NIGERIA'S CHALLENGE TO AFRICA'S POST-COLONIAL BORDERS AND A REAPPRAISAL OF THE *UTI POSSIDETIS JURIS* DOCTRINE*

Abstract

Establishment of colonialism in Africa was in breach of international law. When in 1885, European States at the Berlin Conference declared most of Africa as *terra nullius,* and the inhabitants incapable of governing themselves, they contradicted the existence of more than two centuries of trading relationship with the continent. Most colonial territories in Africa were acquired by agreements with African Chiefs and Kings under which colonialists guaranteed African leaders that the colonialist would extend her favour and protection to them. Colonialists extrapolated their rights under these treaties to sovereign powers and expropriated the territories they covenanted to protect. Acting as sovereigns, they made boundary treaties and demarcated their respective areas of influence. Recently, Nigeria expressed discontent with the artificiality of postcolonial African boundaries, and their divisive effect on African societies. The objective of this paper is an analysis of the nature of the doctrine of *uti possidetis juris* as a whole, and a general reappraisal of its application to postcolonial African borders. The methodology adopted is doctrinal. The paper relied on primary and secondary sources. These include writings of scholars and journal publications and articles, conference papers, books, case law comprised in the judgments of international and domestic tribunals, resolutions, treaties, declarations and other materials, both electronic and print. The methodology does not indicate any necessity for investigation of the details of boundary demarcations and the technicalities of border delineations: thus, the enquiry did not proceed in that direction. This paper theorised that application of *uti possidetis juris* to postcolonial African borders constituted an effort to ratify illicit colonial acquisition and demarcation of African territories. The paper found that the doctrine's international law outlook developed in Latin America and was extended to Africa during decolonisation to transform administrative colonial borders into international boundaries at the date of independence. The paper argued that this practice ratified the absurdity of colonial borders which divided societies and confined disparate peoples into a single geographical space. The paper on examining recent instances of the doctrine's application in Africa and outside Africa found that the doctrine seemed to have achieved an overarching presence so that its application was no longer limited to decolonisation situations. The paper then disclosed that the doctrine possessed severe shortcomings, concluded that its application in postcolonial Africa was improper, and recommended that recourse to the doctrine should not be inevitable.

Keywords: *Berlin Conference; Border; Boundary, Colonial border, Postcolonial; Uti Possidetis,*

I. Introduction

Defined territory is a central attribute of statehood.[1] Territory in this sense, being a physical territory suggests a section of terrestrial space subject to the exclusive authority and control of the state. Since exercise of sovereignty is limited to a state's territory, clarity of territorial limits is inevitable to the exercise of jurisdiction and sovereignty. The *uti possidetis* rule converts administrative borders into international boundaries and freezes colonial boundaries at the time of independence. The doctrine has been severely criticised as an *ex post facto* ratification and continuation of arbitrary and unconscionable colonial division of African societies and peoples.

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[1] Art. 1 of Montevideo Convention 1933

About August 15, 2022, Nigeria's Presidency described the boundaries between Nigeria and her neighbours as artificial. Expatiating on this, the Presidency's spokesman stated that, *'All these boundaries are very much artificial. The Europeans in Congress of Berlin just took a piece of paper and were drawing lines across places where they have never been; they never intended to be, separated people who should be united and uniting people, perhaps, who should be separated…..*'[2] On November 28, 2022, Nigeria's President Muhammadu Buhari called on members of the Economic Community of West African States to remove *'[o]utdated physical and psychological boundaries, as well as other colonially-inspired differences'*[3] From this perspective, this paper will reappraise application of the *uti possidetis* doctrine to Africa's postcolonial borders. Part II will conduct a historical analysis of the development of the doctrine and its application to postcolonial Africa. Part III with look at the paradox of colonial borders, and the damage they inflicted on African societies. Part IV will consider recent applications of the doctrine in Africa, while part V will survey recent applications of the doctrine outside Africa. In part VI, the paper will point out the shortcomings of the doctrine, while part VII will question the rationale for application of the doctrine to Africa. Part VIII will conclude.

II. Historical Background to the *Uti Possidetis* Doctrine

Uti possidetis is a term originating from Roman Law. It was an interdict under which disturbance of current possession of immovable property, as between two individuals, was forbidden.[4] Upon transfer of the expression *uti possidetis* from Roman law, to International Law, the concept underwent a change. In International Law, use of force is lawful and the right of conquest was recognized, unlike its basic purpose in private law which was to preclude and nullify, the use of force. In International law, it no longer denoted a judicial or quasi-judicial procedure for a proscription, but was articulated in the words *uti possidetis, ita possideatis* - '*As you possess, so may you possess*.' In this regard, it provided a date from which rights were to be

[2] 'Boundaries between Nigeria, neighbours artificial - Presidency' <https://www.vanguardngr.com/category/national-news/>Accessed November 29, 2022

[3] Ibekimi Oriamaja, 'ECOWAS must remove colonially imposed physical and psychological barriers. – President Muhammadu Buhari', <https://www.tracknews.ng/tag/ecowas-must-remove-colonially-imposed-physical-and-psychological-barriers-president-muhammadu-buhari/> Accessed November 29, 2022

[4] John Bassett Moore, *Costa Rica - Panama Arbitration Memorandum on Uti Possidetis*, (Commonwealth, Virginia: 1913) 5-8; [Writers are not agreed about the origin of the process. Some find the origin in measures for protecting occupants of public lands, who, while unable to show original title and thus could not maintain an action for ownership, received on the strength of his possession, the recognition and sanction of the State, and freedom from disturbance by his adversary. Subsequently, the interdict evolved to an ancillary process to decide which party, as possessor, should have the advantage of standing on the defensive in litigation to determine ownership. The substance of the decree is embraced in the words *uti possidetis, ita possideatis: "As you possess, so may you possess."* See Muirhead, *Historical Introduction to the Private Law of Rome,* (2nd ed. 1899) 206; Freddy D Mnyongani, 'Between a rock and a hard place: the right to self-determination versus *uti possidetis* in Africa', (2008) XLI CILSA [463-479] 468 [*Uti possidetis* originated in Roman private law as a Praetorian Edict to settle property ownership. The Edict provided provisional possession in litigation involving property ownership, by providing more rights to the possessor. The reluctance of the Edict to disturb possession was to maintain order. The possessor's rights were, weakened if he obtained the land in a clandestine manner or had used force. It was a general practice in Roman law that the '*status quo would be preserved; irrespective of the means by which possession had been gained'*. This notion of preserving the '*status quo'* inspired the principle of *uti possidetis* as it later came to be applied to territory in international law.] See Enver Hasani '*Uti possidetis juris*: From Rome to Kosovo' (2003) 27(2) *Fletcher Forum of World Affairs* [85-97] 85; Steven R. Ratner 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', (1996) 90 *AJIL*, 593; Joshua A. Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial "National" Identity* (Martinus Nijhoff: 2000)110–111

