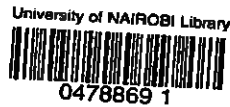


**University Of Nairobi  
Institute Of Diplomacy and International Studies**

**The Principle of *Uti Possidetis* and its Implication on Border Demarcation in  
Africa**

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R50/75653/09**

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**Research project presented in partial fulfillment of the requirement for the degree of Masters of Arts in International Conflict Management, Institute of Diplomacy and International Studies, University of Nairobi**

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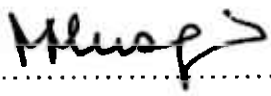
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## Declaration

I, Akademia Nanjala Wandibba hereby declare that this project is my original work and has not been submitted for the award of a degree in any other University.

Signed.......... Date..... 7.11.11.....  
Akademia Nanjala Wandibba

This project has been submitted for examination with my approval as University Supervisor;

Signed.......... Date..... 07 November 2011.....  
Prof. Makumi Mwangi  
Institute of Diplomacy and International Studies  
University of Nairobi

## **DEDICATION**

To dad and mum, I can only truly express my gratitude by hard work. Dad I hope to follow in your footsteps academically in a few years to come.

## **ACKNOWLEDGEMENTS**

I would like to first give thanks to God for this far He has brought me. My thanks also goes to my family for the support and encouragement since I began this course. I would also like to thank Prof. Mwangi for the immense intellectual input without which I would not have been able to undertake the study. Finally, I would also like to thank my peer discussion group: Rita, Osman, Tum, Mwiruri, Eunice, Charity, Biko and Hussein who made discussions very interesting and shared material that was useful during studies and exam time.

## **ABBREVIATIONS**

<b>ACHPR</b>	<b>African Charter on Human and Peoples Rights</b>
<b>AHG</b>	<b>African Heads of State and Government</b>
<b>AUBP</b>	<b>African Union Border Programme</b>
<b>AUHIP</b>	<b>African Union High Level Implementation Panel of Sudan</b>
<b>AU</b>	<b>African Union</b>
<b>CPA</b>	<b>Comprehensive Peace Agreement</b>
<b>CSSDCA</b>	<b>Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa</b>
<b>DRC</b>	<b>Democratic Republic of Congo</b>
<b>ELF</b>	<b>Eritrean Liberation Front</b>
<b>EPLF</b>	<b>Eritrean People's Liberation Front</b>
<b>GOS</b>	<b>Government of Sudan</b>
<b>ICJ</b>	<b>International Court of Justice</b>
<b>ICCPR</b>	<b>International Covenant on Civil and Political Rights</b>
<b>ICESCR</b>	<b>International Covenant on Economic, Social, Cultural Rights</b>
<b>IGAD</b>	<b>Intergovernmental Authority on Development</b>
<b>IR</b>	<b>International Relations</b>
<b>LCBC</b>	<b>Lake Chad Basin Commission</b>
<b>OAU</b>	<b>Organization of African Unity</b>
<b>REC</b>	<b>Regional Economic Communities</b>
<b>SPLM</b>	<b>Sudan Peoples' Liberation Movement</b>
<b>UN</b>	<b>United Nations</b>

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## ABSTRACT

The problem of border conflicts in Africa has been a setback to the enjoyment of peace and security in the continent. These conflicts presented themselves immediately newly independent states came into existence. To handle the conflict the Organization of Africa Unity and later the African Union adopted the principle of *uti possidetis* to avoid conflicts over the location of international boundaries and curtail secessionist claims which would open a Pandora's Box of secessionist claims in other parts of the continent. Nevertheless, secessionist claims in Africa continued to be witnessed as did conflicts over borders. This study set out to assess the validity of the principle in African diplomacy and assessing the implication of the right to self-determination on border diplomacy. To guide the study, the theoretical framework used was based on international law on territory and treaties.

The study focused on Africa more so highlighting case studies of countries that had made secession claims and those that had conflicts over borders. Qualitative research method was adopted to collect the data which was both primary and secondary. Presentation of the findings was contextualized to fit in the content discussions. The conclusion of the study is that the principle of *uti possidetis* was misplaced as the rationale of dealing with secession claims. It also showed that the OAU ought to have interrogated further the root causes of those claims which would have resulted in the correct solution to the problem. Also, the study concludes that for as long as minorities were not guaranteed of their rights, then the question of internal self-determination would not go away. In addition, the study showed that the principle of *uti possidetis* was also not the appropriate solution to border conflicts and hence should not be used as the guiding framework in the demarcation of borders. It further found that as a principle held dear in African diplomacy, it needs to be revisited taking into account that it plays no role if at all in the current state of affairs. Finally, it concludes that conflicts over borders are due to the uncertainty on the ground and hence concerted efforts should be put in place to demarcate and delineate the borders hence legitimize them

The study concludes by proposing various suggestions including doing away with the principle, encouraging states to adopt good governance practices in their countries and demarcation efforts are spearheaded by sub-regional organizations with the assistance of the AU through encouraging bilateral treaties, adoption of the diplomacy of *bon voisinage* and adoption of a holistic approach when handling the conflict.

## Chapter One

### Introduction to The Study

#### Introduction

Post independence Africa continues to witness conflicts over boundaries. These problems have been a source of constant tension and have sometimes led to full scale war. Boundaries collectively divide the continent into many states and, at times place one community into different countries. They become a source of international conflict and can affect the spatial pattern of economic development.<sup>1</sup> A boundary conflict is a conflict over a boundary line that as a minimum is defined, or is in the process of being defined, by the parties, by implicit consent or explicit agreement. This means that all stakes and issues leading to disputes and armed conflicts are related to somehow agreed upon boundaries.<sup>2</sup> The boundaries of Africa continue to cause problems in different ways. Their arbitrariness divides people, creating absurd situations. Their ambiguity and lack of definition lead to differences of interpretation, while their inconsistency in the use of physical features creates further uncertainty.<sup>3</sup>

Notwithstanding the many problems arising from European-drawn boundaries, they have remained sacrosanct in the post-independence period. This is as a result of the application in African diplomacy by the Organization of African Unity (OAU) the practice of respecting colonial borders.<sup>4</sup> This is the rule known as *uti possidetis ita possidetis*. By paragraph 3 of Article III of the 1963 Charter, all member states pledge 'respect for the sovereignty and territorial integrity of each state'.<sup>5</sup> This was further elaborated during the 1964 meeting of OAU

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<sup>1</sup> Griffiths, I., 'The Scramble of Africa: Inherited Political Boundaries', *The Geographical Journal*, Vol. 152, No. 2, (1986), pp 204-216:204.

<sup>2</sup> Ubi, E.N., 'Territorial Theory and The Resolution of African Territorial Conflicts: The Case of Ethiopia/Eritrea Boundary Conflict', *Journal of Alternative Perspectives in the Social Sciences*, Working Paper No. 9, (2010), pp 1-28: 5.

<sup>3</sup> Griffiths, 'The Scramble of Africa: Inherited Political Boundaries', op cit, (1986), p 209.

<sup>4</sup> Griffiths, 'The Scramble of Africa: Inherited Political Boundaries', op cit, (1986), p 213.

<sup>5</sup> The Organization of African Union Charter, (1963), Paragraph 3, Article III.

in Cairo where it was stated that, 'considering that border problems constitute a grave and permanent factor of dissension...all member States pledge themselves to respect the borders existing on their achievement of national independence'.<sup>6</sup> This is the position that was also adopted by the African Union (AU) the successor to the OAU under Article 4 of its constitutive Act. However, Africa continues to witness border conflicts such as those between Nigeria and Cameroon (1980), and Eritrea and Ethiopia (1998). These conflicts have become one of the thorniest issues and a source of continuing hostilities in Africa.

### **Statement of the Research Problem**

Colonial patterns of making boundaries in Africa reflected the superimposition of physical and political limits on socioeconomic, cultural, and linguistic discontinuities.<sup>7</sup> As a result Africa experienced its fair share of border conflicts both intrastate and interstate. When border conflicts erupted in North Africa and the Horn of Africa, the OAU meeting in July 1964 adopted a resolution that enjoined African states to respect the existing borders as a "tangible reality". This rule was to be applied in addition to the one of *uti possidetis* to which all member states pledged. The rationale for the adoption of this principle was that it would reduce the possibility of armed conflict among African states as to the location of their international borders, and would reduce the possibility of secessions and irredentist claims in the new African states thus avoiding the domino effect of secessions in the continent. Secession claims emerged as a result of ethnic minorities in the new dispensation not being able to enjoy their human rights in particular the right to internal self-determination. Whenever such claims arose, they were suppressed by the state on the basis of the principle of *uti possidetis*.

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<sup>6</sup>Griffiths, 'The Scramble of Africa: Inherited Political Boundaries', op cit (1986), pg 213.

<sup>7</sup> Khadiagala, G. M., 'Boundaries in Eastern Africa', *Journal of Eastern African Studies*, Vol.4 No. 2 (2010), pp 266 — 278: 267.

*Uti possidetis* operates along provisions of international law particularly those of human rights and the respect of the rights of minorities. Borders have remained intact because the principle of self-determination upheld by the OAU in post-independence Africa was limited to only alien or foreign rule. This explains why the right to self-determination was applied to colonies but not to individuals and groups which wanted to disassociate themselves from existing colonial territories. Also, it did not accommodate the right to make changes to territorial borders existing at the time of independence. One of the earliest tests to the principle of self-determination was Somali's claim that the populations in the Northern Frontier District of Kenya should be allowed to exercise their right to self-determination. In response the Kenyan delegate at the Council of Ministers meeting in Lagos (1964) affirmed the OAU's position by arguing that "the principle of self-determination was inapplicable to people living in an independent state and that the redrawing of borders on ethnic grounds would affect many African states".<sup>8</sup> This implies that in the African setting where there are many ethnic communities divided by the territorial borders created through subscription to *uti possidetis*, the question of internal self-determination will just not go away for as long as ethnic minorities are forced to stay in a territory that will not and does not guarantee their human rights. This therefore questions the validity of the principle in current practice. Currently, the respect of borders existing at independence is a principle that is enshrined in the AU Constitutive Act. At the same time the respect of human rights is also noted as a principle in the same Act.<sup>9</sup>

Over forty years after the 1964 Cairo Assembly, the African Union constituted a Border Programme (AUBP) with the express aim of encouraging African governments to clearly delimit

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<sup>8</sup> Touval, S., 'The Organization of African Unity and African Borders', *International Organization*, Vol. 21, No. 1 (1967), pp. 102-127:115.

<sup>9</sup> Art. 4 (b) and (m), Constitutive Act of the African Union.

and demarcate their boundaries by 2012 to deal with the persistent problem of territorial borders.<sup>10</sup> Implementation in spite of the problem it raises is to be guided by the principle of *uti possidetis*.<sup>11</sup> Given that *uti possidetis* is going to be applied as the rationalizing framework for the demarcation of borders in Africa, some of the issues it raises such as its implication for human rights arising out of this context will need to be re-examined. The principle of *uti possidetis* is in conflict with the right to internal self-determination when claims of peace among states clash with claims of justice by the people yet the borders being protected were created in ignorance of natural or cultural boundaries. Both principles are held dear in African diplomacy and that is why this issue being central in African diplomacy must be re-examined.

### **Objectives of the Study**

The objectives of the study are to:

1. Assess the validity of the rule of *uti possidetis* as the guiding principle in African diplomacy on borders
2. Assess the implication of self-determination on border diplomacy in Africa.
3. Examine the border making framework in Africa.

### **Literature Review**

Borders in Africa operate within the limits drawn up during the colonial era. The European diplomats undertook this with little regard for, or knowledge of, the socio-cultural characteristics of the continent. As a result of the unreliability of the European partition, a typical African boundary grouped together many ethnic groups in one state, cut across many ethnic or national boundaries of the past, or created a state whose physical characteristics hindered political, social, or economic stability.<sup>12</sup> The colonial nature of the boundaries made them to be treated as exogenous because they did not represent the territorial culmination of a locally

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<sup>10</sup> Declaration on the African Union Border Programme and its Implementation Modalities as Adopted by the Conference of African Ministers in Charge of Border Issues held in Addis Ababa, 7 June 2007 African Union (AU) (2007).

<sup>11</sup> Declaration on the AUBP and its Implementation Modalities, (2007), Preamble 1(c).

<sup>12</sup> Boyd, J.B., 'African Boundary Conflict: An Empirical Study', *African Studies Review*, Vol. 22, No. 3 (Dec., 1979), pp. 1-14:1.

generated political process.<sup>13</sup> Zartman noted that the newness of African states and the frequent irrelevance of their geographic frames to their economic, social, and political lives made the continent more potentially susceptible to territorial disputes than any other<sup>14</sup>. With the emergence of colonies to independent statehoods, the widespread rejection of borders gave way to the application of a new doctrine which accepted the borders as they were.<sup>15</sup>

### The Rule of *Uti Possidetis* in Africa

The rule of *uti possidetis* has its origin in the Roman law providing legal protection for the effective possessions of estates<sup>16</sup>. The rule aimed at regulating the issue of private property and made a distinction between the possession of things and the ownership over them. This rule did not allow for judgement as to ownership but shifted the burden of proof on the party not holding the land.<sup>17</sup> It constituted a provisional remedy between two individuals based on possession and pending a final judicial determination as to ownership.<sup>18</sup> *Uti possidetis* was generally a concept used in private law for private land and was made to apply to public land especially territory including that considered *terra nullis*. This is the doctrine that was adopted by the OAU to help in the settling of border disputes arising in post independence Africa<sup>19</sup>. This rule became a guiding principle in African diplomacy and remains to date. Reliance of this rule was based on the assumption that it would reduce breakout of armed conflict and avoid a repeat

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<sup>13</sup> Kapil, R.L., 'On the Conflict Potential of Inherited Boundaries in Africa', *World Politics*, Vol. 18, No. 4 (Jul., 1966), pp. 656-673: 659.

<sup>14</sup> Zartman, I. W., 'The Foreign and Military Politics of African Boundary Problems', (1969), in C. G. Widstrand (ed.) *African Boundary Problems*, Uppsala: Scandinavian Institute of African Studies, pp 79-100.

