional title prevails over any effectivities to the contrary.⁴⁶⁴ It is the obvious that colonial treaties and agreements are the conventional providers of title.

In this regard, the Court first took the position that the delimitation is made based on the treaties referred earlier and effects of historical consolidation must be seen after this period as acts *contra legem* which means against the law. Thus, when it comes to historical consolidation, it argued it is highly controversial and cannot replace the established modes of acquisition of title under international law, which take into account many other important variables of fact and law.⁴⁶⁵ And the period that Nigeria claims of historical consideration is too short, only 20 years, to the theory that supports its claim.⁴⁶⁶ The court seem to accept Nigeria's claim establishment of such as health station, justice system police, however, that, as there was a pre-existing title held by Cameroon in this area of the lake, the pertinent legal test is whether there was thus evidenced acquiescence by Cameroon in the passing of title from itself to Nigeria.⁴⁶⁷ It concluded that Cameroon never acquiesced. Nigeria's claim does not correspond to the law while Cameroon has title and thus preference should be given to it.⁴⁶⁸ Similar argument and decision were made in the case of Ethiopia by the Commission though the nature of argument may not be identical. Similar decision was given by ICJ in the

⁴⁶³ Ibid

⁴⁶⁴ Ibid

⁴⁶⁵ Ibid

⁴⁶⁶ Ibid

⁴⁶⁷ Ibid

⁴⁶⁸ *ibid*

case Libya and Chad against the claim of Libya based on history, geography, and, settlement etc.

4.2.3. The decision of Bakassi Peninsula: the reflection of the inequality of treaties

According to the judgment, Cameroon relies on the Anglo-German Agreement of 11 March 1913 which places the peninsula to the German.⁴⁶⁹ On the other hand, Nigeria contested that the specific article of United Kingdom and Germany (Anglo-Germany Agreement) was not made effective and invalidated for different reasons. Nigeria contends that the title to sovereignty over Bakassi on which it relies was originally vested in the Kings and Chiefs of Old Calabar and UK has no the authority to decide and cede the peninsula to third party or to Germany. As per Nigeria, the Treaty of Protection signed on 10 September 1884 between Great Britain and the Kings and Chiefs of Old Calabar in no way did it transfer sovereignty to Britain over the territories of the Kings and Chiefs of Old Calabar.⁴⁷⁰ It argued that the treaty itself says protecting and thus UK has a role to protect and no more than this.

As also raised by Nigeria, the chiefs in the first place have no power to represent the people and sign treaties. On the other hand, Cameroon argued that the treaty provided the UK protectorate power and during the colonial times both protectorate and colonials have no substantive difference internationally in their status. The period was the time that European colonialists compete and partitioned the land of Africans without the knowledge and consent of Africans through the camouflage of treaties among them or with local leaders. Although it does not say about their legal validity, the Court has mentioned important facts which occurred at the end of 19th century. It states that during the era of the Congress of Berlin, the European Powers entered into many treaties with local rulers, and that Great Britain concluded some 350 treaties with the local chiefs of the Niger delta which includes the agreement signed with the Kings and Chiefs of Old Calabar.⁴⁷¹

Based on the argument, advisory opinion it provided previously and the treaty itself, the Court was unable to know whether the 1884 treaty provides UK protectorate power or not. However, the Court further notes that a characteristic of an international protectorate is being an ongoing meetings and discussions between the protecting power and the rulers of the

⁴⁶⁹ Ibid

⁴⁷⁰ Ibid

⁴⁷¹ Ibid

protectorate.⁴⁷²The Court states that in this regard Nigeria did not show the existence of such role from Chiefs Calabar. Additionally, no record of British Orders in Council refers to Old Calabar protectorate nor the Chiefs of Calabar protest the 1913 treaty. Thus, it concludes that under the law of the time, Great Britain was in a position in 1913 to determine its boundaries with Germany in respect of Nigeria⁴⁷³ The question is that in such competition of grabbing lands and in time where European were highly civilized including in law, is it fair to expect from the then local leaders such actions. It is unfair to expect Calabar leaders to be aware to the effect of the 1913 Treaty and the legal effect of remaining silent or opposing it.