calculated, without recourse to earlier disputes.[5] In early 19th century, Spanish colonies of Central and South America proclaimed their independence. They adopted a rule that the frontiers of the Spanish provinces which they were succeeding would be the boundaries of the newly established republics, and gave the name of *uti possidetis juris* to this principle. While the doctrine was largely a basis for defining borders, it offered an advantage because its application was expected to eliminate territorial conflicts among the states *inter se* due to clear demarcation of each border based on colonial-era administrative lines.[6] While seeking to prevent boundary conflicts, the rule had a further purpose of preventing renewed European colonization in Latin America on the basis that parts of the continent were *terra nullius* and open to acquisition by effective occupation. It strengthened local control on the basis of constructive, rather than actual possession. It thus constituted a proclamation of constructive possession, and changed emphasis from effective occupation to endorsement of colonial administrative borders.[7] Notwithstanding differences between the political and historical backgrounds of Africa and Latin America, Africa's decolonisation witnessed the introduction of the doctrine. However, Africa's colonisation did not parallel that of Latin America. While a single colonial power was involved in Latin America, Africa had about seven colonial powers, each with more than one colony at different times. Furthermore, border-creation in Africa differed from Latin America. African boundaries were basically geometric lines without regard to local ethnic or other considerations.[8] African heads of state and government in a summit in Cairo, Egypt, 1964, adopted a resolution which considered that borders of African states, on the day of their

[5] John Bassett Moore, (n 3) 86 [At the end of Spanish rule in America, the new States followed the dividing lines of former Spanish administrative units. However, these units had not been properly demarcated by the Spaniards. Boundary disputes arose from the ensuing uncertainty. Arbitrators appointed to settle these disputes were requested by the parties to apply the rule of *uti possidetis* at independence. This anticipated that, by perusing Spanish decrees, precise demarcation of the former administrative units could be traced. This assumption was unrealised. Evidence disclosed that the new States exercised authority beyond the border limits of their apparent territorial jurisdiction. States that expanded in this manner insisted that the meaning of *uti possidetis* was administrative possession as it *actually* existed at independence, while opposing parties contended that the principle required restriction of sovereignty to areas *rightfully* occupied by the antecedent colonial unit. The two conflicting theories of *uti possidetis* were known as *uti possidetis de facto* and *uti possidetis juris,* respectively.] See AO Cukwurah, *The Settlement of Boundary Disputes in International Law,* (Manchester: 1967) 112; Joshua Castellino& Steve Allen, *Title to Territory in International Law: A Temporal Analysis,* (Dartmouth: 2003) 11; Enver Hasani, (n 4) 85-6

[6] Paul R. Hensel, Michael E. Allison & Ahmed Khanani**,** 'Territorial Integrity Treaties, *Uti Possidetis,* and Armed Conflict over Territory', Paper presented at 2006 Shambaugh Conference *Building Synergies: Institutions and Cooperation in World Politics*, University of Iowa, 13 October 2006, 8 [Each state was acknowledged as holding all territories presumed to have been held by its colonial predecessor as at the last period the borders could be considered to have been under Spanish authority. The advantage of this principle is that it created a rule that legally, no territory of old Spanish America was unoccupied. It was expected to eliminate boundary disputes between the new states, and prevent new territorial claims by extra-regional (European) states, because the entire continent was deemed to be under the sovereignty of independent states.] See Ian Brownlie, *Principles of Public International Law,* (5th ed., 1988) 133; Joshua A. Castellino, (n 4) 63ff, 142-143; Gordon Ireland, *Boundaries, Possessions and Conflicts in South America,* (Harvard: 1938) 327-329; Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (McGill-Queen's:2002) 28ff; Steven R. Ratner, (n 4) 593-595, 598-601; Surya P. Sharma, *Territorial Acquisition, Disputes, and International Law*(MartinusNijhoff:1997) 119-129; Malcolm N. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', (1996) 67 *British Yearbook of International Law* [75-154] 141-150

[7] Malcolm N. Shaw, 'Peoples, Territorialism and Boundaries', (1997) 3 *EJIL* [478-507] 492; Freddy D Mnyongani, (n 4) 469 [In Latin America, *uti possidetis* brought the concept of *terra nullius* to an end by recognising the new states as possessors of all territories presumed to have been held by their colonial predecessors. Its application, by accepting identification of each border's location based on colonial-era administration lines eliminated or reduced potential border conflicts.]

[8] Malcolm N. Shaw, (n 7) 493

independence constituted a tangible reality; reaffirmed the respect of all member states for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence; and declared that all member states pledged themselves to respect the borders existing on their achievement of national independence.[9] Despite the deliberate failure of this resolution and several other continental documents to use the *uti possidetis* term, the rule and concept has been imported into and applied to the African decolonisation and post colonisation context. In *Burkina Faso vs. Republic of Mali*,[10] the ICJ Chamber held that the 1964 resolution *'deliberately defined and stressed the principle of uti possidetis juris'*. It theorised that the fact of new African states agreeing to respect administrative boundaries and frontiers established by colonial powers *'must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope*'. Shaw, echoing this stance, in support of application of *uti possidetis* to Africa's post colonisation context, argues that acceptance of colonial borders by Africa's leaders and OAU constituted recognition and confirmation of an existing principle,[11] and, avoidance of conflict upon a succession of sovereign authorities in the territorial context, which is primary reason for the principle, applies equally to the postcolonial scenario.[12]

III. The Paradox of Colonial Borders

Borders, also known as boundaries or frontiers,[13] are lines that delimit a region from other regions.[14] In international law, a boundary is a line delineating the territorial jurisdiction of a state or other entity possessing international status.[15] Borders mark the limits and sovereignty of a specific territory, and delimit territories over which states exercise authority.[16] Boundaries as a concept have legal and political ramifications. Legally, they disclose the magnitude of a state's sovereignty and confines of its national legal system, while politically they are observable limits of size and location.[17] Though the concept of borders in contemporary times correlates with the idea of territorial possession, it was only in the 19th century that States adopted territory as a vital attribute of statehood. Prior to that, population and government were more important than territory. Thus, marking a state's jurisdiction and sovereignty by drawing a boundary on a map and demarcating borders on the ground is of recent origin.[18] Functionally,

[9] OAU Resolution AHG/Res.16 (1) adopted by the First Ordinary Session of the Assembly of Heads of State and Government held in Cairo, from 17th to 21st July 1964. This principle on respect of colonial boundaries is currently protected by article 4(b) of the Constitutive Act of the African Union.

[10]1986 ICJ Reports 565, the Chamber noted that the essence of *uti possidetis* lay in its primary aim of securing territorial boundaries at the moment of independence. Such territorial boundaries might be mere delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case application of the principle resulted in administrative boundaries being transformed into full international frontiers.