<sup>15</sup> Touval, S., 'The Organization of African Unity and African Borders', *International Organization*, Vol. 21, No. 1 (1967), pp. 102-127:102.

<sup>16</sup> Ratner, R.S., 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', *The American Journal of International Law*, Vol. 90, No. 4, (1996), pp 590-624: 592

<sup>17</sup> Reisman, M.W., 'Protecting Indigenous Rights in International Adjudication', *American Journal of International Law* Vol. 89, Issue 2 (April 1995), pp. 350-362:352.

<sup>18</sup> Lalonde, S., *Determining Boundaries in a Conflicted World: The Role of uti possidetis*, McGill-Queens University Press, (2002), p 3.

<sup>19</sup> Griffiths, 'The Scramble of Africa: Inherited Political Boundaries' op cit (1986), p 213.

of another scramble for Africa by member states and that it would curb any secessionist attempts made by groups.<sup>20</sup>

In the month leading to the Cairo summit in 1964, the OAU was called to intervene in the Algerian/ Moroccan war, Somali dispute with Kenya and Ethiopia, and the row between Dahomey and Niger. This trend led member states to feel that border conflicts had become a plague and hence needed to do something about it. It is then that leaders decided to take the initiative and affirm the preservation of the territorial *status quo*.<sup>21</sup> In its judgment in the Burkina Faso-Mali Frontier case, the International Court of Justice (ICJ) asserted that *uti possidetis* was a general principle of international law, characterised by the 'pre-eminence accorded to legal title over effective possession as a basis of sovereignty'.<sup>22</sup> The court also noted that the essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitation between different administrative divisions or colonies of the same sovereign.<sup>23</sup>

The adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960 by the UN General Assembly, with its emphasis on the continued territorial integrity of colonial territories after independence also reinforced recognition of the principle.<sup>24</sup> Further, it has been recognized by treaties, namely Article 62, paragraph 2(a) of the Vienna Convention on the Law of Treaties (1969) and article 11 of the Vienna Convention on

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<sup>20</sup> Ratner, 'Drawing a Better Line: *Uti possidetis* and the Borders of New States', op cit (1996), p 591.

<sup>21</sup> Touval, 'The Organization of African Unity and African Borders', op cit (1967), p 122.

<sup>22</sup> Frontier Dispute (Burkina Faso/Mali), ICJ (22 December 1986), (1986) ICJ Reports 1986, (Para 23).

<sup>23</sup> Burkina Faso/Mali (ICJ 1986) para 23.

<sup>24</sup> Radan, P., *The Break Up of Yugoslavia and International Law*. Routledge, (2002) p 122.

Succession of States in Respect of Treaties 1978.<sup>25</sup> The doctrine basically states that the new independent states will continue to exist with the same boundaries that they had when they were administrative units within territory or territories on one colonial power. These were the boundaries that were created for them by the colonial rulers. Therefore the doctrine respects the *de facto* situation existing prior to colonial departure. It is one of the aspects of the process of creation of statehood. The doctrine has had the greatest influence on shaping of the map of the world today in addition to being the most important factor in creating and maintaining modern postcolonial entities.<sup>26</sup>

The application of the principle maintained the current existing borders in Africa thus ensuring statehood. This statehood was influenced by the colonialists during the Berlin conference. As a result Africa was composed of modern states that had a defined territory and were also sovereign. Under international law, states acquire rights and duties towards other states and populations they govern. Examples of these rights include, the right to exercise jurisdiction over its territory and permanent population, the right to engage in acts of self-defence in certain situation, right to enjoy sovereign equality and to freely choose and develop its political, social, economic and cultural systems. On the other hand, the obligations include the duty not to interfere in the internal affairs of other sovereign state, respect the personality of other states, and protection of human rights and fundamental freedoms of individuals they govern.<sup>27</sup>

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<sup>25</sup> Naldi, J. G., 'The Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali): *Uti Possidetis* in an African Perspective', *The International and Comparative Law Quarterly*, Vol. 36, No. 4 (October, 1987), pp. 893-903: 898.

<sup>26</sup> Castellino, J., 'Territory and Identity in International Law: The Struggle for Self Determination in the Western Sahara', *Millennium-Journal of International Studies*, Vol. 28, No.3, (1998), pp 523-551:527.

<sup>27</sup> Shaw, M, 'International Law, 6<sup>th</sup> Ed., Cambridge University Press, (2008), pg 212 & 214.



Application of the principle in the creation of the new states also gave rise to secessionist claims by ethnic groups which did not want to be associated with the existing colonial territory. This is because the colonial states were artificially created and therefore composed of different national, ethnic and religious groups. As a result of these differences, they became embroiled in internal struggles in the name of self-determination.<sup>28</sup> This was the case where some found themselves as minority in the new territory and thus felt threatened because their human rights were not guaranteed. Therefore they made claims of external self-determination to either join an existing state as was the case for the Somalis in Kenya or form a new state. However, they were not successful in their claims because in African diplomacy, the right to self-determination was considered to mean the rights of African states to be free from foreign occupation and rule. This position nonetheless did not stop ethnic groups from continuously making claims for self-determination. After decolonization, the issue of self-determination still persists in Africa attracting sentiments and implications well exemplified by the conflicts over Biafra and Katanga in the 1960s and in Eritrea, the Tigray province of Ethiopia and the Southern Sudan.<sup>29</sup>

### **Self-determination in Africa**

The right to self determination has been defined as the right of people to determine the nature and extent of their political, social and economic sovereignty.<sup>30</sup> Brownlie defines self-determination in the notion of rights as the right of cohesive national groups (peoples) to choose for themselves a form of political organization and their relation to other groups.<sup>31</sup> On the other

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<sup>28</sup> Michalska, A., 'Rights of Peoples to Self-determination in International Law', in Twining, W., (ed.) *Issues of Self-determination*, Aberdeen University Press, p 75.

<sup>29</sup> Blay, S. K., 'Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights', *Journal of African Law*, Vol. 29, No.2, (1985), pp 147-159: 147.

<sup>30</sup> Hill, M. A., 'What the Principle of Self-determination means Today', *ILSA Journal of International And Comparative Law*, Vol. 1, (1995), p 120.

<sup>31</sup> Araujo, R., 'Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law', *Fordham International Law Journal*, Vol. 24, Issue 5, (2000), pp 1477-1530: 1495.

hand, the (ICJ) in an advisory opinion concerning the region of the Western Sahara defined self determination as the 'freely expressed will of peoples or the free expression of the wishes of the people'.<sup>32</sup> This implied that it is a right held by the people rather than by the government alone. Thus governments must not decide the life and future of peoples at their discretion rather people must be enabled freely to express their wishes in matters concerning their conditions. Self-determination has also been referred to as the capacity of a person or group to make its own rule, conduct their affairs as they deem fit.<sup>33</sup>

The principle of self-determination relates to international subjects. The fundamental philosophy behind this principle has historically been that every human being is entitled to control their own destiny. The political destiny therefore of a group of individuals in a state or community must be decided by the aggregate rights of self-determination of each person.<sup>34</sup> In addition self-determination concentrates on the relevant people whose pattern of habitation will dictate the appropriate international boundaries.<sup>35</sup> The core of self-determination means human beings whether individually or as groups should be in control of their own destinies and the institutions of government should be devised based on that.<sup>36</sup> It is this thinking that led to the downfall of colonial structures and abolition of apartheid in South Africa and today promotes

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<sup>32</sup> The Western Sahara Case, (1975) ICJ, Report at 12. Judgement available at ICJ website: <http://www.icj-cij.org/>.

<sup>33</sup> Preda, A., 'The Principle of Self-Determination and National Minorities', *Dialectical Anthropology*, Vol. 27, (2003), pp 205-226: 206.

<sup>34</sup> Durusma, J., *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood*, Cavendish Publishers, London, (1997), p 7.

<sup>35</sup> Shaw, M., 'Peoples, Territorialism and Boundaries', *European Journal of International Law*, (1997), pp 478-507: 479.

<sup>36</sup> Walt, M. & Serro, O., *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, Report of the International Conference of Experts held in Barcelona from 21 to 27 November (1998), UNESCO Division of Human Rights Democracy and Peace & Centre UNESCO de Catalunya, pp 13-37: 23

democracy. Therefore, self-determination has its roots in and is linked to the concept of democracy.<sup>37</sup>

There are two forms of self-determination: internal and external self-determination. External self-determination<sup>38</sup> is the act by which a people determines its future international status and liberates itself from alien rule. This entails the right to separate from the existing state of which the group concerned is a part and to set up a new independent state.<sup>39</sup> In Africa, countries that have successfully sought external self-determination are South Sudan recently in 2010 and Eritrea from Ethiopia. On the other hand, internal self-determination is the selection of the desired system of government.<sup>40</sup> It entails the right to decide the form of government and identity of rulers by the whole population of a state and the right of a population group within the state to participate in decision making at the state level. It can also mean the right to exercise cultural, linguistic, religious or political autonomy within the boundaries of the existing state<sup>41</sup>. The origin of the principle of self-determination can be traced back to the American Declaration of Independence of 1776 and French revolution of 1789. These periods marked the era of the notion that individuals and peoples as subjects of the king were objects to be transferred, alienated, ceded or protected in accordance with interests of the monarch.<sup>42</sup> The French revolution symbolized the recognition of the right of the ruled to turn against the rulers. The

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<sup>37</sup> Ibid, p 23.

<sup>38</sup> Pomerance, M., *Self-determination in Law and Practice: the New Doctrine in The United Nations*, Martinus Nijhoff Publishers, (1982), p 37.

<sup>39</sup> Walt et al, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, op cit (1998), p 24.

<sup>40</sup> Pomerance, *Self-determination in Law and Practice: the New Doctrine in the United Nations*, op cit (1982), pg 37.

<sup>41</sup> Walt et al, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, op cit (1998), p 36.

<sup>42</sup> Cassese, A., *Self-Determination of Peoples: A Legal Appraisal*, Cambridge University Press, Cambridge, (1995), p 11.

modern day right of the peoples to external self-determination has its origin in this period by permitting states to justify allocations of territories to one state as opposed to another.<sup>43</sup>

The principle of self-determination of peoples gained world-wide importance during the First World War. In implementing the fourteen points of President Wilson, a number of nations in Central and Eastern Europe gained independence.<sup>44</sup> According to widely adopted views, only people under colonial rule have the right to self-determination involving accession to independent statehood. Once this is achieved, the territorial integrity is protected against any attempts to destroy national unity.<sup>45</sup> The post-WW II international order resembled more than anything else the order created by the Congress of Vienna: it was a system based on the state sovereignty, that is, on the concept of state self-determination.<sup>46</sup> Self-determination in the UN Charter was state-centric and this was a result of the fact that this time self-determination, as opposed to World War I, was not a war aim but rather decolonization aim.<sup>47</sup> The forms of self-determination that evolved later were the result of political pressure stemming from socialist countries, later joined by increasing number of newly independent third world countries equating it to anti-colonialism. The Declaration of the Granting of Independence triggered off a rapid process of decolonization.

Resolutions adopted in the recent years have been concerned mainly with the right to self-determination of peoples. Therefore subjects of this right are no longer states and colonial people but also peoples living under foreign domination, in racist systems and under regime of

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<sup>43</sup> Ibid, (1995), p 13.

<sup>44</sup> Michalska, A., 'Rights of Peoples to Self-determination in International Law', in Twining, W., (ed.) *Issues of Self-determination*, Aberdeen University Press, p 75.

<sup>45</sup> Ibid, p 78.

<sup>46</sup> Samuel, B. and Cronin, B., 'The State and the Nation: Changing Norm and Rules of Sovereignty in International Relations'. *International Organization* Vol. 48 No. 1 (Winter 1994) pp. 107-130 at 122-125.

<sup>47</sup> Cassese, A., 'Self-Determination of Peoples: A Legal Reappraisal', (Cambridge: Cambridge University Press, 1995) pp. 37-43.

apartheid. The application from this perspective then looks at self-determination of peoples living in independent states. This is a new concept concerned with internal self-determination. The right to self-determination is directed against authoritarian regimes and therefore against both external and internal interference of the people. It is a right to struggle against all forms or arbitrary oppression of peoples.<sup>48</sup> This right is set alongside the principle of territorial inviolability of frontiers, territorial integrity of states and the principle of non-intervention in international affairs in some international instruments such as the 1975 Helsinki Final Act.

### **Border Making Framework in Africa**

Since African countries gained independence, the borders which were drawn during the colonial period in a context of rivalries between European countries and their scramble for territories in Africa have been identified as having been a recurrent source of conflicts on the continent. Most of the borders are poorly defined and not delineated. These conflicts witnessed include between Morocco and Algeria, Ethiopia and Somalia in the 1960s, Uganda and Tanzania in the 1970s, Senegal and Mauritania in the late 1980s and Nigeria and Cameroon in the 1960s and 1980s.<sup>49</sup> It is because of this that the Unity (OAU) and later the African Union (AU) have established mechanisms in place to combat this recurrent problem. Post-independence African borders have been conditioned by the OAU Resolution of 1964 and the provisions of the Constitutive Act of the AU (2002) which adopted the Latin American model of *uti possidetis*.

The Organization of African Unity was established in 1963 as the regional organization for all the independent states in the continent. The objectives of its founders included the promotion of unity and solidarity among Member States; the eradication of all forms of

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<sup>48</sup> Michalska, A., 'Rights of Peoples to Self-determination in International Law', in Twining, W., (ed.) *Issues of Self-determination*, op cit (1975) p 83.