Similar to the right it has made over the areas around Lake Chad, Nigeria has also claimed the Peninsula based on historical consolidation. Nigeria particularly emphasizes that the title on the basis of historical consolidation, together with acquiescence, in the period since the independence of Nigeria, "constitutes an independent and self-sufficient title to Bakassi".⁴⁷⁴ Cameroon, as it used it in the claim of Lake Chad and its vicinities, argues that a title drawn from legal treaties cannot be displaced by what in its view amounts to no more than a number of alleged effectivities.⁴⁷⁵ The Court has also used similar justification saying that there existed no Nigerian title capable of being confirmed subsequently by "long occupation". Besides to this, the Court also finds consolidation of historic titles cannot in any event vest Nigeria title to Bakassi, where its "occupation" of the peninsula is adverse to Cameroon's prior treaty title and where, moreover, the possession has been for a limited period.⁴⁷⁶

In relation to the interpretation of the treaty and consideration of situation of their formation that should have been endeavored and found out by the court regarding the 1884 and 1913 and agreements and subsequent act, the separate opinion of judge Raizjeva would be sufficient. He questioned that the refusal to accord international status to the agreements concluded by the United Kingdom with the chief of Old Calabar justifies reference to the concept of "the law at the time"? No lawyer can help but be surprised at the Court's warping of the founding principle of international law.

Similarly other judge, who argue that while the court should have accept and interprets in good faith the 1884 as it is only provide protection it reject and accept the treaty of 1913

⁴⁷²Ibid

⁴⁷³Ibid

⁴⁷⁴ Ibid

⁴⁷⁵ Ibid

⁴⁷⁶ Ibid

which lacks consent.⁴⁷⁷ According to the judges, the Calabar did not give consent to UK to decide on the sovereignty of their land and thus the 1913 treaty should be called defective. Judge Rezek has also a view that the 1884 agreement should be considered as treaty because even colonialists have the duty to show good faith. To the writer of this paper, the assertions of separate opinion of judges have the real reflection on the nature of the treaties.

4.2.4. Vagueness

Similar problems to the case of Eritrea and Ethiopia exist in relation to names of rivers and place in the ICJ's decision over Nigeria and Cameroon dispute. For instance, while it tries to identify the land border line from Lake Chad to the Bakassi Peninsula between the countries, the court considered around 16 rivers, places and mountains referred in the instruments or agreements. Some of the provisions of the instrument (the 1931 Thomson-Marchand Declaration) refer names of several rivers to show the course of the land boundary but difficult to identify from their source or channel. As indicated by the Court in the judgment, in Limani area the interpretation of the Thomson-Marchand Declaration raises difficulties in that it simply refers to "a river" in this area, while there are in fact several river channels.⁴⁷⁸ It has to carefully look wordings of the declaration and map attached and other evidences of the parties to decide on the claim.

In other situation, the instrument refers a single river like Karua to show the course of the boundary but that boundary channel splits in two eastern and western channel in this case difficult to determine which direction or channel the boundary follows. Some village like Kotcha (Koja) found to spread more than it was identified in the 1931 agreement because the people spread out to the boundary of Cameroon side though it was initially Nigerian Village.⁴⁷⁹ Some other treaties or parts of the treaties also contain a series of material error which even consider fundamental.⁴⁸⁰ The court generally reached to the decision through interpretation.