[11] Malcolm N. Shaw, (n 7) 494

[12] Ibid. 497

[13] Martin Glassner, *Political Geography* (John Wiley & Sons:1993); Dina Sunyowati, Haidar Adam & Ria Tri Vinata, 'The Principles of *Uti Possidetis Juris* as an Alternative to Settlement Determination of Territorial Limits in the Oecusse Sacred Area (Study of the NKRI and RDTL Boundaries)', (2019) 34(2) *Yuridika* [279-301] 285

[14] Starke, *Introduction to International Law* (Sinar Grafika: 10th ed. 2002); Dina Sunyowati, Haidar Adam & Ria Tri Vinata, (ibid.) 285

[15] BA Garner, (ed.) *Black's Law Dictionary* (10th ed. 2014) 223

[16] Adolph C. Ulaya, 'The Doctrine of *Uti Possidetis* and its Application in Resolution of International Boundary Disputes in Africa', (LL.M Thesis, Mzumbe University, 2015) 36

[17] Freddy D Mnyongani, (n 4) 465; see also Malcolm N Shaw, (n 6) 77

[18] Aman Kuma, 'A Relook at the Principle of *Uti Possidetis* in the Context of the Indo-Nepal Border Dispute', (2021) 12(1) *Jindal Global Law Review* [95–115]; Daniel-Erasmus Khan, 'Territory and Boundaries' in Bardo

proper demarcation of borders between countries lessens the prospect of border conflicts and assists enforcement of laws on both sides of the border. Thus borders are significant factors in identity management, law enforcement and national sovereignty.[19] The basic difference between internal and international boundaries is that international boundaries establish permanent geographic and legal outlines with full international consequence. They identify the confines of sovereignty and territorial jurisdiction between separate international persons. They possess vital consequences for international responsibility and jurisdiction. They may not be altered arbitrarily, but only through the consent of relevant states. Internal borders do not possess any of these features. However, in current practice, internal lines may in the process of independence morph into international boundaries.[20]

In its early period, international law, was an implement of colonialism. An example of a rule created by colonisers to justify their unlawful territorial acquisition was demarcation of colonial borders. Colonisers who drew the borders of most postcolonial states were driven solely by their commercial interests.[21] Colonialists' geopolitical, economic, and administrative policies determined demarcation of the borders. Little regard was had to historical, cultural, or ethnic realities of the natives in creating these borders. The borders split historical and cultural groups, and, confined in the same territorial space, different cultures, religions, languages and identities.[22] Upon decolonisation, these newly independent former colonies were compelled by the *uti possidetis* principle to continue with colonial borders.[23] Thus, so as to gain statehood recognition, dissimilar political entities with different complex features were constrained to embrace a Western model of statehood that expressed certain views of territory, nation, and ethnicity.[24] The result of colonial borders that either separated cultural groups or confined different cultural groups inside a common territory is that all over the global South, colonial borders have resulted in postcolonial states which lack correspondence between their borders and socio-political identity.[25]

Fassbender & Anne Peters (eds.), *The Oxford Handbook of History of International Law* (Oxford: 2012) [The idea of borders is traceable to Egyptian, Assyrian, Chinese, and Roman origins. In the 12th and 13th centuries, demarcated borders became important to territorial consolidation of European monarchies. Precise boundaries as a feature of the postcolonial state is a European development.] See Tayyab Mahmud, 'Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars along the Afghanistan-Pakistan Frontier,' (2010) 36(1) *Brooklyn Journal of International Law* 23; Verkijika G. Fanso, *Traditional and Colonial African Boundaries: Concepts and Functions in Inter-Group Relations*, (Présence Africaine: 1986) 137–138

[19] Dina Sunyowati, Haidar Adam & Ria Tri Vinata, (n 13) 286; Ria Tri Vinata, Masitha Tismananda Kumala, & Penijati Setyowati, 'Implementation of the *Uti Possidetis* Principle as a Basic Claim for Determining Territorial Integrity of the Unitary State of Republic Indonesia, (2021) 24(2) *International Journal of Business, Economics and Law* [A criterion to be satisfied by a state as a subject of international law is possession of territory. Certainty and clarity of boundaries are fundamental. A change in the status of a country's territory will have a juridical effect on the state's sovereignty, including the citizenship of those who live in the region.]

[20] Malcolm N. Shaw, (n 7) 490

[21] Aman Kuma, (n 18)

[22] Tayyab Mahmud, (n 18) 25 [Inherited colonial borders, which have been accepted by the postcolonial states, often provoke challenge and resistance from the local population due to the shared yet divided questions of identity and difference] Aman Kuma, (n 18); Mohammad Shahabuddin, 'Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar,' (2019) 9(2) *Asian Journal of International Law* 334, 336

[23] Aman Kuma, (n 18)

[24] Mohammad Shahabuddin, (n 22) 335

[25] Tayyab Mahmud, (n 18) 50.; see generally, Aman Kuma, (n 18); Enver Hasani, (n 4) 89 [Similar to Latin America, African concept of self-determination is territory-based instead of ethnicity. This resulted in non-recognition of self-determination claims by indigenous groups in these regions. Conversely, in Asia, colonial frontiers largely paralleled the European system in preserving pre-colonial state structures. The result was that

Colonisation involved territorial acquisition by forceful occupation of African territories or entering into agreements with local African leaders. Having obtained the local territories by force or subterfuge, colonialists concluded boundary treaties among themselves to demarcate their areas of influence.[26] Binding treaties among colonial powers was the device by which most of these boundaries were established or altered. For instance, the Anglo-German Treaty of 1890 between Britain and Germany established the boundaries of Germany's sphere of influence in Tanganyika. The 1919 Franco-British declaration (Milner-Simon Declaration) delimited Lake Chad area. The 1913 Anglo-German Agreements delimited the area around Bakassi Peninsula between the colonies of Cameroon and Nigeria. The agreement between Britain and Portugal in November 18, 1954 established changes on the boundaries between the colonies of Nyasaland and Mozambique with respect to Lake Nyasa area and the Chisamulo and Likoma islands.[27] In fixing these boundaries, ignorance of historical, geographical and social factors, often led to situating antagonistic groups in the same unit.[28] Subsequent efforts to deviate from *uti possidetis* and depend on ethnic or historical parameters have been unsuccessful.[29] Exercise of the right to self-determination within the decolonisation context was constrained to colonial territorial boundaries. Although the purpose of this was to protect the stability of the new states and avoid post-independence territorial conflicts among African States, it however, resulted in colonial territorial boundaries becoming international boundaries for postcolonial African states.[30]

IV. Recent Instances of the Doctrine's Application in Post-Colonial Africa

postcolonial state borders in Asia were congruent with already existing precolonial sovereignties with state traditions. Their self-determination pattern was a full restoration of pre-colonial forms of state organization. This was particularly apparent South East Asia.]

[26] Adolph C. Ulaya, (n 16) 39 [African states that were not colonized like Ethiopia had their territorial boundaries fixed by treaties with colonial governments. In the second half of the 19th century and first half of the 20th century, the British, signed various treaties with independent Ethiopia to demarcate the Ethiopia-Sudan, Ethiopia-Kenya and Ethiopia-British Somaliland boundaries.]