<sup>49</sup> Zartman, W., 'Bordering on War', *Foreign Policy*, (2001), 66-67: 66 - 67.

imperialism and minority rule in Africa as well as the promotion of the quality of life of the average African<sup>50</sup>. The OAU at its First Ordinary Session of the Assembly of Heads of States and Governments in 1964 solemnly declared that all Member States pledge themselves to respect the borders existing on their achievement of national independence.<sup>51</sup> When the Summit Conference of Independent African States met in Addis Ababa, Ethiopia, in May 1963, several events served to remind the assembled dignitaries that borders posed pressing and urgent problems. For instance, the Somali Republic which had staked out territorial claims against Ethiopia and Kenya as had Mauritania over Morocco.<sup>52</sup> To avoid further conflicts over borders the OAU adopted the principle in 1964. The principle became the basis of the transformation of colonial boundaries to the boundaries of sovereign states following decolonization. The subsequent OAU Charter stipulated that member states should pledge themselves to respect their inherited borders. In the spirit of the Charter, the Assembly of Heads of States and Governments sitting in Cairo in 1964 made a solemn declaration which in effect ratified these boundaries. The Declaration sought to commit African states to respect the borders existing on their achievement of national independence.<sup>53</sup> This position effectively lay to rest suggestions for the readjustment of these boundaries.

The African Union is the successor to the OAU, the inter-governmental organization for African states in existence since 1963, created with the aim of strengthening integration among member states and the voice of the African continent in global affairs.<sup>54</sup> The call for the

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<sup>50</sup> The Preamble, OAU Charter, 1963.

<sup>51</sup> OAU, Resolution 16:1.

<sup>52</sup> Touval, S., 'The Organization of African Unity and African Border', *International Organization*, Vol. 21, No.1, (1967), pp 102-127: 104.

<sup>53</sup> *Ibid*, p 104.

<sup>54</sup> *Strengthening Popular Participation in the African Union: A Guide to AU Structures and Processes*, An Open Society Institute Network Publication, (2009), p 4.

establishment of the A.U came about after 1999 when the Heads of State and Government of the Organization of the African Unity issued a declaration calling for its establishment.<sup>55</sup> The Constitutive Act of the African Union was adopted in 2000 at the Lome Summit and entered into force in 2001. Its first objective is to achieve greater unity and solidarity among African countries and among the peoples of Africa. Whereas the purposes set out in the OAU Charter focused on the defense of the sovereignty, territorial integrity and independence of African states and the eradication of all forms of colonialism from Africa, the AU has a much broader set of objectives, including the promotion of peace, security, and stability; democratic principles and institutions, popular participation and good governance; and human and peoples' rights. The AU has 54 Member States the latest entrant being South Sudan.<sup>56</sup>

In keeping with the spirit of its predecessor, the AU chose to adopt the solemn declaration of 1964 as its mantra on boundaries which it still adopts to date. Indeed, the AU went a step further than its predecessor by establishing a standing programme on borders known as the African Union Border Programme (AUBP) under the direct supervision of the African Union Commission. This approach of the AU underscores the crucial importance of boundaries to the issues of peace, security, progress and integration in the continent. Indeed, in the Constitutive Act establishing the AU, high up in the Union's objective is the defense of the sovereignty, territorial integrity and independence of its Member States. Further the Act provides that the Union shall function in accordance with the following principles: (b) Respect of borders existing on achievement of independence.<sup>57</sup>

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<sup>55</sup> African Union in a Nutshell accessed at <http://au.int/en/about/nutshell> on 20th July, 2011.

<sup>56</sup> Open Society Institute Network Publication, *Strengthening Poplar Participation in the African Union: A Guide to AU Structures and Processes*, op cit (2009), p 4.

<sup>57</sup> Art. 3 & 4, Constitutive Act of the African Union, (2002).

## **Theoretical Framework**

A territorial boundary has been defined as the imaginary lines on the surface of the earth which separate the territory of one state from that of another or from unappropriated territory of from the open sea.<sup>58</sup> The Berlin conference marked for Africa the beginning of the modern state system with demand for precise and characteristically, artificial and often arbitrary territorial framework.<sup>59</sup> Artificial boundaries are defined as those boundary lines which not being dependent upon natural features of the surface of the earth for their section has been artificially or arbitrarily created by men.<sup>60</sup> From the viewpoint of political boundary makers, what happened to Africa at the conference in Berlin was initiation of delimitation. This term has been held by Lord Curzon to refer to the earlier process for determining a boundary down to and including its embodiment in a treaty or convention. Delimitation is the phase for policy-decision dominated by statesmen and bureaucrats.<sup>61</sup>

The concept of state system in international law came about after the Peace of Westphalia. Westphalia refers to the peace settlement negotiated at the end of the Thirty Years War (1618-1648), which has also served as establishing the structural frame for world order that has endured, with modifications from to time to time, until present.<sup>62</sup> It was characterized by the existence of a multiplicity of states, each sovereign within its territory, equal to one another and free from external earthly authority. This new system rests on international law and the balance of power, a law operating between states and a power operating between rather than above

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<sup>58</sup> McCorquodale, R., & Pangalangan, R., 'Pushing Back the Limitations of Territorial Boundaries', *European Journal of International Law*, (2001), Vol. 12, No.5, pp867-888: 869.

<sup>59</sup> Asiwaju, A., *Artificial Boundaries, Civileis Personalities*, New York, (1990), p 15.

<sup>60</sup> Lord Curzon of Kedleston, *Frontiers, the Romanes Lecture*, Oxford University Press, (1997), p 23.

<sup>61</sup> Curzon, K., p 23.

<sup>62</sup> Osiander, A., 'Sovereignty, International Relations, and the Westphalian Myth', *International Organization*, Vol. 55, No. 2 (Spring, 2001), pp. 251-287:261.



states.<sup>63</sup> The European state system therefore brought a new sense of what borders are in Africa. Under international law, for a state to be recognized as one it should possess the qualifications of a defined territory.<sup>64</sup>

The international boundary regime is premised upon in international law signing of treaties. States transact a vast amount of work by using treaties. For instance, territory will be acquired by means of treaties. It is an agreement between parties in international scene and is primarily concerned with relations between states.<sup>65</sup> The fundamental principle of treaty law is that they are binding upon the parties and must be performed in good faith. Waldock in his first report on Succession of States and Governments in Respect to Treaties in 1968 declared that boundaries established by treaties remain untouched by mere fact of a succession. This approach was also supported by state practice and by the Latin American concept of *uti possidetis* whereby administrative divisions of the former Spanish empire were to constitute the boundaries of the newly independent states in South America. The concept was also echoed in the OAU meeting of 1964.<sup>66</sup>

This principle regarding continuity of borders in the absence of consent to the contrary is enforced by other principles of international law such as article 62(2) of the Vienna Convention on the Law of Treaties which stipulates that a fundamental change in circumstances may not be invoked as a ground for terminating or withdrawing from a treaty that establishes a boundary.<sup>67</sup> In addition, article 11 of the Vienna Convention on Succession of Treaties specifies that such

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<sup>63</sup> Gross, L., 'The Peace of Westphalia, 1648-1948', *The American Journal of International Law*, Vol. 42, No. 1 (Jan., 1948), pp. 20-41:28 - 29.

<sup>64</sup> Art1, Montevideo Convention on the Rights and Duties of States (1933).

<sup>65</sup> Shaw, M., *International Law*, 6<sup>th</sup> Ed., Cambridge University Press, (2008), p 903.

<sup>66</sup> *Ibid*, (2008), p 968.

<sup>67</sup> *Ibid*, (2008), p 969.

succession does not affect a boundary established by treaty or obligations and rights established by a treaty and relating to the regime of a boundary. African borders were also created through bilateral treaties concluded between Europeans and Africans before and after the Berlin Conference. The treaties entered into during the scramble for Africa were part of the process of European colonial expansion.<sup>68</sup> Treaties between African rulers and Europeans played a role in the process of partitioning Africa.

### **Justification of the study**

The African continent continues to witness border conflicts and disputes which have at times resulted in war. The African Union in a bid to resolve this issue has called upon all member states to demarcate their boundaries but with respect to the principle of *uti possidetis*. The blanket application of *uti possidetis* based on the rationale of reducing conflicts has created more problems especially those relating to human rights. The extension of *uti possidetis* to modern breakups leads to genuine injustices and instability by leaving significant populations both unsatisfied with their status in new states and uncertain of political participation there and the principle supports status quo instead of providing a long term solution such as the need to undertake some necessary territorial adjustments. Moreover, this rule that allows transformation of all administrative modern states into international boundaries can result in the temptation of ethnic separatists to divide the world further along administrative lines creating more room for conflicts. The principle has been adopted as guiding principle in border programme. Based on the challenges that arose previously and those that are bound to arise due in its implementation, it is important that its application be re-examined to avoid future conflicts.

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<sup>68</sup> Touval, S., 'Treaties, Borders and the Partition of Africa', *Journal of African History*, Vol. 6, No. 2, (1966), pp 279-293: 279.

## **Methodology**

This study will use both primary and secondary data for the study. This study will be conducted through historical research design which is mainly qualitative. The study is mainly concerned with the principles of *uti possidetis* and self-determination and the border making framework in Africa. This will be best investigated through this research design. The research design will assist in highlighting the implications of assessing the rule of *uti possidetis* and its implication on African diplomacy by examining the already existing literature on the same. The study will focus on Africa because the two principles are held dear and are unimpeachable in African diplomacy. It is therefore considered as the appropriate scope that will bring out issues emerging as a result of the application of the two principles. The study sample will consist of case selection of countries in Africa which will be analyzed and interrogated in relation to the two principles and the border making framework. The sampling technique that will be employed is purposive sampling in selection of the sample. Purposive sampling will allow the researcher to select which countries in will be useful for discussion. This will also help in selection of useful cases and information.

The study will conduct structured interviews and document analysis as the source of data collection. The selection of the data collection tool of structured interview is been guided by the nature of data to be collected, time available as well as the objectives of the study. The study is concerned with views, opinions and sentiments of targeted people on the research problem. Such information can best be collected through structured interviews with identified key informants who are experts in the field of international law. The study will also hold interviews with officials from the Ministry of Foreign Affairs who are policy makers in order to gather their views concerning application of the principle of *uti possidetis* in border demarcation. Their views

will also be sought in relation to the African Union Border Demarcation Programme of 2007. Structured interviews will also be undertaken with citizens of the countries of South Sudan and Eritrea to collect their views on both principles since they have experienced either of their application. In addition their perspective will add value to the discussion by shading light on the issues that arose leading to claims of self-determination. Purposive sampling methodology will be applied to identify key informants. This will allow for collection of information related to the study. Analytical examination of documents with information related to application of the two principles will be undertaken. The tool will allow for the collection of unobtrusive information that will be useful in explaining the issues being explored. The data will be collected from books, journals and academic websites. The data will be presented in a narrative analysis form within the context it falls in the chapters on *uti possidetis*, self-determination and the border making framework in Africa.

### **Chapter Outline**

The study will be presented in five chapters. Chapter one presents the general introduction to the project. Chapter two is concerned with the principle of *uti possidetis*. Chapter three presents the principle of self-determination generally. The chapter provides a historical background of self-determination analyzing its old form adopted before the end of cold war and the post cold war conception of the principle. The framework for border demarcation in Africa is the subject of chapter four. Finally chapter five presents the summary and the conclusion, which includes the contributions of the study to the theme of border diplomacy in Africa. The chapter concludes with possible views as to the way forward.

## Chapter Two

### The Principle of *Uti Possidetis* in Africa

#### Introduction

This chapter will highlight in detail the origin of this doctrine in international law by looking at its content, function and transformation, judicial approval of the principle, how the doctrine was adopted by the Organization of African Unity (OAU) and later by the African Union (AU). The chapter will also discuss why the rule was adopted in African diplomacy. Finally the chapter will highlight the implications of adopting this rule in African diplomacy.

#### History of *Uti Possidetis*

The rule of *uti possidetis* has its origin in the Roman law providing legal protection for the effective possessions on estates.<sup>1</sup> The rule aimed at regulating the issue of private property and made a distinction between the possession of things and the ownership over them. Where two parties had a claim over ownership of real property, provisional possession would be granted to the possessor during litigation unless it could be shown that he had obtained the land by fraudulent means or force and not in good faith.<sup>2</sup> Where possession was obtained in good faith, the magistrate would apply the rule of *uti possidetis, ita possidetis* meaning 'as you possess, so may you possess'. This rule did not allow for judgement as to ownership but shifted the burden of proof on the party not holding the land.<sup>3</sup> The status quo was preserved irrespective of the means by which possession had been gained.

Prior to the wave of decolonization in the wake of World War II, the application of the principle of *uti possidetis* as a basis for the resolution of post-decolonisation border disputes was

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<sup>1</sup> Ratner, R.S., 'Drawing a Better Line: Uti Possidetis and the Borders of New States', *The American Journal of International Law*, Vol. 90, No. 4, (1996), pp 590-624: 592.

<sup>2</sup> Ibid, (1996), p 593.

<sup>3</sup> Reisman, M.W., 'Protecting Indigenous Rights in International Adjudication', *American Journal of International Law* Vol. 89, Issue 2 (April 1995), pp. 350-362:352.

essentially confined to the Americas. It was only with its use and further development in post-World War II Africa, and to a lesser extent Asia, that it was transformed into a general principle of international law in the context of post-decolonization border disputes.<sup>4</sup> Eventually, early scholars of international law adopted this notion by altering it in two ways: first, by changing the scope of application from private land claims to state's territorial sovereignty while the other had to do with the transformation of possession as a factual and provisional situation over things in private law into a permanent legal status of sovereign rights over certain state territory. The process developed at a time when the use of unlimited force between states with the view of gaining territories was not considered as illegal and illegitimate. This state of affairs lasted until the Second World War.<sup>5</sup> The rule emerged during the decolonization of Latin America and Africa but would apply to the logical extension of breakup of states today. Nevertheless, the principle was not confined to Latin America but has become universally applied. It was adopted by the newly emancipated African states. It has been invoked in disputes between Asian states. It has also found expression in Europe, in Principle III of the Helsinki Final Act (1975). The adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960 by the UN General Assembly, with its emphasis on the continued territorial integrity of colonial territories after independence also reinforced recognition of the principle.<sup>6</sup> Further, it has been recognized by international agreements of a universal character, namely Article 62, paragraph 2(a) of the Vienna Convention on the Law of Treaties (1969) and Article 11 of the unratified Vienna Convention on Succession of States in Respect of Treaties 1978.<sup>7</sup> The doctrine

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<sup>4</sup> Radan, P., *The Break Up of Yugoslavia and International Law*, Routledge, (2002), p 118.