4.2.5. The effect of the judgment on the border people

In relation to the effect of the decision on previous relation and on the people who used to have lived, the court shelter itself on the countries' claims and counter-claims of state

⁴⁷⁷ Ibid

⁴⁷⁸ Ibid

⁴⁷⁹ Ibid

⁴⁸⁰ Ibid

responsibilities. On 21 March 2002 the Agent of Cameroon stated before the Court that "over three million Nigerians live in Cameroonian territory."⁴⁸¹ Nigeria was ordered to pull out from the Bakassi and boundaries from Lake Chad to Bakassi its civil administration and forces pursuant to the present Judgment fall within the sovereignty of Cameroon. The justification is that if the Court was to recognize Cameroon's sovereignty over such areas, there is nothing irreversible in the relevant arrangement made by Nigeria.⁴⁸² Cameroon also promised the court it will provide protection to Nigerians in areas of Lake Chad and Bakassi and it took this to its satisfaction.

What is interesting more here is the position of the Court on the Nigerian people who have gradually spread through time to the recent border of Cameroon. It argued that, it cannot take into considerations such facts or interests of population rather it is up to the parties to deal and it left to Cameroon the peoples of Nigerian by following the line in the declaration. It is instead up to the Parties to find a solution to any resultant problems, with a view to respecting the rights and interests of the local population.⁴⁸³

⁴⁸¹ Ibid

⁴⁸² Ibid

⁴⁸³ Ibid

Summary and Recommendations

A. Summary

Africa's current boundaries are the results of its 19th and early 20th century colonialists' negotiation and agreements entered to satisfy their colonialism interests. The boundaries are thus the results of rivalry strategic, political, religious mainly economic interests of African colonialists of the 19th and 20th centuries. The agreement reached among European countries in a conference held between 1884 and 1885, usually referred as the Berlin Conference, is widely quoted for its effect on Africa's modern boundaries. In the conference, previous land scrambling agreements were blessed and rules for their next partitioning of the land of the continent in a form of sphere of influence were set out.

The European countries divided and drew maps without having knowledge and taking into account the social, political, economic and geographic conditions of the African people. In most cases, the boundaries were determined by geopolitical, economic, administrative policies and interests of colonial powers without the participation and consent of Africans. Thus, the boundaries are said to be largely colonial origin, unusually arbitrary and artificial having had profound effects on the people, statehood and the nature of territory of the continent. They either split the same ethnic, historic and cultural units or incorporated together different ethnic, historic and cultural units. Due to the disrespect of social, political, or cultural characteristics of the people, for instance, 177 cultural areas or groups were dissected between 1984 and 1985 alone. Africa is also said to have over 165 borders which make it the most bisected continent.

The boundaries are seriously affected by continuous colonialists bilateral and multilateral treaties and agreements made to expand their competitive sphere of influence or land holdings and occupation. The colonialists signed series of land related agreements among themselves and with some local leaders through or by their private companies, officials, explorers and other individuals in various parts of the continent. The treaties and agreements were signed with the full knowledge and to the satisfaction of competing interests of the then colonial state governments against the interests of Africans. For Africans their decisions were

invariably based on their perceptions of European strength and induced with unbearable pressure to signor indigenous leaders were unaware that they meant to loss of sovereignty.

The treaty practices between European powers and some African chieftains from and, indeed, the Berlin Conference until the Second World War were unequal or *Leonine* treaties where the requirements for international engagements such as capacity and consent were lacking in a majority of the treaties. The colonial period treaties are thus challenged by many scholars for their certainty and legal effects.

In no legal order is freedom of contract unlimited in the sense that the law would place its guaranty of coercion at the disposal of all and every agreement regardless of its terms. These colonial treaties are against some mandatory rules of agreements such as Art 52 and 53 of VCLT, public law, jus cogens, which neither waived nor changed by parties. They are mainly contrary to the contemporary meaning of consent. The multilateral and bilateral treaties signed among and between the colonialists are also challenged based on the principle of *pacta tertiinocentnecpro sunt* since they were signed against the interest and participation of African countries.