[27] Adolph C. Ulaya, (n 16) 4-5; Enver Hasani, (n 4) 87-8 [Africa, was divided much earlier than the Berlin-Congo Conference (1884-1885), which is incorrectly portrayed as a meeting that divided Africa. The Final Act of the Berlin-Congo Conference, signed on February 26, 1885, simply prohibited slave trade and provided for free movement of goods and persons within the territories under the sovereignty of colonial powers (Britain, France, Germany, Portugal, and Belgium). Unlike in Europe where territorial sovereignty was based on effective administrative control, sovereign rights of these powers over their respective colonial territories were based on longitudes and latitudes starting at the coasts of Africa. Upon decolonization, majority of these abstract lines calibrated along longitudes and latitudes, whose basic function was demarcation of colonists spheres of influence, were, on the principle of *uti possidetis juris* transformed into international boundaries. Consequently, 40 percent of African borders are straight lines that separate a great number of ethnic groups.] See Norman Rich, *Great Power Diplomacy: 1814-1914* (McGraw-Hill: 1992) 237-242; Arthur Berriedale Keith, *The Belgian Congo and the Berlin Act* (Clarendon: 1919) 314-315; Friedrich Kratochwil, 'Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System', (1986) 39(1) *World Politics* [36-41] Joshua Castellino, 'Territoriality and Identity in International Law: The Struggle for Self-Determination in the Western Sahara,' (1999) 28(3) *Millennium: Journal of International Studies,* 529 [Quoting Lord Salisbury, British Prime Minister of late 19th century '*We* (the colonial powers) *have engaged... in drawing lines upon maps where no white man's feet ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew where exactly these mountains and rivers and lakes were'.*]

[28] Steve Allen & Joshua Castellino, 'Reinforcing Territorial Regimes: *Uti possidetis* and the Right to self-determination in Modern International Law, (2003) 48 *Amicus Curiae*

[29] Enver Hasani, (n 4) 88; Kelvin Mbatia 'The Threat of a Rising Sea Level: Saving Statehood through the Adoption of *Uti Possidetis Juris',* (2020) *Strathmore Law Review*, [65-83] 81

[30] Malcolm N. Shaw, *International Law* (Cambridge, 6th ed. 2008) 526-7; Malcolm N. Shaw, (n 7)494, 497; Adolph C. Ulaya, (n 16) 4-5

State succession is an old subject of international law.[31] In the *Burkina Faso v. Mali* case, the Court stated that *'[t]here is no doubt that the obligation to respect pre-existing international boundaries in the event of a state succession derives from a general rule of international law'*.[32] Article 11 of Vienna Convention on Succession of States in Respect of Treaties provides that *'a succession of states does not as such affect a boundary established by a treaty.'* Article 62 (2) of Vienna Convention on the Law of Treaties states that '*A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from treaty between two or more states and one or more international organizations if the treaty establishes a boundary'.* These are in accord with the rule that termination of a treaty on the grounds of a fundamental change of circumstances does not apply where the treaty establishes a boundary.[33] The OAU, formed in 1963 is currently the AU. Article 2 of OAU Charter provides that one of the purposes of the Organization is to defend the sovereignty, territorial integrity, and independence of its members. In article 3, member states, in pursuit of the purposes stated in article 2, affirmed and declared their adherence to the principle of respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence. Article 3 of AU Constitutive Act provides that the objectives of the Union shall *inter alia* be to defend the sovereignty, territorial integrity and independence of its member states. Article 4 of the AU Constitutive Act provides *inter alia* that the Union shall function in accordance with the principle of respect of borders existing on achievement of independence.

Although *uti possidetis* as a rule of international was developed and first applied in Latin America, its basic principles awaited the case of *Burkina Faso v. Mali*,[34] for amplification. The dispute was in respect of territory between Burkina Faso and the Republic of Mali. Both parties requested the ICJ to adjudicate the dispute based on the principle of the intangibility of frontiers inherited from colonisation. This gave the chamber an opportunity to elaborate the *uti possidetis* doctrine. The Chamber noted that, the principle of *uti possidetis juris*, accords pre-eminence to legal title over *effectivités* as a basis of sovereignty, and its purpose is to secure respect for territorial boundaries which existed when independence was achieved. The Chamber specified

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[31] Oscar Schachter, 'The Once and Future Law' (1993) 33 *Virginia Journal of Int'l Law* 253; Carter & Trimble, *International Law* (Little, Brown & Co.2nd ed. 1993) 480; Dina Sunyowati, Haidar Adam & Ria Tri Vinata, (n 13) 279

[32] (n 10) 566

[33] The rule that a delimitation, established by a treaty, is unchangeable irrespective of the treaty's subsequent fate was confirmed in the *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand),* ICJ Reports 1962, 34, where the ICJ stated "*In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious*." The rule also asserted in the *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Reports 1994, 37, para. 73, where the ICJ stated "*A boundary established by treaty … achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary … [W]hen a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed*." See *Jure Vidmar,* 'Confining New International Borders in the Practice of Post-1990 State Creations', (2010) *Max-Planck-Institut für ausländischesffentliches Recht und Völkerrecht* [319-356] 320

[34] (n 10) The compromise by which the parties submitted the case to ICJ specified that settlement of the dispute should be based on respect for the principle of '*intangibility of frontiers inherited from colonisation'*. The ICJ opined that the principle had developed into a rule of customary international law and was unaffected by emergence of the right of peoples to self-determination.

that, when those boundaries were mere delimitations between different administrative divisions or colonies of the same sovereign, application of *uti possidetis juris* transformed them into international frontiers.[35] In *the Land and Maritime Boundary between Cameroon and Nigeria; Equatorial Guinea Intervening*[36], Cameroon applied to the ICJ to determine *inter alia*, sovereignty over the Bakassi Peninsula and a parcel of land in the Lake Chad area, both of which were in dispute between Cameroon and Nigeria. Cameroon's case was based solely on boundaries demarcated by former rulers of both territories during colonialism. Cameroon argued that colonial agreements which delimited territories of both parties, and which were inherited by both parties on independence, created valid boundaries binding on both parties. *Uti possidetis* was applied by the Court as the rule in determining the disputed boundaries, and upheld the validity of the colonial boundary agreements invoked by Cameroon. At certain points where the maritime boundary was not evidenced by any colonial delimitation, *uti possidetis* could not apply; rather the court delimited the boundary on equitable basis, based on the applicable existing international law requested by the parties. In *the Frontier Dispute between Burkina Faso and Niger*[37]both countries, before they attained independence in 1960 were French colonies. The parties submitted a Special Agreement to the ICJ which *inter alia* provided for the applicable laws in the delimitation of their disputed boundaries. The Special Agreement provided for the applicable laws to include the principle of intangibility of boundaries inherited from colonization and an Agreement of 28th March 1987. Pursuant to the special agreement, the ICJ was guided by the principle of intangibility of boundaries inherited from colonization. In the 1987 Agreement, the parties agreed to apply the *Arrêté* of 31st August 1927 to determine the delimitation line that existed when both countries gained independence. The *Arrêté* of 31st August 1927 was an Act of the French colonial administration, amended by the Erratum of 5th October 1927 which was adopted by the Governor-General *ad interim* of French West Africa with a view to fixing the boundaries of the colonies of Upper Volta and Niger as clarified by its Erratum of 5th October 1927.The ICJ interpreted the *Arrêté*(as amended by its *Erratum)* in its context, taking into account the circumstances of its enactment and implementation by the colonial authorities.