<sup>5</sup> Ratner, S., 'Drawing a Better Line: Uti possidetis and Borders of New States' op cit (1996), p 593.

<sup>6</sup> Radan, P., *The Break Up of Yugoslavia and International Law*, op cit (2002), p 122.

<sup>7</sup> Naldi, J. G., 'The Case concerning the Frontier Dispute (Burkina Faso/Republic of Mali): *Uti Possidetis* in an African Perspective', *The International and Comparative Law Quarterly*, Vol. 36, No. 4 (Oct., 1987), pp. 893-903: 898.

basically states that the new independent states will do so with the same boundaries that they had when they were administrative units within territory or territories on one colonial power. These were the boundaries that were created for them by the colonial rulers. Therefore the doctrine respects the *de facto* situation existing prior to colonial departure. It is one of the aspects of the process of creation of statehood. The doctrine has had the greatest influence on shaping of the map of the world today in addition to being the most important factor in creating and maintaining modern postcolonial entities.<sup>8</sup> The United Nations has a strong position against fragmentation of states and therefore this principle was a major pillar in effecting this position. It also ensured that states did not fragment into states that would not be economically viable in the international system.<sup>9</sup>

Lalonde explains that two differing interpretations were debated by early jurists. These are *uti possidetis de facto* and *uti possidetis juris*. The former refers to recognition of the *de facto* possession of territory and latter to the possession of territory through recognised legal title that is *juris*. International law has developed to give deference to the latter over the former so that the term *uti possidetis* now refers to *uti possidetis juris*.<sup>10</sup> Dependence on the application of this rule post cold-war derived from three arguments: that the rule would reduce prospects of armed conflict by providing the only clear outcome in such situations. In the absence of such policy borders would be open to disputes and new states would fall prey to secessionist claims. Secondly that since a cosmopolitan democratic state can function within any borders, conversion of administrative borders to international was a sensible approach and finally that the principle would be applied as the default rule in international law that would mandate conversion of all

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<sup>8</sup> Castellino, J., 'Territory and Identity in International Law: The Struggle for Self Determination in the Western Sahara', *Millennium-Journal of International Studies*, Vol. 28, No.3, (1998), pp 523-551:527.

<sup>9</sup> Interview conducted with Dr. Musila G. (PhD), International Law Consultant, on 15<sup>th</sup> August, 2011 in Nairobi.

<sup>10</sup> Lalonde, S., *Determining Boundaries in a Conflicted World*, McGill-Queen's University Press, (2002), pp 30-32.

administrative boundaries into international borders.<sup>11</sup> Ultimately, the primary function of the doctrine was to seek to prevent boundary conflicts between successor states.<sup>12</sup> The content and the function of *uti possidetis* as it stands at present, refers to inviolability of previous colonial administrative borders, that define borders of newly sovereign states on the basis of their previous administrative frontiers both within and outside the colonial context.

### **Judicial approval of the Principle**

Since 1957, the beginning of formal de-colonisation in Africa, the International Court of Justice (ICJ) has adjudged eight international land boundary disputes of which no less than five have been located in Africa.<sup>13</sup> These are: Burkina Faso/Mali 1983-1986,<sup>14</sup> Libya/Chad 1990-1994,<sup>15</sup> Cameroon v. Nigeria 1994-2002,<sup>16</sup> Botswana/Namibia 1996-1999<sup>17</sup> and Benin/Niger 2002-2005.<sup>18</sup> In its judgment in the Burkina Faso-Mali Frontier case, the ICJ asserted that *uti possidetis* was a general principle of international law, characterised by the 'pre-eminence accorded to legal title over effective possession as a basis of sovereignty'.<sup>19</sup> It is also in the same case that the application of the rule resulted in administrative boundaries being transformed into international frontiers in the full sense of the term. The chamber further endorsed the application of the rule notwithstanding the fact that when both States that is Mali and Burkina Faso attained independence in 1960, the Organization of the African Union did not exist. The chamber stated

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<sup>11</sup> Ratner, S., 'Drawing a Better Line: *Uti possidetis* and Borders of New States, op cit (1996), p 591.

<sup>12</sup> Shaw, M., 'Peoples, Territorialism and Boundaries', *European Journal of International Law*, Vol. 3, (1997), pp 478-507: 493.

<sup>13</sup> A ninth case (also from Africa) concerning a land boundary dispute between Burkina Faso and Niger was submitted to the ICJ in July 2010.

<sup>14</sup> Frontier Dispute (Burkina Faso/Mali), ICJ (22 December 1986) (1986) ICJ Reports 1986.

<sup>15</sup> Territorial Dispute (Libyan Arab Jamahiriya/Chad), ICJ (4 February 1994) (1994) ICJ Reports 1994.

<sup>16</sup> Land and Maritime Boundary Between (Cameroon v. Nigeria with Equatorial Guinea intervening), ICJ (10 October 2002) (2002) ICJ Reports 2002.

<sup>17</sup> Dispute over Kasikili/Sedudu Island (Botswana/Namibia), ICJ (13 December 1999) (1999) ICJ Reports 1999.

<sup>18</sup> Frontier Dispute (Benin/Niger), ICJ (12 July 2005) (2005) ICJ Reports 2005.

<sup>19</sup> Frontier Dispute (Burkina Faso/Mali), ICJ (22 December 1986) (1986) ICJ Reports, op cit (1986).



that when a new state acquired independence, its sovereignty was within the territorial base and boundaries left to it by its colonial powers.<sup>20</sup> In effect the decision of the chamber froze territorial title and confined the right of self determination of peoples to a territory defined by the colonial power.<sup>21</sup>

The practise of the rule largely attempted to protect existing borders rather than recognizing their artificial nature in many places in Africa.<sup>22</sup> In the words of Lord Salisbury:

'We (the colonial powers) have 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, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.'<sup>23</sup>

### ***Uti Possidetis in the African Context***

In the wave of decolonization in Africa after World War II the principle similar to *uti possidetis juris* as applied in Latin America was adopted to settle international boundaries after decolonization. In July 1964 at the OAU conference of Heads of State and Government in Cairo adopted a declaration requiring member states pledge themselves to respect the borders existing on their achievement of national independence.<sup>24</sup> This declaration offers two explanations concerning post-colonial boundaries in Africa: first, it ended the debates regarding the status and future of these boundaries between two contending sides, one rooting for an across-the-board readjustment of boundaries or their virtual abolition in the formation of a union government, while the other advocated for a gradual, but functional integration of the states in the continent, based on the inherited colonial boundaries. Secondly and more importantly, the declaration

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<sup>20</sup> Shaw, M., *International Law*, op cit (1997), p 357.

<sup>21</sup> Dugard, J., *International Law: A South African Perspective*, Juta & Co. Ltd, 3<sup>rd</sup> Ed, (2005), p 131.

<sup>22</sup> Elden, S., *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, op cit (2006), p 12

<sup>23</sup> As cited by Judge Ajibola, *Reports of the International Court of Justice*, (1994), p 53.

<sup>24</sup> Brownlie, I, *African Boundaries: A Legal and Diplomatic Encyclopaedia*, London, C. Hurst & Co, (1979), p 11.

sanctioned inherited colonial boundaries as the basis for ordering post-colonial inter-state relations in the continent.<sup>25</sup>

The principle of *uti possidetis juris* applied to former international boundaries between the various colonial powers just as it did to internal boundaries of colonial entities under the rule of a single power.<sup>26</sup> The application of *uti possidetis juris* was also concerned with the problem of establishing the precise locations of the former colonial boundaries. Just as in Latin America, when the principle of *uti possidetis juris* was applied, there were problems ascertaining boundaries because of conflicting and incomplete documentary evidence.<sup>27</sup> Currently under the AU, the principle of *uti possidetis* is enshrined in its Constitutive Act giving it legal status elevating it from the declarative status it had under the OAU.<sup>28</sup> This makes it binding upon member states.

Prior to the Berlin conference, few of the present boundaries in Africa existed. The ones that did were limited to settler territories such as in the South African Republic and in the north between Algeria and Morocco.<sup>29</sup> Pre-colonial Africa adopted age-old systems of using zones or border marches as buffer between kingdoms. Such zones were of varying width and they fell into three distinct categories during the 19th century: the frontier of contact where distinct cultural and political groups lived and operated side by side, frontier of separation where communities were separated by a buffer zone over which neither side claimed or exercised any authority and finally existed in regions of considerable over-lapping of diverse groups of migratory

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<sup>25</sup> Touval, S., 'The Organization of African Unity and African Borders', op cit (1967), p 104.

<sup>26</sup> Radan P., *The Break Up of Yugoslavia and International Law*, op cit, (2002), p 127.

<sup>27</sup> Radan, *The Break Up of Yugoslavia and International Law* (2002), p 122.

<sup>28</sup> Art. 4 (b), Constitutive Act of the African Union.

<sup>29</sup> Griffiths, I., 'The Scramble for Africa: Inherited Political Boundaries', *The Geographical Journal*, Vol. 152, No.2, (1986), pp 204-216:204.

tendencies.<sup>30</sup> In addition, Africa was stateless and was formed around ethnic communities with their leaders.<sup>31</sup> Africa adopted the modern state system structure in international law at the Berlin conference.

### **The Berlin Conference (1884-1885)**

In Africa, the story of exclusive boundaries as a basic requirement of the modern state system began with the Berlin Conference. The conference was a response to the need to bring some order into a state of affairs that was fast degenerating into imminent danger of armed friction among the competing imperialist states.<sup>32</sup> The rule about effective occupation resulted in colonial territories with demand for definitive boundaries and visible administrations. This in effect launched Africa into the orbit of a new world of sharply bound territorial states on the model of the European nation-states.<sup>33</sup> The Berlin conference marked for Africa the beginning of the modern state system with demand for precise and characteristically, artificial and often arbitrary territorial framework.<sup>34</sup> Artificial boundaries are defined as those boundary lines which not being dependent upon natural features of the surface of the earth for their section has been artificially or arbitrarily created by men.<sup>35</sup> From the viewpoint of political boundary makers, what happened to Africa at the Berlin was initiation of delimitation. This term has been held to refer to by Lord Curzon the earlier process for determining a boundary down to an including its embodiment in a Treaty or Convention. Delimitation is the phase for policy-decision dominated by statesmen and bureaucrats.<sup>36</sup> Effective occupation and de facto control over African territory were sufficient for the acquisition of sovereign rights. Where local rulers opposed colonial

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<sup>30</sup> Ajala, A., 'The Nature of African Boundaries', *Africa Spectrum*, Vol. 18, No. 2, (1983), pp. 177-189: 178 - 179.

<sup>31</sup> Mazrui, A., 'Africa's Identity: The Indigenous Personality', (1986), p 63.

<sup>32</sup> Asiwaju, A., *Artificial Boundaries*, Civiletis International, New York, (1990), p 25.

<sup>33</sup> Ibid, p 26.

<sup>34</sup> Ibid, p 15.

<sup>35</sup> Lord Curzon of Kedleston, *Frontiers, the Romanes Lecture*, Oxford University Press, (1997), p 23.

<sup>36</sup> Ibid (1997), p 23.

conquest, international law offered two instruments: either war or the conclusion of treaties. The latter was frequently adopted resulting in a number of agreements with local rulers entered into with European States.<sup>37</sup>

The Berlin Conference was followed by a series of smaller and more focused conferences to enable particular European powers reach specific diplomatic agreements and set up appropriate commissions for the demarcation of the agreed boundaries.<sup>38</sup> These include the Anglo-French Agreement of 10<sup>th</sup> August 1889 which formed the basis of the western boundary with present day Peoples Republic of Benin<sup>39</sup> and the Anglo-German treaty of 1890 which delimited the Kenya-Tanzania and Tanzania-Malawi borders.<sup>40</sup> In spite of arbitrariness and artificialness, the boundaries have had to be accepted as legal alignments of the territorial framework of post-colonial nation states. They therefore assume the same kind of roles on international boundaries in such older parts of the world of nation-states as Europe and North America.<sup>41</sup>

Under international law, states acquire rights and duties towards other states and population they govern. Examples of these rights include, the right to exercise jurisdiction over its territory and permanent population, the right to engage upon as act of self-defence in certain situation, right to enjoy sovereign equality and to freely choose and develop its political, social economic and cultural systems. On the other hand, the duties include the duty not to interfere in the internal affairs of other sovereign state, respect the personality of other states, and protection

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<sup>37</sup> Cassese, A., *International Law*, 2<sup>nd</sup> Ed, Oxford University Press, (2005), p 28.

<sup>38</sup> Asiwaju, A., *Artificial Boundaries*, op cit (1990), p 27.

<sup>39</sup> Asiwaju, A., *Artificial Boundaries*, op cit, (1990), p 27.

<sup>40</sup> Khadiagala, G. M., 'Boundaries in Eastern Africa', *Journal of Eastern African Studies*, Vol. 4:2, (2010), pp 266-278: 267.

<sup>41</sup> Asiwaju, A., *Artificial Boundaries*, op cit 91990), p 30.

of human rights and fundamental freedoms of individuals they govern.<sup>42</sup> In the Montevideo Convention on the Rights and Duties of States, states enjoy the following rights: to defend ones territory, legislate upon its interest, administer its service and define its jurisdiction are rights also enjoyed by states. States are under obligation to observe peace and not to intervene in the domestic and foreign affairs of another state.<sup>43</sup>The concept of state system in international law came about as a result of the Peace of Westphalia.

### **The Peace of Westphalia**

The Westphalian system originated in Europe, formalized by treaties at the end of The Thirty Years War in 1648<sup>44</sup>. Westphalia refers to the peace settlement negotiated at the end of the Thirty Years War (1618-1648), which has also served as establishing the structural frame for world order that has endured, with modifications from to time to time, until present. It marked the starting point in the development of the modern state system. Different scholars in international relations share the same view. Boucher<sup>45</sup>, for example, contends that the settlement provided the foundation for, and gave formal recognition to, the modern states system in Europe, Brown<sup>46</sup> speaks of the "Westphalian principles" and elaborates that even to this day two principles of interstate relations codified in 1648 constitute the normative core of international law: the government of each country is unequivocally sovereign within its territorial jurisdiction, and countries shall not interfere in each other's domestic affairs, Holsti<sup>47</sup> explains that the peace legitimized the ideas of sovereignty and dynastic autonomy from hierarchical control. It created a

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<sup>42</sup> Shaw, M, *International Law*, 6<sup>th</sup> Ed., Cambridge University Press, (2008), pp 212 - 214.