While the boundary treaties are challenged for those defects and effects, they seem to have received acceptance or recognition by Africans when OAU decided to apply the principle of territorial integrity in 1964 usually referred as the 1964 Cairo Declaration. Although there are some different opinions to the reference of territorial integrity by OAU charter or the Declaration, many scholars and ICJ interpret it that while OAU has adopted territorial integrity it was referring to the principle of *uti possidetis* which was already implemented by Latin American countries to determine their boundary when they were liberated from the Empire of Spain. The boundary disputes in Africa are also tried to be solved using the principle of *uti possidetis*. Some other scholars and judge argue that territorial integrity has its own broader meaning and does not implicitly relate with the principle of *uti possidetis*.

As per the principle, newly decolonized States will come to independence with the same boundaries they had when they were administrative units within the territory of a colonial power. Generally, the colonial administrative lines were upgraded and transformed into international boundaries based on the principle. But its scope and application found to be illusive. The principle has historically evolved which impacted on its meaning and scope. It developed from Roman law with a purpose of governing rights on immovable property between two individuals. Later on, it started to determine international boundaries of mainly

decolonized countries. It also gradually branched out into *uti possidetis de facto* and *uti possidetis juris* with different meanings where the former relates with rights of boundary established based on actual possession while the latter bases title of boundary mostly derived from treaties. Nevertheless, it is argued that the former principle gradually faded out and the latter continued to be applied by Latin America and Africa and now in Yugoslavia to identify their international border during independence.

The nature of colonialism in Africa and Latin America was not similar. Latin American countries were largely under the colony of only Spain as different provinces where as in Africa there were several colonialists involved with different boundary related bilateral and multilateral treaties and agreements. There was a constant back and forth with European powers swapping pieces of land. Therefore, it is possible to conclude that applying the principle is practically difficult in Africa due to the problem of getting conclusive treaties and agreements of boundaries.

In order to decide the colonial boundary or administrative line based on *uti possidetis*, there is a notion referred as critical-date which sometimes difficult to establish particularly in the case of Africa if disputing countries differ on the date of independence of each country. Generally, the critical-date is the date of the lasting of colonial rule. It is on that date that the colonial power left the people in colonial territory and the people inherits the colonial border/line and became an independent state. The application of the principle freeze-framing of boundaries on the date of decolonization and it makes the issue of the history of these boundaries moot after this date. After the critical date, boundary changes will be accepted if it is made with acquiesce or consent. But the principle has no ruling on retroactive effects of historical developments. Nevertheless, establishing acquiesces and consent from the subsequent conduct and the retrospective considerations of developments are not an easy matter and usually exposed to matter of interpretation.

In all these complex situations, looking into the norms of ICJ is important as the principle gradually developed and clarified by its decisions. But, the application of the principle by the court varies case to case. It seems that the principle is not uniformly applied and this leads one to raise question to the status of the principle whether it attained customary international law or not. Though *uti possidetis* establishes colonial boundaries during independence with the understanding there will be pre-defined line, it is not always the case. Contrary to this,

ICJ relies on determining boundaries based on the principles by looking on to treaties and the principle prevails over the other principles and evidences.

The principle has also different shortcomings. Firstly, the application indirectly furnishes legitimacy to boundary treaties by side stepping the question of their origin. Secondly, the principle unusually assumes first the formation of state then nations while it should be the reverse and such territorial based state formation blamed for generating conflicts among minorities, ethnicities, and can engender ethno-nationalism. Thirdly, it is said to be anti-self-determination as it only allows territorial independence. Fourthly, the principle fails or disadvantages cross-border communities who are often unrepresented by the governments on both sides of the frontier in border disputes. Finally, there are scholars who argue that the principle has not stooled boundary disputes as it was intended.

Since Africa was arbitrarily divided by Colonialists, there has been the tendency or move for ethnic gatherings or ethnic based independence and quest for border revision. The leaders feared that the question will be endless and lead to have various small states and disintegration of the continent. To contain such issues, the African leaders have primarily chosen the *uti possidetis* principle to determine boundary of new states.