Without doubt, colonial boundaries were arbitrarily established. However, even with this obvious arbitrariness, the ICJ has held that *uti possidetis* '*is a firmly established principle of international law where decolonization is concerned;* 'and that in the decolonization context, *uti possidetis* has become a principle of customary international law, applicable not only in Latin America, where it was initially developed.[38] The assertion that *uti possidetis* has become part of customary international law is debatable. Clearly, its application in the decolonisation process was not prescribed by any particular norm of international law, but was simply '*a policy decision in order to avoid conflicts during decolonization*.'[39] A tendency to overstate the application of

[35] See Enver Hasani, (n 4) 97

[36] ICJ Judgement delivered on October 10, 2002

[37] ICJ Judgment delivered on April 16, 2013

[38] *Case Concerning the Frontier Dispute (Burkina Faso/Mali)*, (n 10)

[39] See Jure Vidmar, (n 33) 323-4; Steven R. Ratner, (n 4) 598; Helen Ghebrewebet, *Identifying Units of Statehood and Determining International Boundaries*, (Verlag Peter Lang: 2006) 76 et seq., arguing*: "The necessary element for the establishment of customary law, opinio juris is lacking … Neither the Latin American republics nor the African states considered themselves bound to adopt the uti possidetis principle in delimiting their new international boundaries. Rather, they eventually agreed to adopt a status quo policy for reasons of expedience and convenience in the interests of peace and security."* See G. Abi-Saab, 'Le principe de l' *uti possidetis* son rôle et ses limites dans le contentieux territorial international', in: MG. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law*, (2007) 657 (657 et seq.). [It is notable that *uti possidetis* was applied in order to transform colonial boundaries to international borders, irrespective of the origin of these

the doctrine should be resisted. It should be confined to its status as a provisional doctrine with a primary purpose of regulating the transfer of sovereignty in the process of state succession. It is limited to territorial delimitation for creation of a new state by suggesting continuation of pre-existing borders of whatever origin in the absence of special factors, Although it halts the territorial circumstances during the independence process, it does not suggest an unalterable boundary.[40]

V. Recent Instances of Application of the Doctrine Outside Africa

In the *El Salvador/Honduras* case[41], it was stated that the basic aim of the *uti possidetis* principle lies in securing reverence for territorial boundaries existing at independence. This is so even if such boundaries are ordinary delineations between different administrative divisions or colonies of the same sovereign. In that circumstance, application of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers. While it seems accepted that the principle is applicable generally to decolonization situations, it remains unclear whether it is applicable to all situations of independence, regardless of the factual situation. This particular issue, arose in the context of the Yugoslav and USSR situations.[42] Article 5 of the Agreement Establishing the Commonwealth of Independent States signed at Minsk on 8 December 1991 provided that *'[t]he High Contracting Parties acknowledge and respect each other's territorial integrity and the inviolability of existing borders within the Commonwealth*'.[43] The European Guidelines on Recognition of New States in Eastern Europe and the Soviet Union, adopted by the EC and its Member States on 16 December 1991, provided for a common policy on recognition, which required *inter alia 'respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement*'[44] The Yugoslav Arbitration Commission in Opinion No. 2, emphasised that *'[i]t is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the states concerned agree otherwise'*.[45] The Commission held in Opinion No. 3 that except if otherwise agreed, the former boundaries become frontiers protected by international law.[46] Nevertheless, *uti possidetis* remains a presumption, and not an absolute rule with indubitable application. In the absence of evidence to the contrary, demarcated units in a sovereignty will achieve independence within that territorially-defined unit. It is irrelevant that derivation of such units arose from ethnic or historical ties, arbitrarily, or due to use of force subsequently accepted. The period of transition to independence is the applicable time frame, though specific factors may lead to an earlier date. In other words, parties must contend with the state of affairs as at the appropriate time, even if significant historical changes took place previously.[47]

VI. Shortcomings and Criticisms of the *Uti Possidetis* Doctrine

boundaries. The basis for this elevation of colonial borders to international borders, was a deemed necessity to prevent decolonised territories from reverting to *terra nullius* and also to minimise boarder conflicts among postcolonial states.]

[40] Malcolm N. Shaw, (n 7) 495

[41] ICJ Reports (1992) 351, at 386

[42] Malcolm N. Shaw, (n 7)495-6

[43] Signed by the Republics of Belarus, the Russian Federation and the Ukraine, 31 ILM (1992) 138

[44] 92 ILR 174

[45] 92 ILR 168

[46] Ibid. 171

[47] Malcolm N. Shaw, (n 7) 504 [Post-independence, parties may through any method permitted by law consent or acquiesce to alterations in their boundaries]

Despite its extensive acceptability as a binding principle of international law, the doctrine has severe criticisms and shortcomings.[48] The doctrine is founded on the travesty that at the point of attainment of independence, international borders were confined to arbitrarily drawn colonial boundaries which did not take local identities into consideration and which in any event were never anticipated to become international borders.[49] In its current demand of unquestioning compliance, the doctrine reduces intricate issues of national identity to a simple process of drawing lines in the alleged interest of orderliness. Unfortunately, this method does not contemplate the probable injury that could result in the preservation of an unjust and unstable order.[50] Besides, allowing creation of new states without considering the consequences of this process for the identity of affected peoples is a major flaw of application of *uti possidetis* to decolonisation.[51] Mahmud suggests that *'[t]he doctrine* of *uti possidetis, far from being grounded in any sound legal principle, is thus more a political instrument to legitimize existing state boundaries.'* His position is that *uti possidetis* provides a cover of lawfulness over colonial disposition of territories of the global South by evading the issues of the origins of these dispositions.[52] This position is ratified by Shaw who concludes that the principle *'bestowed an aura of historical legality to the expropriation of the lands of indigenous peoples'*.[53] Nesiah argues for a definite rejection of *uti possidetis* because it extends the evils of colonialism into the postcolonial period. He suggests that the route to travel is creation of genuine boundaries that trail genuine community, demarcated variously through ethnos, political allegiance, culture, language, religion, etc.[54] Granted, that *uti possidetis* does not theoretically, preclude post-independence consensual border alterations,[55] the problem with translating this to reality is that such border alterations can only be accomplished by cession of territory, or in a rare case, exchange of territories. Practical factors make either of these procedures, within the postcolonial African context, impossible.