<sup>43</sup> Art. 3 & 10, Montevideo Convention on the Rights and Duties of States (1933).

<sup>44</sup> Falk, R., 'Revisiting Westphalia, Discovering Post-Westphalia', *The Journal of Ethics*, Vol. 6, No. 4 (2002), pp. 311-352:312.

<sup>45</sup> Osiander, A., 'Sovereignty, International Relations, and the Westphalian Myth', *International Organization*, Vol. 55, No. 2 (Spring, 2001), pp. 251-287:261.

<sup>46</sup> *Ibid*, (2001), p 261.

<sup>47</sup> *Ibid*, (2001), p 261.

framework that would sustain the political fragmentation of Europe, Morgenthau<sup>48</sup> asserts that certain rules of international law were securely established in 1648 more specifically, the Treaty of Westphalia made territorial state the cornerstone of the modern state system and finally according to Parkinson<sup>49</sup>, the settlement spelt out in full the terms on which the new international diplomatic order was to be based.<sup>50</sup>

A number of other important principles also emerged from the Westphalian settlement such as territoriality, secularism and reciprocal recognition. The thirty years' war was a struggle between two main parties. On one side were the "universalist" actors: the emperor and the Spanish king, both members of the Habsburg dynasty. Loyal to the Church of Rome, they asserted their right, and that of the Pope, to control Christendom in its entirety. Their opponents were the "particularist" actors, specifically Denmark, the Dutch Republic, France, and Sweden, as well as the German princes. These actors rejected imperial over lordship and the authority of the Pope, upholding instead the right of all states to full independence<sup>51</sup>. The Peace of Westphalia marked the end of an age and the opening of another. The new world was marked in the political field in which man abandoned the idea of a hierarchical structure of society and opted for a new system. It was characterized by the existence of a multiplicity of states, each sovereign within its territory, equal to one another and free from external earthly authority. This new system rests on international law and the balance of power, a law operating between states and a power operating between rather than above states<sup>52</sup>.

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<sup>48</sup> Ibid, (2001), p 262.

<sup>49</sup> Ibid, (2001), p 262.

<sup>50</sup> Ibid, (2001), p 261.

<sup>51</sup> Ibid, Osiander, A., p 252.

<sup>52</sup> Gross, L., 'The Peace of Westphalia, 1648-1948', *The American Journal of International Law*, Vol. 42, No. 1 (Jan., 1948), pp. 20-41:28 - 29.

As an idea, Westphalia refers to the state-centric character of world order premised on full participatory membership being accorded exclusively to territorially based sovereign states. As process, Westphalia refers to the changing character of the state and statecraft as it has evolved during more than 350 years since the treaties were negotiated, with crucial developments as both colonialism and decolonization, the advent of weaponry of mass destruction, the establishment of international institutions, the rise of global market forces, and the emergence of global civil society. As normative score sheet, Westphalia refers to the strengths and weaknesses, as conditioned by historical circumstances, of such a sovereignty based system, shielding oppressive states from accountability and exposing weak and economically disadvantaged states to intervention and severe forms of material deprivation.<sup>53</sup>

The decades after World War II represented the climax of the Westphalian conception of world order, that is, the extension of the states system to Asia and Africa via the dynamics of decolonization among other avenues.<sup>54</sup> Therefore the contemporary state system is European in origin and it was from here that the model was diffused everywhere else, essentially through colonialism. Interstate boundaries in Africa were hence determined essentially between 1885 and 1914 by which time the present map of the continent had almost evolved.

### **Implications Principle on Africa**

The Berlin conference marked for Africa the beginning of the modern state system. It improved the European acquisition of their state system in Africa. The modern state came about as a result of the treaty of Westphalia. This notion of a state for Africa created a new sense of borders for these states. By incorporating Africa into the international modern state structure the

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<sup>53</sup> Falk, R., 'Revisiting Westphalia, Discovering Post-Westphalia', op cit (2002), pp. 311-352:312.

<sup>54</sup> Falk, R., 'Revisiting Westphalia, Discovering Post-Westphalia, op cit, (2002), p 313.

states under international law acquired rights and obligations to other states and their communities including the minorities as highlighted earlier. This European state system also brought about the aspect of territorial integrity and sovereignty into African diplomacy. Sovereignty expresses internally the supremacy of the government institutions and externally the supremacy of the state as a legal person<sup>55</sup>. The OAU and the AU had no choice but to adopt these system and principles in international law because that was the existing framework in the international system.<sup>56</sup>

Contemporary international boundaries in Africa emerged largely in the 30 years following the Berlin Conference (1884-1885) where the groundwork for the partition of African territories was laid. Territoriality is the corner stone of modern states systems as well as a characteristic of a state in international law. Territorial borders clarify which entities are states and separate states from each other. The boundaries highlight the surface of the earth upon which the state can exercise jurisdiction.<sup>57</sup> A simple line determines which state, subject to international law, can prescribe and apply laws and policies relating to the full range of attributes of persons and property, whether citizenship, taxation or educational opportunities<sup>58</sup>. Inherent in the notion of jurisdictional separation is the state's authority, and exercise of it, to control movement across borders. Immigration standards, customs duties, export and import quotas, and other constraints on the movement of people, goods and intangibles all operate with respect to, and because of,

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<sup>55</sup> Shaw, M, *International Law*, op cit (2008), p 487.

<sup>56</sup> Interview with Dr. G. Musila, International Law consultant, on 15<sup>th</sup> August, 2011 in Nairobi.

<sup>57</sup> McCorquodale, R., & Pangalangan, R., 'Pushing Back the Limitations of Territorial Boundaries', *European Journal of International Law*, Vol.12, No.5, (2001), pp 867-888:869.

<sup>58</sup> Milan Sahovic & William W. Bishop, *The Authority of the State: Its Range with Respect to Persons and Places*, in Max Sorenson ed., 'Manual of Public International Law', (1968).



international borders. The border enables the state to assert its own prerogative over transnational movements<sup>59</sup>.

The rule of *uti possidetis* has its origin in the Roman law providing legal protection for the effective possessions on estates.<sup>60</sup> This is the doctrine with modification that was adopted by the Organization of African Unity to help in the settling of border disputes arising in post independence Africa. This rule was adopted in 1964 during the OAU meeting in Cairo where member states pledged themselves to respect the existing borders on achievement of national independence.<sup>61</sup> This approach is a Latin American concept whereby administrative divisions of the former Spanish empire were to constitute the boundaries of the newly independent states in South America.<sup>62</sup> This rule thus became a guiding principle in Africa diplomacy and remains so to date.

Many countries in Africa had their internal borders drawn along ethnic groups. Therefore when they are converted into international boundaries, they encourage division of new states based on ethnicity encouraging ethnic groups to further divide existing territories. Ratner is against having a rule that allows transformation of all administrative modern boundaries into international boundaries because it can result in the temptation of ethnic separatists to divide the world further along administrative lines.<sup>63</sup> This internationalization of the boundary lines that were administrative into international frontiers is also an aspect which Dugard does not support because according to him they were not intended to serve as international frontiers at any one

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<sup>59</sup> Ratner, R.S., 'Drawing a Better Line: Uti Possidetis and the Borders of New States', op cit (1996), pp 590-624: 602.

<sup>60</sup> Ibid, Ratner, R.S., (1996), p 592.

<sup>61</sup> Griffiths, I., 'The Scramble of Africa: Inherited Political Boundaries', *The Geographical Journal*, Vol. 152, No. 2, (1986), pp 204-216: 213.

<sup>62</sup> Shaw, M., *International Law*, op cit, (2008), p 968.

<sup>63</sup> Ratner, R. S., 'Drawing a Better Line: *Uti possidetis* and the Borders of New States', op cit (1996), p 591.

point but intended for other purposes.<sup>64</sup> This position was also acknowledged by the International Court of Justice in the Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras) case where it was stated that '*uti possidetis juris* is a retrospective principle investing as international boundaries administrative units intended originally for quite other purposes'.<sup>65</sup> In practice, internal administrative borders are established by domestic law which is mostly a political process for a variety of purely domestic purposes such as effective administrative management or disbursement of funds. Many internal borders do merit transformation into international boundaries based on historical and other characteristics. These borders are deeply tied to domestic considerations and are not intended to constitute permanent borders. They may be varied for general reasons such as promoting national unity. In some cases some of them are clearly demarcated while in other they may be confusing and inconsistent.<sup>66</sup> Therefore, many of these internal borders may not merit transformation borders based on how and why they are created. Further, when they are being draw, no one envisages their becoming international borders and as such they would lack some level of keenness in their establishment. International lines possess characteristics that are different from internal borders such as marking the limits of sovereignty and territorial jurisdiction.

Application of the principle in the creation of the new states also gave raise to secessionist claims by ethnic groups who did not want to be associated with the existing colonial territory. This is because the colonial states were artificially created and therefore composed of different national, ethnic and religious groups. As a result of this different, they became embroiled in internal struggles with the ethnic majority in the name of internal self-

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<sup>64</sup> Dugard, J., *International Law: A South African Perspective*, op cit (2005), p 132.

<sup>65</sup> Frontier Dispute (El Salvador/ Honduras) case, International Court of Justice Reports, (1992), paragraph 43.

<sup>66</sup> Shaw, M., *International Law*, op cit (1997), p 489.

determination.<sup>67</sup> This was the case where some found themselves as minority in the new territory that did not guarantee their human rights and thus feel threatened. Therefore they made claims of external self-determination to either to join an existing state as was the case for the Somalis in Kenya or form a new state. However, they were not successful in their claims because in African diplomacy, the right to self-determination was considered to mean the rights of African states to be free from foreign occupation and rule. This position nonetheless did not stop ethnic groups from continuously making claims for self-determination. After decolonization, the issue of self-determination still persists in Africa attracting sentiments and implications well exemplified by the conflicts over Biafra and Katanga in the 1960s and in Eritrea, the Tigray province of Ethiopia and the Southern Sudan.<sup>68</sup>

#### **The African Union Border Programme and the principle of *Uti possidetis***

Conflicts and disputes over borders continued to be witnessed in Africa interfering with the peace and security of the continent. The African Union identified this as one of the many recurrent problems the continent was facing and as such in June 2007, a conference was held in Addis Ababa, Ethiopia to discuss the declaration on the African Union Border Programme and its implementation modalities.<sup>69</sup> In the preamble, member states were to be guided by the principle of respecting existing borders on achievement of independence as enshrined in the Charter of the OAU as adopted in July 1964. Further any demarcation and delimitation of borders was to be undertaken by 2012 where such exercise had not taken place. This position had been adopted by the Assembly of Heads of State and Government in South Africa in July,

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<sup>67</sup> Michalska, A., 'Rights of Peoples to Self-determination in International Law', in Twining, W., (ed.), *Issues of Self-determination*, Aberdeen University Press, (1991), p 75.

<sup>68</sup> Blay, S. K., 'Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights', *Journal of African Law*, Vol. 29, No.2, (1985), pp 147-159: 147.

<sup>69</sup> Declaration of the African Union Border Programme and its Implementation Modalities as Adopted by the Conference of African Ministers in charge of Border Issues Held in Addis Ababa (Ethiopia), on 7<sup>th</sup> June 2007, at <http://www.africa-union.org/root/au/publications/PSC/Border%20Issues>, accessed on 7<sup>th</sup> June, 2011.

2002.<sup>70</sup> The objectives of the AU border programme included the structural prevention of conflicts and promotion of regional and continental integration.<sup>71</sup> Implementation was to be effected at several levels: national, regional and continental. On border delimitation and demarcation, it was dependent on the sovereign decision of States; at the same time they were urged to pursue bilateral negotiation on all problems relating to delimitation and demarcation including the rights of affected populations with a view of finding appropriate solutions.<sup>72</sup> To guide in the initial implementation of the programme, the AU was to undertake a Pan-African survey of borders through a questionnaire to be sent to all member States.<sup>73</sup>

### **Conclusion**

It can be concluded from the above that that the principle of *uti possidetis* was a foreign concept that was adopted by the OUA to deal with armed conflicts over the international boundaries of the state and also to suppress any secessionist attempts that had been coming-up. It was also established that the AU adopted the same principle in its constitutive Act and is also using it as a guiding principle in the demarcation of border. In addition, the principle supports territorial integrity of colonial borders as at independence at the expense of the will of the claims of the minority. It was also established that the Berlin Conference brought about creation of modern state systems in Africa generated after the Peace of Westphalia. In international law, states have rights and duties towards other states and also the people they govern. The duties towards the individuals comprising the minority include protection and promotion of their human rights which includes self-determination. The concept of territorial integrity of the state also

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<sup>70</sup> Ibid, Declaration of the African Union Border Programme and its Implementation Modalities as Adopted by the Conference of African Ministers in charge of Border Issues, Preamble 1 (c).

<sup>71</sup> Ibid, Declaration of the African Union Border Programme and its Implementation Modalities as Adopted by the Conference of African Ministers in charge of Border Issues Art. 4.

<sup>72</sup> Ibid, Declaration of the African Union Border Programme and its Implementation Modalities as Adopted by the Conference of African Ministers in charge of Border Issues Art. 5 (a), (i).

<sup>73</sup> Concept Note of the African Union 2<sup>nd</sup> Conference of African Ministers in charge of Border issues, Preparatory Meeting of Governmental Experts, Addis Ababa, Ethiopia (United Nations Conference Centre), 22-25 March, 2010.

came about and can cease to be sacrosanct where systemic human rights violations occur undertaken by government against minority groups. However, the problem with the practice is that it encourages ethnic groups to further divide existing territories into new states from the secessionist claims due to the colonial boundaries that divided the ethnic communities and divided others into different territory and further where such new states are established when administrative boundaries there is bound to exist some minorities who will not support being in a new states where their rights are not guaranteed. This aspect thereby posses challenges for border diplomacy in Africa.