However, there are new issue which challenges such positions and boundary treaties in Africa which will make boundary demarcation more complex. The concept of self-determination is getting gradually expanded and external self-determination (secession) is becoming a threat to African boundaries. Self-determination was initially applied in association with decolonization to guarantee the independence of colonized people. It gradually widened in its scope and definition though it is difficult to say there is full consensus among scholars. Self-determination expanded gradually and includes external-self determination which equates with secession. The effect of colonialism which arbitrarily separated people or brought together against their will by their boundary treaties which later on transferred to international boundaries and the spread of western principle of democracy and human rights have exacerbated the claim of secession.

Initially self-determination was considered as political right but later on after it was enshrined in the UN charter, it continued to be considered as political and international legal right. Since then they continued to be included in various human right conventions such as UN Covenants on Human Rights. However, its scope and definition as to who is entitled to the right and the extent of the right remained to be controversial and a matter of interpretation.

The UN charter grants right of people to self-determination without defining people and scholars argue that it grants rights of independence for people under colonization and foreign administration. While other argues that such rights are granted in the 1960 UN resolution known as the Declaration on the Granting of Independence to Colonial Countries and Peoples (DGICCP).

The right to internal and external self-determination became pronounced more after the issuance of the Declaration of Friendly Relations and Cooperation among States (DFRCS). Though it does not define what people mean, it allows people racially and religiously discriminated by their regime have the right to internal self-determination or external self-determination/secession. Since then regional organization and international human right conventions enshrined both external and internal type of self-determinations. At the same time the importance of territorial integrity continued to get emphasis. However once secession occurs, it results in border changes since there will be the creation of new states separated from old states and it is inconsistent with territorial integrity.

The international community seems to trying to balance these opposing practices. Firstly, as far as secession is concerned it is difficult to argue that it is permitted by international law. Secondly, it is not totally denied because when internal self-determination is not allowed for groups or peoples, the possibility to challenge the exercise of external self-determination will be weak. In addition to this, the practice of states to deny or provide recognition of seceded state depends on their respective interest and this create loophole for the occurrence of secession. This seems a reality in Yugoslavia, Czechoslovakia and USSR.

Since the achievement of independence of African countries, the quests for Self-determination and secession have occurred though it could not be materialized. Different from the previous practices Eritrea, and South Sudan gained their independence. Somali Land is also a de facto state. These are real examples for secession as a new boundary threat of Africa. While African governments remain autocrat and try to forcefully keep boundaries inherited from colonialists, the spread of western democracy and human rights have increased the awareness of Africans. Such changes certainly feared to provoke ethnics and groups who were unusually arbitrarily divided as a result of colonial boundaries to claim secession. The advent of democratization provided the impetus for various marginalized groups to begin to seek redressing and the end of Cold War has also exacerbated the claim for secession.

In nearly all states, ethnic divisions and identity associated with boundary have arguably become more pronounced in existing Africa. There had been secession claims before which were controlled by their respective governments such as the case of Ebo ethnics in Nigeria (1967), Cabinda (Angola). But these do not guarantee that there will not be others. Different recent Coup attempts, ethnic tensions, and interstate wars have strong ties with secession claims. While the threat of secession seems a threat to Africa, its application became more complex. Like the developments in the international conventions, the African Constitutive Act and the 1986 African (Banjul) Charter on Human and Peoples ' Rights recognize self-determination rights of peoples including deciding on their political status without defining peoples who are allowed to exercise those rights. The Act of AU like that of OAU upholds territorial integrity without showing the mechanisms how the two principles will be reconciled.

The problem of secession become more visible during boundary making process particularly if the two countries did not agree in different effects of the secession such as nationality, economic and other strategic ties. There is no readily and sufficiently tried international principle. The international community seem to follow *uti possidetis* but its general applicability beyond the purely decolonization scenario has been challenged. It is also contrary to the right to self -determination. It will be very problematic if a seceding country previously has unitary type of ties with mother state and if its secession claim is based on past history which will not help remove feud and endless to redress problems. The best solution which avoids intractable boundary problem is seeking internal mechanisms before secession became a boundary challenge.