Precolonial sovereign authorities were supplanted and replaced by colonial regimes. Decolonisation failed to restore the authority of precolonial regimes. Since they had been superseded by colonial regimes, they no longer constituted a valid basis for claims or territorial integrity in the decolonisation process. Thus, the goal of decolonisation was not to restore

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[48] Farhad Sabir oglu Mirzayev, 'General Principles of International Law: Principle of *Uti Possidetis*', (2017) 3 *Moscow Journal of International Law*[31-39]; Anne Peters, 'The Principle of *Uti Possidetis Juris*; How relevant is it for Issues of Secession? in Christian Walter, Antje von Ungern-Sternberg & Kavus Abushov, (eds.) *Self-Determination and Secession in International Law*, (Oxford: 2014) 95-137; Malcolm N. Shaw, (n 30) 528-529 [Notwithstanding its acceptance as a general principle of customary international law and its applicability to frontier disputes, among the major challenges to the doctrine is its inability to solve all boundary disputes.]

[49] See Steven R. Ratner, (n 4) 595; see Jure Vidmar, (n 33) 323

[50] Steve Allen & Joshua Castellino, (n 28)*;* Steve Allen & Joshua Castellino, (n 5)

[51] Steve Allen & Joshua Castellino, (n 28) [During decolonisation, the only choice African peoples had was to exist inside territorial structures created for them. Postcolonial states comprised peoples constrained to live within the same boundaries with only two things in common. First, a history of having been under the same colonialist, and, second, the fact of being compelled to inhabit a territory created by the colonialist to constitute the post-colonial state. Political unification entailed propounding a thesis of state nationalism under which ethnic and national differences of the groups comprising the postcolonial state could be eradicated by nation-building. In the absence of the autocratic colonial government, the latent structural divisions which they had suppressed began to emerge with serious consequences for the postcolonial state.]

[52] Tayyab Mahmud, (n 18) 65- 66

[53] Malcolm N. Shaw, (n 6) 98; Enver Hasani, (n 4) 89

[54] Vasuki Nesiah, 'Placing International Law: White Spaces on a Map' (2003) 16(1) *Leiden Journal of International Law* 1, 27.

[55] Freddy D Mnyongani, (n 4) 472; Steven R. Ratner, (n 4) 600

precolonial sovereignties, but to give specific rights to colonial peoples.[56] International law in emphasising *uti possidetis* introduced a novel inflexibility to international boundaries which touches on the nationality idea. The doctrine limits issues of legitimacy to a purely territorial basis, in preference over other legitimating elements as ethnicity, tradition, linguistics, religion, ideology or history.[57] By forcing disparate people to circumscribe their political aspirations within predetermined territorial bounds, *uti possidetis* reverses the vision of self-determination that seeks to protect vulnerable peoples by allowing them political and territorial arrangements of their own.[58] In opinion no. 2, the Badinter Arbitration Committee, declared that *[w]hatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis de jure) except where the states concerned agree otherwise.*[59] Common ethno-linguistic unit of a people as the basis of sovereignty is inevitable to exercise of the right of self- determination. Redrawing of borders is inevitable to this reality, thus rendering it unattainable. In effect, granting the inviolability of established borders priority over the right of national self-determination, has converted the right of self-determination to merely a right to preserve orderliness, instead of being a redemptive power of liberty for oppressed national minorities.[60]

VII. Propriety of Application of the *Uti Possidetis* Doctrine in Post-Colonial Africa

Establishment of colonial rule was accomplished through violation of international law. Declaration of African lands as *terra nullius* subverted international law because the lands were not *terra nullius*. The fact of colonialists entering into treaties of protection with the local chiefs and Kings contradicted the ascribed status of *terra nullius*; you don't protect a *terra nullius*.[61] The peoples described as incapable of governing themselves, had founded empires that rivalled those of Europe, and had for centuries transacted with Europe in commercial enterprise. These people denoted with incapacity to govern themselves, apparently had sufficient perspicacity to enter into binding treaties with Europeans.[62] In the 1971 *Namibia (South-West Africa) Case*[63], the ICJ stated:

> *'African law illustrated ... the monstrous blunder committed by the authors of the Act of Berlin, the results of which have not yet disappeared from the African political scene. It was a monstrous blunder and a flagrant injustice to consider Africa south of the Sahara as terrae nullius, to be shared out among the Powers for occupation and colonization,*

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[56] SKN Blay, 'Self-determination vs. Territorial Sovereignty in Decolonisation', (1985-86) 18 *NYU Journal of Int'l Law & Policy,* 461-2

[57] Steve Allen & Joshua Castellino, (n 28) [The fundamental premise of *uti possidetis,* that only states are entitled to participate in the boundary re-alignment process, entrenches a state-centric doctrine that only the colonial or postcolonial state, instruments of European domination of non-European peoples, should be accorded international personality.]

[58] Tayyab Mahmud, (n 18) 65- 66

[59] (n 45)

[60] Eric Allen Engle, 'The Failure of the Nation-State and the New International Economic Order: Multiple Converging Crises Present Opportunity to Elaborate a New *Jus Gentium*' (2003) (16) *St. Thomas Law Review;* [187-206] 203

[61] In the *Western Sahara* case: *(Advisory Opinion, ICJ Reports 1975,* 124.) Judge Dillard summarized the matter in his separate opinion *"[a]s was cryptically put in the proceedings: you do not protect a terra nullius. On this point there is little disagreement."*

[62] In the *Land and Maritime Boundary between Cameroon and Nigeria* (n 36) in the separate opinion of Judge Al-Khasawneh, at 496 para 5, the Judge stated that it is difficult to understand how a local ruler would be considered to be entitled to absolute sovereign immunity and to have been divested of his territorial sovereignty at one and the same time.

[63] *Namibia (South-West Africa) Case*, 1971 ICJ Rep. 55

> *even when in the sixteenth century Victoria had written that Europeans could not obtain sovereignty over the Indies by occupation, for they were not terrae nullius. By one of fate's ironies, the declaration of the 1885 Berlin Congress which held the dark continent to be terrae nullius related to regions which had seen the rise and development of flourishing States and empires. One should be mindful of what Africa was before there fell upon it the two greatest plagues in the recorded history of mankind: the slave-trade, which ravaged Africa for centuries on an unprecedented scale, and colonialism, which exploited humanity and natural wealth to a relentless extreme. Before these terrible plagues overran their continent, the African peoples had founded states and even empires of a high level of civilization....'*

Exercise of sovereignty over African lands by colonialists violated international law. African lands did not devolve to colonialists by either occupation, conquest, cession, prescription, or accretion, which in international law, are the usual ways to acquire territory. The most expansive title the colonialists could have obtained over African lands through the Treaties of Protection they entered into with African rulers was as trustees. None of these treaties anticipated a transfer of sovereignty. In 1885 the British Foreign Office gave its view that *"[a] protectorate involves not the direct assumption of territorial sovereignty but is 'the recognition of the right of the aborigines, or other actual inhabitants to their own country, with no further assumption of territorial rights than is necessary to maintain the paramount authority and discharge the duties of the protecting power.'"*[64] No law or practice establishes support for any suggestion that treaties of protection in sub-Saharan Africa normally permitted for the transfer of sovereignty to the colonial/protecting power.[65]