## Chapter Three

### The Principle of Self Determination in Africa

#### Introduction

Chapter two gave an analysis of the principle of *uti possidetis* by examining its origin, adoption by the African Union (AU) and the implications of adopting the principle in African diplomacy. It also highlighted the implication of colonialism in Africa after the Berlin conference which brought about creation of modern states in Africa. The Peace of Westphalia marked the starting point in the development of the modern state system. These states which originated after the treaty of Westphalia have under international law rights and duties not only to other states but also the internal population. To the internal population the responsibilities include protection and enjoyment of human rights and where not fulfilled resentment begins building and if persists then groups begin agitating for self determination. It is not a surprise that over the last few years in Africa and other parts of the world the demand for self determination has acquired more considerable force.<sup>1</sup> At the beginning of 2003 there were 22 ongoing armed conflicts for self-determination, 51 groups using conventional political means to pursue self-determination and 29 groups using militant strategies short of armed violence universally.<sup>2</sup> After decolonization, the issue of self-determination still persists in Africa attracting sentiments and implications well exemplified by the conflicts over Biafra and Katanga in the 1960s and in Eritrea, the Tigray province of Ethiopia and the Southern Sudan.<sup>3</sup>

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<sup>1</sup> Archibugi, D., 'A Critical Analysis of the Self-determination of Peoples: A Cosmopolitan Perspective', *Constellations Volume 10*, No.4, (2003), Blackwell Publishing Ltd, pp 488-505: 488.

<sup>2</sup> Quinn, D. & Gurr, T., 'Self-Determination Movements: Origins, Strategic Choices and Outcomes', in Month, G. M., & Gurr, T., *Peace and Conflict 2003: A Global Survey of Armed Conflicts, Self-determination Movements and Democracy*, Center for International Development and Conflict Management, University of Maryland, (2003), p

<sup>3</sup> Blay, S. K., 'Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights', *Journal of African Law*, Vol. 29, No.2, (1985), pp 147-159: 147.

This chapter will examine this principle of self determination dealing with the origin and growth of self-determination, definition and forms of self-determination, sources of self-determination, the old and new concept of self-determination and finally the implication of the adoption of the principle in Africa.

### **Definition of Self determination**

The right to self determination has been defined as the right of people to determine the nature and extent of their political, social and economic sovereignty.<sup>4</sup> Brownlie defines self-determination in the notion of rights as the right of cohesive national groups (peoples) to choose for themselves a form of political organization and their relation to other groups.<sup>5</sup> On the other hand, the International Court of Justice (ICJ) defined self-determination in the advisory opinion concerning the region of the Western Sahara as the 'freely expressed will of peoples or the free expression of the wishes of the people'.<sup>6</sup> This implied that it is a right held by the people rather than by the government alone. Thus governments must not decide the life and future of peoples at their discretion rather people must be enabled freely to express their wishes in matters concerning their conditions. Self-determination has also been referred to as the capacity of a person or group to make its own rule, conduct their affairs as they deem fit.<sup>7</sup>

The principle of self-determination relates to international subjects. The fundamental philosophy behind this principle has historically been that every human being is entitled to control its own destiny. The political destiny therefore of a group of individuals in a state or

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<sup>4</sup> Hill, M. A., 'What the Principle of Self-determination means Today', *ILSA Journal of International And Comparative Law*, Vol. 1, (1995), p 120.

<sup>5</sup> Araujo, R., 'Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law', *Fordham International Law Journal*, Vol. 24, Issue 5, (2000), pp 1477-1530: 1495.

<sup>6</sup> The Western Sahara Case, (1975) ICJ, Report at 12. Judgement available at ICJ website: <http://www.ici-cij.org/>.

<sup>7</sup> Preda, A., 'The Principle of Self-Determination and National Minorities', *Dialectical Anthropology*, Vol. 27, (2003), pp 205-226: 206.

community must be decided by the aggregate rights of self-determination of each person<sup>8</sup>. In addition self-determination concentrates upon the relevant people whose pattern of habitation will dictate the appropriate international boundaries.<sup>9</sup> The core of self-determination means human beings whether individually or as groups should be in control of their own destinies and the institutions of government should be devised based on that.<sup>10</sup> It is this thinking that led to the downfall of colonial structures and abolition of apartheid in South Africa and today promotes democracy. Therefore, self-determination has its roots in and is linked to the concept of democracy.<sup>11</sup> The object of the right to self-determination is formulated in terms of human needs as postulated by Washington. People and communities strive to gain control over means to satisfy their human needs. The most important are the needs for human security and welfare. Security in his view includes economic, health, environmental and food security and as security of the person from physical violence and respect of human rights and freedoms.<sup>12</sup>

Theoretically, the principle is based on liberal and democratic values. The liberal theory is concerned with the protection of the rights of individuals. The government has the obligation to provide for this right and where it fails to do so systematically and persistently the citizens then have the right to emigrate, resist or secede.<sup>13</sup> This obligation to protect the citizens is also under international law recognized as a duty for any state. Democratic theory is a view of

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<sup>8</sup> Durusma, J., *Fragmentation and the International Relations of MicroStates: Self-Determination and Statehood*, Cavendish Publishers, London, (1997), p 7.

<sup>9</sup> Shaw, M., 'Peoples, Territorialism and Boundaries', *European Journal of International Law*, (1997), pp 478-507: 479.

<sup>10</sup> Walt, M. & Seroo, O., *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, Report of the International Conference of Experts held in Barcelona from 21 to 27 November (1998), UNESCO Division of Human Rights Democracy and Peace & Centre UNESCO de Catalunya, pp 13-37: 23

<sup>11</sup> Ibid, p 23.

<sup>12</sup> Ibid, Walt et al, *he Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, ibid, (1998), p 38.

<sup>13</sup> Freeman, M., 'The Right to Self-Determination in International politics: Six Theories in Search of Policy', *Review of International Studies*, Vol. 25, No.3, (1999), pp 355-370: 359.



legitimate power which is vested in the people rather than in the elite thereby granting power to the people.<sup>14</sup> From the two theories the individual is placed at the center and has a legitimate claim over government and not vice-versa. As a legal principle, self-determination contains at least one of the following elements: the right of a people in a state to determine their status without outside interference, the right of a people subjugated to foreign occupation or domination to free itself from the occupation or domination, the right of a people including colonial people to secede from a state and set up their own state or join another state and the right of a people to govern by having a democratic system of government.<sup>15</sup>

### **Forms of self determination**

There are two forms of self-determination: internal and external self-determination. External self-determination<sup>16</sup> is the act by which a people determines its future international status and liberates itself from alien rule. This entails the right to separate from the existing state of which the group concerned is a part and to set up a new independent state.<sup>17</sup> In Africa, countries that have successfully sought external self-determination are South Africa, South Sudan recently in 2010 and Eritrea from Ethiopia. On the other hand, internal self-determination is the selection of the desired system of government.<sup>18</sup> It entails the right to decide the form of government and identity of rulers by the whole population of a state and the right of a population group within the state to participate in decision making at the state level. It can also mean the right to exercise cultural, linguistic, religious or political autonomy within the boundaries of the

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<sup>14</sup> Freeman, M., 'The Right to Self-Determination in International politics: Six Theories in Search of Policy', *Ibid*, p 362.

<sup>15</sup> Rosas, A., *Internal Self-Determination*, in *Modern Law of Self-Determination*, Tomuschat, C., , Martinus Nijhoff Publishers, (1993), p 227.

<sup>16</sup> Pomerance, M., *Self-determination in Law and Practice: the New Doctrine in The United Nations*, Martinus Nijhoff Publishers, (1982), p 37.

<sup>17</sup> Walt et al, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, op cit (1998), p 24.

<sup>18</sup> Pomerance, *Self-determination in Law and Practice: the New Doctrine in The United Nations*, op cit (1982), p 37.

existing state.<sup>19</sup> Internal self-determination also refers to self-determination from oppressive and dictatorial rule. In Africa many of the internal conflicts were centered upon this form of self-determination such as Algeria, Democratic Republic of Congo, Somalia among others<sup>20</sup>. Internal self-determination is also the basis of minorities and indigenous people's right to determine their own destiny.<sup>21</sup>

### **Sources of self determination**

Only after 1945, and in response to anti-colonial struggles, did the international community create instruments that represent sources for locating the right of self-determination. The creation of the United Nations saw the incorporation of self-determination into its charter as a fundamental principle and purpose of the organisation. The principle and fundamental rights of self determination is also established in international law. Today, the right to self-determination is considered *jus cogens* and a part of customary international law that imposes binding obligations on all nation states.<sup>22</sup>

The principle of self-determination was first mentioned in articles 1(2) and 55 of the United Nation (UN) Charter. Article 1 of the United Nations Charter declares one of the purposes of the United Nations to be to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. The common article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which were both adopted by the UN General Assembly in 1966, appears to spell out this principle in unequivocal terms. It

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<sup>19</sup> Walt et al, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, op cit (1998), p 36.

<sup>20</sup> Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, Centre for Conflict Research, (2006), p 144.

<sup>21</sup> Ebai, E. S., 'The right to self-determination and the Anglophone Cameroon situation', *The International Journal of Human Rights*, Vol. 13, No. 5, (2009), pp 631-653:638.

<sup>22</sup> *Ibid*, (2009), p 636.

provides that all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>23</sup>

The Human Rights Committee in interpreting article 1 of the International Covenant on Civil and Political Rights Covenant in its general comment on self determination adopted in 1984 emphasized that the realization of the right was an essential condition for effective guarantee and observance of individual human rights. The effect of these provisions is that it did not limit this right only to decolonization but also included the assertion of internal self-determination. States which are parties to either or both Covenants are bound, as a matter of international law, to promote the realization of, and respect for, the right to self-determination within their own borders.<sup>24</sup> However, this right is regarded as a collective right and not individual hence it cannot be sought by an individual<sup>25</sup>. The principle has also been affirmed by the International Court of Justice (ICJ) in the Namibia case, the Western Sahara case and the East Timor case.<sup>26</sup>

Article 20 of the African Charter on Human and Peoples Rights (ACHPR), 1981 stipulates that 'all people have the right to existence.....unquestionable and inalienable right to self determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have chosen'.<sup>27</sup> Though the

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<sup>23</sup> Freeman, M., 'The Right to Self Determination in International Politics', *Review of International Studies*, Vol. 25, (1999), pp 355-370: 355.

<sup>24</sup> An-Naim, A.A., 'The OAU and the Right of Peoples to Self-Determination: A Plea for a Fresh Approach', *Africa Today*, Vol. 35, No. 3/4, The OAU at 25: The Quest for Unity, Self-Determination and Human Rights (3rd Qtr. - 4th Qtr., 1988), pp. 27-35:29.

<sup>25</sup> Shaw, M., *International Law*, op cit (1997), p 217.

<sup>26</sup> Report on the International Conference of Experts on the Implementation of the Right to Self-determination as a Contribution to Conflict Prevention, UNESCO, op cit (1998), p 10.

<sup>27</sup> Article 20, The African Charter on Human and Peoples Rights, (1981).

Charter does not define peoples, within the context of the provision it could be said to refer to the collection of individuals who make up constituent communities of Africa and to whom the collective rights therein are applicable. The Charter therefore does not restrict the application of the right only to colonial relations.<sup>28</sup>

The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States extended the frontiers of self-determination with respect to the territorial aspect of states. Elaborating on the Charter principle of equal rights and self-determination of peoples, it suggested, that the borders of states may not be sacrosanct.<sup>29</sup> This is because a state that gravely violates human rights of its citizens loses the legitimacy to rule over them and cannot keep on claiming territorial integrity. This position was wisely emphasized by Dillard in a separate opinion regarding the Western Sahara case that "it is for the people to determine the destiny of the territory and not the territory the destiny of the people".<sup>30</sup> The 1970 Declaration on Principles of International Law also referred to self-determination as arising, in addition to the colonial context, in situations of 'subjection of peoples to alien subjugation, domination and exploitation'. This expanded the claim for the right to include these other instances.<sup>31</sup> The Declaration on Principles of International Law Concerning Friendly Relations limits the right to territorial integrity to those states conducting themselves in compliance with the principles of equal rights and self-determination of peoples without distinction to race, creed or colour<sup>32</sup>. Where a minority group is systematically excluded from public life, the remedy at first instance is representative government. Where a territorially concentrated group is

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<sup>28</sup> Blay, S., 'Changing African Perspectives on the Right of Self-determination in the wake of the Banjul Charter on Human and Peoples Rights', op cit, (1985), p 158.

<sup>29</sup> Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States, op cit (1996), p 611.

<sup>30</sup> McCourquodale, 'Pushing Back the Limitations of Territorial Boundaries', op cit (1994), p 869.

<sup>31</sup> Shaw, N.M., 'Peoples, Territorialism and Boundaries', *European Journal of International Law*, Vol. 3, (1997) pp 478-507: 481.

<sup>32</sup> Wheatley, S., *Democracy, Minorities and International Law*, Cambridge University Press, (2005), p 93.

systematically excluded, secession is a potential remedy of last resort, in cases of serious human rights abuses against members of the group.<sup>33</sup>

### **Historical evolution of Self-determination in African**

There are three periods through which self-determination has undergone during the history of its own development. First period starts with the Peace of Westphalia and ends up with the Congress of Vienna (1648- 1815). This phase is better known as the period of dynastic or monarchic legitimacy. They are the period of the balance of power (1815-1914) and the period between the two wars (1918-1939). In this second phase, self-determination served more or less as a guide for the conduct of international relations rather than as a revolutionary principle.<sup>34</sup> The old and new concept of self-determination is explained through this evolution. The old concept of self-determination is generally understood to refer to freedom from colonization and foreign rule which is widely adopted. This involved accession to independent statehood. However this idea was challenged on international legal and other grounds. A wider interpretation of the right was noted by the General Assembly Resolution 637A/VII which declared that the right to self-determination is a pre-requisite to the full enjoyment of all fundamental human rights. Further that it is to be exercised by the peoples of non-self governing territories and in particular regarding their political progress.<sup>35</sup> This introduced a new concept of the right which referred not only to peoples under colonial domination but also to peoples under alien domination. For example, the case of South Africa as noted in Resolution 2629/XXV.<sup>36</sup>

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<sup>33</sup> Orentlicher, D., 'Separation anxiety: International Responses to ethno-separatist Claims', *Yale Journal of International Law*, (1998), p 23.