Thus seeking internal solutions such as granting of internal self-determination, exercising of voluntary integration, encouraging democracy, respect for human rights and promptly acting on the causes of self-determinations are important. Doing this will also alleviate a problem of seceding state. Secession by itself will not guarantee for peace and stability. No one will also be sure that there will not be claim of secession within the seceding state.

The other type of new challenge to Africa could be summarized as the challenge of delimitation and demarcation between two existing states. The African Union has established the African Border Commission in order to undertake the demarcation and delimitation of boundaries and develop cross-border integration dynamics among others. Today only about a quarter of the African borders are said to be clearly defined (delimited) and physically

marked (demarcated). However, one of the challenges in the process is vagueness of treaties. What is indicated in treaties and what is on earth are unrelated. On average, most African countries have got their independence over half a century ago and various changes have occurred around borders. Various sensitive projects have also been established around border areas. All these make the delimitation and demarcation unusually challenging.

The political, economic and social forces together constitute or provide an environment within which conflicts occurs change according to a particular historical period affecting both the nature and extent of conflicts. The discovery of new expensive minerals such as crude oil or becoming strategically important route than they were previously is one of the new challenges boundaries. African states are recently desperately looking to their borders and territories to ease the economic pressure. The practice of courts, ICJ generally rejects social and economic considerations in their proceedings though such considerations may constitute important causes of the disputes.

Together with this, while the previous border issues among neighboring states were related to reuniting of divided ethnics. Now it may be more complicated if the borders are mainly rich in resource in that the divided ethnics likely disregard maintaining the status quo or reuniting. They may rather prefer to secede.

Scholars and some human rights conventions emphasize the rights of indigenous people, border people who may also be considered minorities in certain situations or people who should get priority in border demarcation. Diplomatic, arbitration and judicial mechanisms on the other hand only involve states not on border people and this will be a new challenge.

B. Recommendations

1. As it was indicated in the successive discussions of the paper, the principle of *uti possidetis* had passed or came after historical milestone. Like other legal notions and concepts, its history traces back to Roman times but gradually changed in its scope and definition. It appears to depend on treaties but the inclusion and exclusion of historical developments following retrospective consideration until the critical date and subsequent conducts that should be taken into account after the critical date are not distinctively indicated or they are unclear. Its application was only expected to be clarified mainly by the ICJ or similar tribunals which apply the principle to resolve

real disputes. But their application particularly that of ICJ seems to be more confusing and vary case to case.

Thus, how boundary lines or colonial administrative lines transferred to boundary lines of newly independent state based on the principle of *uti possidetis* unclear and requires further study and research.

2. Although there are more or outweighing arguments that OAU has adopted the principle of *uti possidetis* while it approves the 1964 Cairo declaration and also in its charter, its direct reference of territorial integrity instead of the *uti possidetis* has created confusion. There are some scholars and judges who came out to reflect their comment that OAU does not adopt the *uti possides* principle rather it used territorial integrity with its own scope and definition. On the other hand, ICJ has clearly stated that it is *uti possidetis* applied to resolve boundary dispute related to decolonized states. Scholars and ICJ argue that OAU has also adopted the *uti possidetis* principle. While such divisions or discrepancies are there on the two principles which have their own historical backgrounds, similarities and differences, it seems that OAU as well as AU or any other relevant organ of the continent did not say on these different interpretations. If the interpretation differences are considered, they are very relevant. While territorial integrity includes effective control, it is excluded by *uti possidetis* principle. They also follow different application of changes after independence