It would certainly be wrong to theorise that pre-colonial African societies did not possess borders to physically mark out the territorial limits of the societies one from another. The difference between precolonial borders and colonial era borders was that while the borders of precolonial African societies were congruent with the legitimating elements of the different societies, such as ethnicity, tradition, linguistics, religion, ideology or history, colonial era boundaries were based solely on the economic interests of the colonist.[66] This border-drawing exercise by the colonisers implemented without regard to historical, cultural, or ethnic realities, split historical and cultural groups, and enclosed dissimilar cultures, religions, languages,

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[64] FO 40319, No. 92 (14 January 1885) cited by Malcolm N. Shaw, *Title to Territory in Africa*, (Clarendon: 1986) 283*fn* 155; *Land and Maritime Boundary between Cameroon and Nigeria* (n 36) separate opinion of Judge Al-Khasawneh, at 497 para. 7

[65] *Land and Maritime Boundary between Cameroon and Nigeria* (n 36), separate opinion of Judge Al-Khasawneh, at 499 paras. 8 & 9 *'So far, I have attempted to demonstrate that existence of any category of protectorates the so called "colonial protectorates" where the protecting power was free to dispose of the protected territory at will is a proposition that neither state practice nor judicial precedents supports and is in all probability, no more than a fiction existing in the minds of some commentators who try to find ex post facto legitimization for unfathomable and illegal acts by the invention of sub-categories where normally applicable rules do not operate.'*

[66] Adolph C. Ulaya, (n 16) 7; Enver Hasani (n 4) 90 [Most colonial era African borders were calibrated according to particular longitudes and latitudes, regardless of either the topography, terrain or desires of local populations.] William FS Miles, *Hausaland Divided: Colonialism and Independence in Nigeria and Niger*, (Cornell: 1994) 68 [*Borders were drawn essentially according to the geopolitical, economic and administrative interests of the colonial powers, often taken into account at a global scale. The most often cited example is that of the division of the Hausaland, between today's Niger and Nigeria. The Franco-British treaties of 1904 and 1906 redrew the border in favor of the French side, in exchange for France's renunciation of fishing rights off the coast of Newfoundland.]* See Wondwosen Teshome, 'Colonial Boundaries of Africa: The Case of Ethiopia's Boundary with Sudan', (2009) 9(1) *Ege Akademik Review* [337-367] 343

identities, and affiliations in single territorial units.[67] Applicability of *uti possidetis juris* provides a convenient legal expedient to evade the uncomfortable task of interrogating the legality of the colonial enterprise in Africa. The principle, in according pre-eminence to legal title over *effectivités* as a basis of sovereignty, deliberately refuses to inquire into the manner of obtaining legal title and thus promotes a 'the *means justifies the ends*' approach to law and justice. In order for application of the doctrine of *uti possidetis juris* to postcolonial borders in Africa to found a legally and morally defensible system, it should transcend a simply formalistic consideration of the issues involved. Such issues include determination of state practice at the relevant time and whether that practice –assuming it permitted acquisition of title to African territories - could be invoked in an African case when no African State participated in formation of such alleged practice; the relevance of the rule of *pacta sunt servanda* on the passing of title and the effect of the rule of *nemo dat quod non habet* on the exchange of African territories amongst colonial rulers and border demarcation treaties by colonial rulers.[68]

The Cairo resolution by African heads of state and government *inter alia*, held that borders of African states, on the day of independence, constituted a tangible reality; and declared that all member states pledged themselves to respect the borders existing on their achievement of national independence.[69] Preceding adoption of this resolution, competing views existed. In 1945, the Manchester Pan-African Congress concluded that, *'The artificial division and territorial boundaries created by the imperialists powers are deliberate steps to obscure the political unity of the African people.* 'The Kwame Nkurumah-led Pan African movement desired political unity of African peoples. Another Pan-African movement for restructuring colonial boundaries in accordance with the wishes of natives also existed. Pan-Africanists positions clearly opposed post-independence preservation of colonial boundaries.[70] At Accra in 1958, the All-Africa Peoples Conference approved a resolution that *inter alia* denounced artificial frontiers drawn by colonial powers, principally the ones that divided peoples of the same ethnicity. The resolution demanded prompt elimination of or modification of such frontiers.[71] However, the views of Nyerere of Tanganyika and Balewa of Nigeria on colonial boundary legacy diverged from that of the Pan Africanists. Balewa held that though these boundaries were artificial and in some instances, divided communities, attempt to compel such communities by coercion to change the current boundaries should be discouraged, since such interference would result in instability. Ethiopian and Madagascan leaders held that it was no longer possible, or desirable to modify the boundaries.[72] By 1964 while voting in favour of resolution 16(1) on preservation of colonial boundaries, most African leaders had accepted the principle of colonial boundary heritage. The only exceptions were Morocco and Somalia which reserved their right to claim territory on the basis of religion, history or ethnicity.[73] Article 4(b) of the AU

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[67] Tayyab Mahmud, (n 18) 25; Aman Kuma, (n 18); Mohammad Shahabuddin, (n 22) 336. *['[P]ost-colonial states are essentially products, via colonization and decolonization, of the international legal norms and associated rules crafted by Europe. International law has contributed to the formation of post-colonial statehood and the ensuing atrocities, which involve a wide range of issues such as: the drawing of post-colonial boundaries.'*]

[68] See *Land and Maritime Boundary between Cameroon and Nigeria* (n 36) separate opinion of Judge Al-Khasawneh, at 494-5 para 3

[69] (n 9)

[70] BO Michael, 'Panafricanism, African Boundaries and Regional Integration', (2012) 8(4) *Canadian Social Science* [232-237] 233; Adolph C. Ulaya, (n 16) 81

[71] Touval, Saadia, *The Boundary Politics of Independent Africa* (Harvard: 1972) 56-57

[72] See James Mayall, 'The Malawi-Tanzania Boundary Dispute', (1973) 11(4) *The Journal of Modern African Studies*[611-628] 621; BO Michael, (n 70) 233; Adolph C. Ulaya, (n 16) 81-2

[73] Ian Brownlie, *African Boundaries. A legal and Diplomatic Encyclopedia*, (C. Hurst & Co: 1979)11; Adolph C. Ulaya, (n 16) 6

Constitutive Act in providing that; '*The Union shall function in accordance with the following principles ... (b) respect of borders existing on achievement of independence'* has now enshrined this principle of preservation of colonial boundaries at the time of independence.