<sup>34</sup> Hedley B., *The Anarchical Society: A Study of Order in World Politics*, (London: Macmillan, 1977), pp. 33-38.

<sup>35</sup> Michalska, A., 'Rights of Peoples to Self-determination in International Law', in W. Twining, (ed), *Issues of Self-determination*, Aberdeen University Press, (1991), pp 78-79.

<sup>36</sup> *Ibid*, p 80.

### **The Old Concept of Self-determination**

The origin of the principle of self-determination can be traced back to the American Declaration of Independence of 1776 and French revolution of 1789. These periods marked the demise of the notion that individuals and peoples as subjects of the King were objects to be transferred, alienated, ceded or protected in accordance with interests of the monarch.<sup>37</sup> The French revolution symbolized the recognition of the right of the ruled to turn against the rulers. It is at this stage that the evolution of the idea of human freedom arrived in that period.<sup>38</sup> The modern day right of the peoples to external self-determination has its origin in this period by permitting states to states to justify allocations of territories to one state as opposed to another.<sup>39</sup> Every law stemmed from the will of the people which acted through the state and its organs. The dream of a universal monarchy was abandoned and the authority of the Church matched by that of state, and the human beings became conscious of their destiny.<sup>40</sup> Since then, the idea spread to other parts of the world resulting to unifying people into nations, promoting revolutions, crumbling empires, freeing colonies and threatening modern states.<sup>41</sup>

The next period in the development of self-determination starts with the Congress of Vienna, which introduced a new philosophy and the concept of self-determination in power management. This period ended around the years 1917-1918. The Congress of Vienna (1815) suppressed the nationality principle and installed the balance of power based on dynastic legitimacy as an order of the day. This meant that territories could be traded for the sake of stability notwithstanding the wishes of the population. For the stake of preserving the balance of power, the Congress allowed the application of the previous methods of ceding and partitioning

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<sup>37</sup> Cassese, A.,', Cambridge University Press, Cambridge, (1995), p 11.

<sup>38</sup> Ronen, D., *The Quest for Self determination*, Yale University Press, London, (1979), p 6.

<sup>39</sup> Cassese, A., *Self-Determination of Peoples: A Legal Appraisal*, op cit (1995), p 13.

<sup>40</sup> Calogeropoulos-Straits, S, *Les Droit Des Peoples a Disposes d'eux Memes*, (Bruxelles:Bruylant, 1973) pp.18-19.

<sup>41</sup> Ronen, *The Quest for Self determination*, op cit (1979), p 6.

the territories of sovereign states without consulting the populations concerned. Attempts at secession were ruthlessly suppressed.<sup>42</sup>

In the nineteenth century, self-determination manifested itself in the context of minority protection regime established by the peace treaties and with regard to the mandates system created at that time.<sup>43</sup> The end of the First World War marked the beginning of the third phase in the development of self-determination. After this war, self-determination does not appear any more as a revolutionary principle but as a guide to the conduct of day-to-day international relations.<sup>44</sup> At the end of World War 1 both the Bolsheviks and President Wilson preached self-determination of people though with different meanings. The Bolsheviks referred to self-determination from the inside believing that the principal factor of division among people was dominion of autocratic governments and minorities oppressing majorities.<sup>45</sup> The Wilsonian self-determination originated from the western political thought and was based on the principle that governments must be based on the consent of the governed.<sup>46</sup>

At the Versailles conference following the First World War, US President Woodrow Wilson called for self-determination as a means of promoting peace, collective security and international order.<sup>47</sup> Wilson used this concept to suggest that the only way that international peace and stability could be maintained was if minorities within states were given the freedom to

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<sup>42</sup> Chadwick, E., *Self-Determination, Terrorism and International Humanitarian Law of Armed Conflict*, (The Hague: Martinus Nijhoff Publishers, 1996) pp.20-21.

<sup>43</sup> Shaw, M., *International Law*, op cit (1997), p 480.

<sup>44</sup> Calogeropoulos-Straits, *Les Droit Des Peoples a Disposes d'eux Memes*, op cit, (1995) p 19.

<sup>45</sup> Archibugu, 'A Critical Analysis of the Self-determination of Peoples: A Cosmopolitan Perspective' op cit (2003), p 489.

<sup>46</sup> Cassese, A., *Self-Determination of Peoples: A Legal Appraisal*, op cit (1995), p 21.

<sup>47</sup> Salmon, C, *Issues in International Relations*, 2<sup>nd</sup> Ed, Routledge, (2008), p 48.

constitute themselves into separate states reflecting their own interests.<sup>48</sup> According to his views, the people had a right to freely choose their government. President Wilson promised he would achieve self-determination of peoples from the outside partly by redrawing borders to create state communities that were as far as possible culturally, ethnically, geographically and linguistically homogenous.<sup>49</sup> The post World War II international order resembled more than anything else the order created by the Congress of Vienna. It was a system based on the state sovereignty, that is, on the concept of state self-determination.<sup>50</sup> Self-determination in the UN Charter was state-centric and this was a result of the fact that this time self-determination, as opposed to World War I, was not a war aim but rather freedom from colonization.<sup>51</sup> The forms of self-determination that evolved later were the result of political pressure stemming from socialist countries, later joined by increasing number of newly independent Third World countries. In its first years of development, self-determination was equated with anti-colonialism.

### **The New Concept of Self-determination**

Apart from this initial form, self-determination took some other forms of manifestations in later years: the 'selves' were now considered as well the territories under alien military occupation and territories where the majority of coloured population were victims of institutionalized apartheid at the hands of Europeans such as was witnessed in South Africa. All these manifestations of self-determination were mostly a product of the diplomatic and other efforts of Afro-Asian-Eastern Bloc countries. The final form of the 1975 Helsinki approach, did

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<sup>48</sup> Castellino, J., 'Territory and Identity in International Law: The Struggle for Self-Determination in the Western Sahara', *Millennium-Journal of International Studies*, Vol. 28, No. 3, (1999), pp 523-551: 525.

<sup>49</sup> Archibugu, A Critical Analysis of the Self-determination of Peoples: A Cosmopolitan Perspective (2003), p 489.

<sup>50</sup> Sammuel, B. and Cronin, B., 'The State and the Nation: Changing Norm and Rules of Sovereignty in International Relations'. *International Organization* Vol. 48 No. 1 (Winter 1994) pp. 107-130 at 122-125.

<sup>51</sup> Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal*, op cit(1995) pp. 37-43.



not consider self-determination to be relevant only in colonial situations, foreign military occupation and racist regimes.<sup>52</sup>

The 1975 Helsinki Final Act, following the spirit of the 1966 Pacts on Human Rights, provided for a definition of self-determination that broke new grounds in international relations. The innovative part of this approach related primarily to internal self-determination with a distinct anti-authoritarian and anti-democratic thrust, thus putting the relationship between human rights and self-determination into a qualitatively different perspective. Art. 1 (1) of both the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights provided the building block to the refining of self-determination. It provided that all peoples have the right to self-determination and therefore are free to determine their political, status and freely pursue their economic, social and cultural development. The two documents exemplified the shift in self-determination focus from States to peoples.<sup>53</sup> The Human Rights Committee has confirmed that the term peoples include the population of sovereign and independent States.<sup>54</sup>

Before this, the single-party system was regarded as compatible with the concept of representative democracy; in particular, pluralism and the rule of law were not always, if ever, considered as indispensable elements of the true democracy. In this period, internal self-determination meant freedom from outside interference. This was the constant practice of the UN Human Rights Committee, a body set up by the 1966 Pact on Human Rights. Above all, this was practice in East-West relations.<sup>55</sup> With the two human rights document in force, self-

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<sup>52</sup> Ibid, Cassese, A., *Self-determination of Peoples: A Legal Appraisal*, op cit (1995), p 62.

<sup>53</sup> Slomanson, W., p 73.

<sup>54</sup> Wheatley, S., *Democracy, Minorities and International Law*, Cambridge University Press, (2005), p 80.

<sup>55</sup> Ibid, pp 64 - 65.

determination meant that people and nations were to have a say in international dealings. Therefore sovereign powers could no longer freely dispose of them for example by ceding or annexing territories without paying any regard to the wishes of the population concerned through plebiscites or referendums. People were also to have a say in the conduct of domestic and foreign business. Self-determination was thus advocated as a democratic principle calling for the consent of the governed in any sovereign state.<sup>56</sup> Self-determination introduced a new standard for judging the legitimacy of power in the international setting which is respect for the wishes and aspirations of people and nations. The right to internal self-determination is directed against authoritarian regimes therefore not only against external interference but mainly against internal interference. This is a right to struggle against all forms of arbitrary oppression of peoples.<sup>57</sup> Self-determination also eroded one of the basic postulates of the international community that is territorial sovereignty.<sup>58</sup> This new concept of self-determination is set alongside the principle of the inviolability of frontiers, the territorial integrity of states and the principles of non-intervention in internal affairs.<sup>59</sup>

### **The Status of Self-determination in African Diplomacy**

The position held by the OAU considered self-determination only to the extent that it applied to African states to be free from foreign occupation and rule and could not be extended to other situations. This implied that territorial integrity was in effect elevated to an absolute principle. This position ignored important issues of human welfare, and possibly condemns oppressed minorities to physical liquidation by ruthless majorities.<sup>60</sup> In the O.A.U. and among

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<sup>56</sup> Cassese, A., *International Law*, 2<sup>nd</sup> Ed, Oxford University Press, (2005), p 60.

<sup>57</sup> Michalska, A., *Rights of Peoples to Self-determination in International Law*, op cit (1991), p83.

<sup>58</sup> Cassese, A., *International Law*, op cit (2005), p 60.

<sup>59</sup> Michalska, A., *Rights of Peoples to Self-determination in International Law*, op cit, (1991), p 88.

<sup>60</sup> Kamanu, S., 'Secession and the Right of Self-Determination: An O.A.U. Dilemma', *The Journal of Modern African Studies*, Vol. 12, No. 3 (Sep., 1974), pp. 355-376: 361.

political leaders was that secessions were inherently incompatible with the goal of African unity. The break-away attempts of Southern Sudan and Biafra were denounced in part for this reason.<sup>61</sup> One of the earliest tests to the principle of self-determination was Somali's claim that the populations in the Northern Frontier District of Kenya should be allowed to exercise their right to self-determination. In response the Kenyan delegate affirmed the OAU's position by arguing that "the principle of self-determination was inapplicable to people living in an independent state and that the redrawing of borders on ethnic grounds would affect many African states".<sup>62</sup> The O.A.U. Charter committed the Organization to defend the territorial integrity of its members even against threats of a purely internal origin. Technically, the O.A.U., at the request of the member state affected, has an obligation to intervene to suppress an internal secessionist revolt. The obligation to defend the territorial status quo theoretically precludes the participation of the O.A.U. in any settlement of an internal conflict whose terms might favour the break-up of a member state. However with the settlement of the conflict in South Africa it removed the conceptual base of the OAU and African diplomacy that self-determination only applied to freedom from alien rule and could therefore not extend to other situations. It left the organization at doctrinal cross-roads. The conflict will present itself in African diplomacy when these fundamental principles are in conflict. Which will guide the other is an issue that will have to be dealt with.

The AU's objectives include defending the sovereignty, territorial integrity and independence of its member states. Nowhere in its Constitutive Act is there general encouragement or support of secessionist ambitions. From the AU's perspective, self-

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<sup>61</sup> Ibid, p 362.

<sup>62</sup> Touval, S., 'The Organization of African Unity and African Borders', *International Organization*, Vol. 21, No. 1 (1967), pp. 102-127:115.

determination is to be exercised only once and that is at the time of decolonization from Europe. It was not designed to be subject to continuous review.<sup>63</sup> This position is similar to its predecessor the OAU. In practice, secession has been witnessed and supported as in the case of Eritrea in 1993 and Sudan 2011. Further the AU also recognizes the objective of human rights. The African Charter on Human and Peoples Rights of 1981 indicates the inseparable link between the rights of peoples to self-determination and other human rights as well as the relationship between human rights and the rights of peoples. This has been observed in the title, preamble and various specific provisions.<sup>64</sup> The AU by subscribing to all these principles of territorial integrity, respect for borders at independence and the right to self-determination is likely to face an insurmountable problem in border diplomacy where there is a conflict between these fundamental principles. In Africa already many post-cold war conflicts characterize this form of internal self-determination, for example in Algeria, Zaire, Nigeria and Liberia<sup>65</sup>. While Africa diplomacy continues to support self-determination only when it applies to foreign rule for fear of secession, in practice secession has been supported as in the case for Eritrea and South Sudan. This issue of internal self-determination will not go away particularly where we have issues of human rights and respect of the rights of minorities. It has been noted of the two institutions that when balancing the right to internal self-determination of people against the principles of sovereignty and territorial integrity, there is a tendency to give preference to the last two, a problem that needs to be addressed to avoid simmering conflicts.

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<sup>63</sup> Gorka, H, 'Somaliland - A Walk on Thin Ice', in Konrad Adenauer Stiftung, *KAS International Reports*, 2011, p 91.

<sup>64</sup> Michalska, A., *Rights of Peoples to Self-determination in International Law*, op cit (1991), p 81.

<sup>65</sup> Mwangiru, M., 'The Organization of African Union (OAU) and the Management of Internal Conflict in Africa', *International Studies*, Vol. 33, No.3, (1996), pp 1-20: 7.