The issues the principle governs, boundary dispute, is extremely important to the continent and there are also sufficient cases to study and define what notion the principle mean or the OAU adopted by the time. ICJ has rulings in Africa like the case of Libya and Chad, Burkina Faso and Mali, Cameroon and Nigeria, and Eritrea and Ethiopia. In one or the other the principle of *uti possidetis* has been referred though the ruling may not equally or solely depend on it. The continent particularly the AU has to take action in this regard since many of the boundaries are not still demarcated. AU or other relevant organ should come out and provide the principle and its scope the African continent adopted by the time. However, the differences of the arguments have their own advantages and disadvantage which have to be also taken into consideration. As per the argument of some scholars, the territorial integrity principle OAU has accepted does not allow changes after independence including those occurred with consent or acquiescence of disputant countries. Never less,

accepting such argument is so difficult and in this regard except the limitation in its application the notion of *uti possidetis* is important to the case of Africa and seems proper since it accepts changes after independence if it occurs with the consent or acquiescence of disputant countries.

3. The principle is becoming nearly a bone in trachea which seems to be difficult either to swallow or get it out. Several European countries which were historically enemies colonized Africa to extend their supremacy as well as exploit the resources of Africa. They signed several successive treaties to ensure their colonial interests. Besides to the motive and objective of the treaties, they have critical legal defects and if not challenged jeopardize African interest continuously. Their certainty is also questionable. There are also areas in the continent such as hinter lands, buffer zones which were not actually controlled except including such areas in treaties as sphere of influence.

Nevertheless, countries do present these treaties and agreements to justify their current border dispute. In rare circumstances, they directly challenge the legality of the treaties because they had got recognition by the adoption of the principle. Countries try to compromise their legality by presenting historical, administrative and effective occupation. However, ICJ disregards these evidences for two reasons. Firstly, it consider as they are difficult to depend on it without showing how they are difficult. Secondly, it initially tries to address title based on treaty and if it able to do so it will not resort to other right ascertaining mechanisms.

If these evidences (historical, administrative and effective occupation) would have been considered, they might have partly balanced the consequence of treaties which have been signed to satisfy the interest of colonialists. Unless they are procured by forceful means, administration, effective occupation relate with actual settlement and reduce disruption of settlement and new feud. The practice of ICJ has also narrowed the opportunity of Africa the possibility to gain experience to seek solution alternatively based on history, administration, effective occupation.

Thus, the continent has to take position for the alternative and equal application of *uti possidetis* and effective occupation, administration and other factors historical situation such as settlement of people, geographical similarity instead of allowing ICJ

to solely depend on colonial treaties based on the principle of *ut ipossidetis* and rules of treaty interpretation.

4. Together with this, the practice of ICJ in interpretation is very rigid and less flexible. ICJ is highly depending mainly on bilateral treaties and always try to define from them the purpose and objectives as if they were made by the current disputant countries. The principle and the convention that dictates treaty interpretation also serves ICJ as justification. It is a fact that the disputant parties are not truly parties as the law of treaty anticipates. The countries who had signed the treaties and countries who seek their implementation are completely different in various aspects. They generally succeeded the treaties through the 1964 Cairo declaration of OAU and its charter.

In order to alleviate certain problems and to balance these differences, a kind of treaty interpretation such as the application of providing effect to treaties should be considered by African countries. In addition to this, there has to be a kind of European human right instrument interpretation which is flexible and in-light of present-day consideration.

5. The function of boundary has evolved through time. Their separating role and attribution with sovereignty are gradually diminishing. This has to be critically considered and instead there has to be integration which reduces the separation effect of boundary. We are now living in the world of globalization where countries benefit one from the other. There are also various regional and continental associations established by countries to work together. The aspiration for integration in Africa is historical which may date back to 1945. Now it is started though the focus seems to be initially economical integration and continue stage by stage. But border integration is a means to reduce conflict caused by boundary or territory claims and it is a base even for economic integration.

Accordingly, in order to bring border integrity, the factors which may pose challenge the process such as the perception to sovereignty and identity has to be uniformly addressed by AU as a rule. Border integration would be also meaningful if the integration is started on bilateral projects around borders which benefit and ties people around the borders and also the nations. It is important to recall back that African leaders decided to maintain colonial boundaries believing that they are tangible and

nation building will side line ethnic divisions, allowing free movement of citizens along the borders.