Noticeably, whilst the Cairo and OAU resolutions and declarations accept the principle of respect for borders inherited at independence, they carefully avoided use of the word '*uti possidetis'* to describe the obligation they were assuming. The question now is whether their commitment may be interpreted to mean a commitment to the *uti possidetis* rule or whether it amounts to something other than that? The ICJ in *Burkina Faso and Mali*[74] suggested that the fact that the new African States agreed to respect boundaries and frontiers drawn by the colonial powers *'must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scop*e', and in this context, the 1964 OAU Resolution *'deliberately defined and stressed the principle of uti possidetis juris.'* Shaw, in agreement with this position, argues that the circumstances in which African states inherited territorial boundaries and the wording of the 1964 Cairo resolution replicate the doctrine of *uti possidetis juris.*[75] In other words, as a result of the Cairo resolution, excluding territorial boundaries which are settled by proof of title to the territory, history and *effectivités*, the doctrine of *uti possidetis* would be applied in settling territorial boundary disputes among African states.[76]

In interpreting the provisions of the OAU declaration, Judge Yusuf in his separate opinion in the *Frontier Dispute between Burkina Faso and Niger*[77] disagreed with the common idea that, the 1964 Cairo resolution which was later enshrined in the AU Charter reflects the Latin American principle of *uti possidetis*. According to him, the 1964 resolution as well as the OAU/AU principles on respect of borders and the doctrine of *uti possidetis*, are neither identical nor equivalent. He stated it was error in the *Burkina Faso/Mali Frontier Dispute* to interpret the principle of territorial integrity in the OAU Charter as an '*indirect*' reference to *uti possidetis*. His position is that as *uti possidetis juris* was not cited in the preparatory works of the OAU or any of its official documents; '*The lack of reference to uti possidetis was not due to a lack of awareness by the OAU/AU member States of the existence of uti possidetis juris as a principle or of its use by the Spanish-American Republics following their own decolonization a century earlier. Rather, different situations, and historical circumstances, dictated the adoption of different legal rules and principles'.* Judge Yusuf also suggested that, *uti possidetis juris* and the OAU/AU principle on respect of borders, due to their different origins, purposes, legal scope and nature, are distinct. He stated that the essence of the OAU/AU principle on respect of borders is; '*The principle of respect for boundaries enshrined in the Cairo Resolution of 1964 ... places the boundaries existing at the time of independence in a 'holding pattern,' particularly to avoid armed conflict over territorial claims, until a satisfactory and peaceful solution is found*

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[74] (n 10) 565-6

[75] Malcolm N. Shaw, (n 30) 526

[76] Adolph C. Ulaya, (n 16) 40

[77] Judgment of 16 April 2013, [*As a preliminary remark, it may be noted that none of the official documents of the OAU or of its successor organization, the AU, relating to African conflicts, territorial or boundary disputes, refers to or mentions in any manner the principle of uti possidetis juris. As stated by a keen observer of the origins and evolution of Pan-African organizations, and an advocate of an "uti possidetis africain", "it would be important to underline that the American precedent was never explicitly invoked during the travaux préparatoires of the Addis Ababa Conference, and even less by the Heads of State in their inaugural speeches". Equally significant are the differences between the two principles with regard to their origin and purpose, their legal scope and content and their legal nature*.]

by the Parties to a territorial dispute in conformity with international law, or until such time as closer integration and unity is achieved among all (or some) African States in keeping with the Pan-African vision'. He concludes that, *uti possidetis juris* and the OAU/AU principle on respect of borders should not be treated as identical or equivalent.[78] Herbst[79]concludes that though African borders, because of their failure to correspond to local concepts of demographic, ethnographic and topographic rationality, are considered artificial and arbitrary, nevertheless, the post-1885 boundary system served the political ends of colonialists and thus was in their view, rational. The boundaries remained unchanged thereafter because they serve the political needs of both the former colonialists and current African leaders. Until African leaders consider readjustment of current borders, a lesser evil than their maintenance, these current borders will continue to be preserved.

VIII. Conclusion and Recommendation

One of the results of colonialism is that upon decolonisation, former colonies, possessing juridical sovereignty but lacking in empirical authority were automatically integrated into the international society of states, albeit as junior members. Premised on this, international law, which foundationally, was basically a legal system to regulate the relationship of European nations *inter se* became applicable to the newly decolonised nations. A major paradox of decolonisation was the overwhelming willingness of newly decolonised nations to accept without interrogation, legal concepts that did not offer practical advantages to them. Colonial borders, just like the colonial system itself, was a perversion and distortion of the social solidarity of different African peoples and societies. Carrying them into the postcolonial state accounts to a great extent for the continued fragility of most postcolonial African states. The sole purpose of the *uti possidetis* rule is to sanctify colonial borders. It is largely accepted that validation of the doctrine lies in its ability to create territorial stability during transition periods. That however is an unjustifiable deification of formalism over profound legal and moral issues. Imposition of colonial rule in sub-Saharan Africa, by either conquest, or deliberate and wilful breach of treaties of protection entered into with natives, besides its violation of international law, presents deeply troubling moral issues. Colonial borders, in pursuit of colonists' economic and administrative interests were demarcated in such a manner as to either deliberately and indifferently divide and separate precolonial local societies, or merge in one territorial unit, societies that had no business being together. At the same time, the different European colonisers, by their border demarcation treaties, exchanged amongst themselves, the local lands they covenanted to protect. Imposition of colonial rule, involved the creation of an impossible legal fiction- the fiction that local Kings and chiefs possessed absolute sovereign authority and immunity to enter into binding treaties regarding their domains, and were simultaneously divested of this territorial sovereignty at one and the same time. It remained shocking to the local Kings and Chiefs, and should also be in the current age that the effect of entering into a treaty of friendship and protection was a forfeiture of sovereignty. The doctrine of *uti possidetis* glosses over the breach of fundamental legal concepts and proceeds on the basis that in the dealings of colonialist Europe with colonized Africa, the vital tenets of *pacta sunt servanda* and *nemo dat quod, non habet* do not exist or apply. If *uti possidetis* intends to establish a system that may be both legally and morally defensible, it ought to transcend a measured disregard of

[78] *Burkina Faso v. Niger* (Separate opinion) 200, according to Judge Yusuf this error was made by the ICJ in the *Burkina Faso v Mali Frontier Dispute*, (n 10) 565-566; see also Adolph C. Ulaya, (n 16) 74-5

[79] Jeffrey Herbst, 'The Creation and Maintenance of National Boundaries in Africa', (1989) 43(4) *International Organization* 692; see Enver Hasani (n 4) 97

the issues involved.[80] Disturbingly, it has not done that. What the doctrine seeks to achieve is to ensure that previous conduct that is violative of current principles of international law and ethically offensive by modern standards is protected from scrutiny. From this perspective, Nigeria's present dissatisfaction with colonial borders is not merely a displeasure with past inequitable practices, but also frustration with the current system of international law that by the creation of an unconscionable fiction ensures that African states are compelled to live in the dysfunctional spaces imposed on them by their erstwhile colonisers. It is recommended that application of *uti possidetis* should not remain the default mode in settlement of boundary issues in postcolonial Africa. The doctrine's veneration of erstwhile colonial forms at the expense of fundamental societal issues of postcolonial African societies renders it destabilising of the citizenship and nationality realities that challenge most African states. While its utter abrogation is not advocated, it should be made to assume the position of one of the least preferred modes of settlement of border issues.

[80] See *Land and Maritime Boundary between Cameroon and Nigeria* (n 36) separate opinion of Judge Al-Khasawneh, discussing similar issues in a different context.