6. Africa is facing a new type of boundary challenges. The issue of secession is threatening though much time is concentrating on diffusing the issue itself as if it is not a problem of Africa. If the colonial scenario and the democratization process which occurs throughout the world and African response to such move are taken into consideration, the threat is imminent. The case of South Sudan, Eritrea, and also Somali Land provide various lessons and referring them with exception will not save Africa from similar occurrences. What is more important is the need to work on the protecting mechanism.

The best and only solution to avoid secession and its effect such as boundary split is expanding and ensuring internal self-determination and voluntary national integration other than forceful one. Such actions provide answer for the question of claimants and are in line with international conventions and understandings.

Thus, Africa has to work hard to prevail democracy within the continent. In addition, it has to strive uniformly to reduce ethnic based identification of people. African countries should rather have to develop nation or country based identification of people.

7. The boundary conflicts are becoming complex in Africa in recent times. The boundaries are no more considered as ragged or simply vacant areas. The population pressure and other technological developments had forced countries to look into borders and these peripheral areas are becoming source of very expensive resources where neither disputant or neighboring countries will pull out from claiming the areas. Therefore, African countries have to design mechanism where countries mutually benefit from such resources rather than focusing on defining where the lines are laying across the countries.
8. Boundary demarcation related with secession is a critical problem. Since it is related with self-determination and a recent issue, there is no amply tested international principle in this regard. The principle applied in Yugoslavia does not seem applicable to Africa. The situation of Yugoslavian Federation and that of countries in African

continent is completely different. In Africa, in whatever it was established, they have lived together for decades in a form of unitary government. The people to people relation, the investments and the dependency established after independency was achieved would not be easily undermined. While such realities are there, trying to demarcate boundaries based on century old treaties will not solve problem rather will cause new trouble. These are the case of Eritrea and South Sudan. It is not the secession which becomes a problem rather the boundary demarcation and other related issues are certainly the challenges.

Thus, the continent has to come up with its solution on the mechanism of border demarcation such as considering recent boundary of seceding states if secession could not be controlled.

9. The border issue does not take into consideration the plight of border people yet. This is the case in Nigeria and Cameroon and Ethiopia and Eritrea border decisions. The norms of international community as reflected in human right convention and treaties are recognizing rights of indigenous people or people rights. Therefore, the continent has to take action and set rules that the rights of border people is regarded such as their right to choose their nationality and the possibility borders are demarcated in a way it accommodate their interest.
10. While boundaries are political, economic and social issues, they are always tried to be rested through judicial means mainly through ICJ. The judicial organs only interpret the law and do not consider the other factors. Disputant countries are a little ready to be a loser. Therefore, the alternative mechanism such as mediation, negotiation or diplomatic means should be applied and must be applied as precondition to go to judicial solutions.
11. The application of the principle allows unlimited reference of over a century old treaties. Nevertheless, as it occurs in Eritrea and Ethiopia and Nigeria and Cameroon they found to be vague. They are either less understandable or unrelated with the current circumstances. ICJ or Arbitration tribunal such as the kind of Ethiopia and Eritrea refers colonial documents including maps released by explorers and individual citizens to define such vague treaties.

The references of evidences, particularly when treaties are vague, need reconsideration because they imbalance the position of parties. In the case of Eritrea and Ethiopia, Italy was colonialist by the time and Eritrea was arguing based on the treaties its colonial has signed into. When some references within the treaties were vague the Commission has defined using Italian individual maps and documents.

Thus, vagueness of treaties are practically occurring and they are inevitable to occur in the future since the treaties have initially difficulties and too old to apply these days. The continent may be required to take position when parts of treaties are vague. It seems sensible to define them based on the recent situation particularly when they have discrepancies with the recent reality and border circumstances.

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