## **Cases Studies of Self-determination**

### *Ethiopia/ Eritrea*<sup>66</sup>

The conflict between Ethiopia and Eritrea has its roots in their histories. The war started in 1961 and flared up in 1998. Ethiopia and Eritrea have had long-standing, strong economic, political and cultural ties. Before gaining its independence in 1991, Eritrea was a part of Ethiopia for four decades. The two nations were ones very closely linked. At the end of the nineteenth century Eritrea was colonized by Italy. In 1941 the British assumed the role of the Italians. In 1952, endorsed by a resolution, Eritrea was put into a federation with Ethiopia on an equal footing. Ten years later it was brutally annexed by Emperor Haile Selassie. This act of aggression marked the beginning of a war which was to last for three decades. Both sides dramatically redrew administrative divisions including those lying on the undefined border, thus raising fears of expansionism and encroachment. The publication by Ethiopia of a redrawn map of Tigray annoyed Eritrea who saw this as part of a colonist dream of a Greater Tigray incorporating parts of Eritrea. Eritreans contended that they were entitled to the right to self-determination and that Ethiopia had ignored and actually denied this right. In 1961, the forcible annexation of Eritrea by Ethiopia amounted to a grave denial of the right to self-determination. This led to an arm struggle for self-determination as had been envisaged in the United Nations resolution. In the struggle many people were killed while others were placed in detention<sup>67</sup>. In 1961, the Eritreans set up an Eritrean Liberation Front (ELF) followed in the 1970s by the Eritrean People's Liberation Front (EPLF). These two liberation movements then engaged in an armed struggle with Ethiopians authorities. Later after the collapse of the Mengistu government,

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<sup>66</sup> Serapio, B., 'International Law and Self-Determination: The Case of Eritrea', *A Journal of Opinion*, Vol. 15, (1987), pp 3-8: 4.

<sup>67</sup> Interview with Mr. J. Yohanes, Security Officer, Eritrean Embassy, conducted on 20<sup>th</sup> September, 2011.

Eritreans acquired full control over Eritrea and after a referendum in 1993 proclaimed their independence.<sup>68</sup>

### *Sudan*<sup>69</sup>

Sudan, Africa's largest country before the January 2011 referendum that saw it split into two is divided along lines of religion (70 per cent Muslim, 25 per cent animist, 5 per cent Christian), ethnicity (African, Arab origin), tribe, and economic activity (nomadic and sedentary). Since its independence in 1956, the country has been characterized by ongoing centre - periphery tensions. As a result, Sudan has been in a state of near constant war, the deadliest conflicts being those between North and South 1956-1972 and 1983-2005, and, more recently, the conflict in Darfur. Sudan was conquered by Ottoman-Egyptian forces in 1820. Under the British divide and rule strategy, the country was separated into North and South. In 1947 political power was granted to the northern elite, which retained it following independence in 1956. Anticipating marginalization by the North, southern army officers mutinied in 1955, and formed the Anya-Nya guerrilla movement, which began launching attacks on government troops. In the North, in 1958 General Abboud seized power in a coup d'état and began instituting a policy of Islamisation. With Abboud himself forced out of office by a 1964 popular uprising, several Arab-dominated governments followed until, in 1969, General Nimieri gained power through a coup d'état. The Addis Ababa peace agreement with the Anya-Nya in March 1972 granted autonomy to the South.

Systematic violations of the agreement by the government, combined with an increasing Islamic shift in late 1970s and discovery of oil in the South eventually led to a resumption of

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<sup>68</sup>Cassese, A., *Self-Determination of Peoples: A Legal Appraisal*, op cit (1995), p 220- 222.

<sup>69</sup> International Crisis Group (ICG), 'Sudan Conflict History', (2010), accessed at [www.crisisgroup.org](http://www.crisisgroup.org) on 2<sup>nd</sup> July, 2011, pp1-24: 1.

hostilities and the deployment of northern troops in southern oil-rich areas. Following a mutiny by southern troops against the government in early 1983, President Nimeiri abrogated the Addis Ababa agreement in June, dissolving the South's constitutional guarantees and declaring Arabic the official language. Islamic Sharia law replaced traditional Sudanese law 3 months later. Southern grievances crystallized around the Sudan People's Liberation Army/Movement (SPLA/M) led by John Garang. A popular uprising overthrew Nimeiri in 1985 and Sadiq al-Mahdi's democratic government elected the following year. The continued struggle and conflict between the southerners and northerners saw them split after a successful referendum in January 2011 when the South voted to become an independent state. On January 9, 2005, the Government of Sudan (GOS) and the Sudan People's Liberation Movement/Army (SPLM/A) signed the Comprehensive Peace Agreement (CPA)<sup>70</sup>. Some of the issues the South Sudan people were claiming included historical injustices such as marginalization by the leadership in the North, inadequate participation in governance, manipulated elections, lack of infrastructure and restricted movement by the people. This led to anger and frustrations among the southerners who did not want to continue being associated with the North<sup>71</sup>. This agreement formally ended a long and brutal civil war in Sudan, and represented the final step in over two years of intensive negotiations since the signing of the Machakos Protocol of 2002.

The CPA was meant to end the Second Sudanese Civil War, develop democratic governance countrywide and share oil revenues. It further set a timetable by which Southern Sudan would have a referendum on its independence. The peace process was encouraged by the Intergovernmental Authority on Development (IGAD), as well as IGAD-Partners, a consortium of donor countries. The CPA defined South Sudan according to its boundaries as the

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<sup>70</sup> Ibid, (2011), p 5.

<sup>71</sup> Interview conducted with Camilo Gatmai, Southern Sudanese National on 20<sup>th</sup> September, 2011.

date of Sudan's independence. In January, 2011 the referendum was held that saw formally in July of the same year South Sudan becoming independent. The 2005 CPA called for the border between the North and the semi-autonomous South to be demarcated within six months. This did not take place. In October 2009, The African Union Peace and Security Council gave mandate to the African Union High Level Implementation Panel of Sudan (AUHIP) to work with the Government of Sudan and the SPLM to complete the outstanding issues of the CPA after the January 2011 referendum. The panel noted in its report 'Preparing for Two Sudan's: A Future of Peace and Cooperation'<sup>72</sup> that since the Parties were not able to complete the demarcation of the North-South boundary, they have agreed to continue this work after 8th July. A Joint demarcation committee shall be established with the assistance of the African Union Border Programme, to conclude the exercise of demarcation.

From both cases issues of violation of human rights were among the key factors that led to claims of self-determination. These violations were against the minorities in the respective countries by the majority who among others curtailed the right to political participation of the people.

## **Conclusion**

From the above it can be noted that the old concept of self-determination continues to be recognized at the expense of the human rights of the peoples. The new dimension of internal self-determination that has been supported by legal instruments has been met with resistance especially by states. This is because it threatens territory and also seems to support secessionist claims. Africa continues to witness claims of this new concept of internal self-determination and will continue to dominate the continent. It is high time the AU re-examines its practices

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<sup>72</sup> Report by the African Union High Level Implementation Panel, 'Preparing for Two Sudan's – A Future of Peace and Cooperation', Addis Ababa, 8<sup>th</sup> July, 2011.



especially where such claims are made and because already two countries have successfully exercised that right. It needs to ascertain the root cause of such claims by people in a country. Kamanu<sup>73</sup> advises that in many cases the fears and aspirations culminating in separatist demands can be 'nipped in the bud' by the timely accommodation of dissident groups through the adoption of compromise solutions such as regional autonomy in a federal system that accord with the principle of self-determination but fall far short of outright secession. Indeed the government of South Sudan learning from past experience has adopted a federal structured system that ensures that there is equitable distribution of resources<sup>74</sup>. Dr. Ambani calls for the AU to encourage member states to adopt the devolution model which can ensure that minorities are not left out. Further the African leaders embrace dialogue with the aggrieved community and not military response when issues are raised. Lastly the Au to call upon its member states to promote democracy and good governance practices which is an avenue that can mitigate most of the internal conflicts that are being witnessed<sup>75</sup>.

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<sup>73</sup> Kamanu, S., *Secession and the Right of Self-Determination: An O.A.U. Dilemma*, op cit (1974), pp 355-376.

<sup>74</sup> Interview with Camilo Gatmai, South Sudan National in Nairobi on 20<sup>th</sup> September, 2011.

<sup>75</sup> Interview with Dr. O. Ambani, (PhD), Constitutional Lecturer, Moi University, on 15<sup>th</sup> September, 2011 in Nairobi.

## **Chapter Four**

### **The Framework of Border Making in Africa**

#### **Introduction**

The principle of self-determination which has been adopted in African diplomacy by the African Union (A.U) was discussed in chapter three. The chapter defined self-determination and went ahead to highlight the old form of self-determination which was applicable before the cold war as adopted in Eastern Europe. After the cold-war, the new form of self-determination emerged in international law which introduced two dimensions: its applicability after post colonial independence and freedom from autocratic and oppressive rule. This chapter examines the border making framework in Africa by looking at the mechanisms put in place by the Organization of African Unity and AU. The chapter will also critically examine the role and structure the A.U has put in place to handle border issues arising between member states: the African Union Border Programme (AUBP) of 2007.<sup>1</sup> The chapter will highlight five case studies (old and contemporary) of countries that have experienced conflicts over the location of their international boundary the sources of the conflict, the process and its management. Finally, the chapter will explore whether or not borders cause conflicts.

#### **African Mechanisms in Border Making**

Since African countries gained independence, the borders which were drawn during the colonial period in a context of rivalries between European countries and their scramble for territories in Africa have been identified as having been a recurrent source of conflicts on the continent. Most of the borders are poorly defined and not delineated. These conflicts witnessed include between Morocco and Algeria, Ethiopia and Somalia in the 1960s, Uganda and Tanzania in the 70s, Senegal and Mauritania in the late 1980s and Nigeria and Cameroon in the 1960s and

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<sup>1</sup> Summary Note on the African Union Border Programme and its Implementation Modalities, African Union, Addis Ababa, Ethiopia, 4<sup>th</sup> – 7<sup>th</sup> June, 2007, p 1.

1980s<sup>2</sup>. It is because of this that the Organization of African Unity (OAU) and later the African Union (AU) have endeavoured to place mechanisms in place to combat this recurrent problem. Post-independence African borders have been conditioned by the OAU Resolution of 1964 and the provisions of the Constitutive Act of the AU (2002) which adopted the Latin American model of *uti possidetis*.

The OAU at its First Ordinary Session of the Assembly of Heads of States and Governments in 1964 solemnly declared that all Member States pledge themselves to respect the borders existing on their achievement of national independence.<sup>3</sup> When the Summit Conference of Independent African States met in Addis Ababa, Ethiopia, in May 1963, several events served to remind the assembled dignitaries that borders posed pressing and urgent problems. For instance, the Somali Republic which has staked out territorial claims against Ethiopia and Kenya as had Mauritania over Morocco.<sup>4</sup> To avoid further conflicts over borders the OAU adopted the principle in 1964. The principle became the basis of the transformation of colonial boundaries to the boundaries of sovereign states following decolonization. This position effectively lay to rest suggestions for the readjustment of these boundaries. The subsequent OAU Charter stipulated that member states should pledge themselves to respect their inherited borders. In the spirit of the Charter, the Assembly of Heads of States and Governments at Cairo in 1964 made a solemn declaration which in effect ratified these boundaries<sup>5</sup>.

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<sup>2</sup> Zartman, W., 'Bordering on War', *Foreign Policy*, (2001), 66-67: 66 - 67.

<sup>3</sup> OAU, Resolution 16:1.

<sup>4</sup> Touval, S., 'The Organization of African Unity and African Border', *International Organization*, Vol. 21, No.1, (1967), pp 102-127: 104.

<sup>5</sup> *Ibid*, p 104.

The African Union was created with the aim of strengthening integration among member states and the voice of the African continent in global affairs<sup>6</sup>. The Constitutive Act of the African Union was adopted in 2000 at the Lome Summit and entered into force in 2001. Its first objective is to achieve greater unity and solidarity among African countries and among the peoples of Africa.<sup>7</sup> The AU has a much broader set of objectives, including the promotion of peace, security, and stability; democratic principles and institutions, popular participation and good governance; and human and peoples' rights. The AU has 54 Member States the latest entrant being South Sudan<sup>8</sup>.

In keeping with the spirit of its predecessor, the AU chose to adopt the solemn declaration of 1964 as its mantra on boundaries which it still adopts to date. Indeed, the AU went a step further than its predecessor by establishing a standing programme on borders known as the African Union Border Programme (AUBP) under the direct supervision of the African Union Commission. This approach of the AU underscores the crucial importance of boundaries to the issues of peace, security, progress and integration in the continent. Indeed, in the Constitutive Act establishing the AU, high up in the Union's objective is the defense of the sovereignty, territorial integrity and independence of its Member States. Further the Act prescribes that the Union shall function in accordance with the following principles: (b) Respect of borders existing on achievement of independence.<sup>9</sup>

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<sup>6</sup> Strengthening Popular Participation in the African Union: A guide to AU Structures and processes, An Open Society Institute Network Publication, (2009), pg 4.

<sup>7</sup> African Union in a Nutshell accessed at <http://au.int/en/about/nutshell> on 20th July, 2011.

<sup>8</sup> Open Society Institute Network Publication, op cit, p 4.

<sup>9</sup> Art. 3 & 4, Constitutive Act of the African Union, (2002).

### **African Union Border Programme (AUBP)**

With the transition from OAU to the AU the commitment to finally solve African border issues increased. In 2007, the AU encouraged the AU Commission to pursue the structural prevention of conflicts. In this context, the African Union Border Programme (AUBP) was created and is coordinated by the Commission of the African Union. The argument being that realizing this objective will reduce boundary-related conflicts in the continent as un-demarcation breeds ambiguity which could then engender conflict between neighbours over territorial extent. In June 2007, the African Ministers in charge of border issues adopted the Declaration on the African Union Border Programme (AUBP) and its Implementation Modalities. This declaration was endorsed by the Executive Council of the African Union, at its 11th Ordinary Session held in Accra, Ghana, from 25 to 29 June 2007.<sup>10</sup> However, the interest of the AU in border issues can be traced to July 2002 when it adopted a Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa (CSSDCA) that recognized border delimitation and demarcation as factors for peace, security and economic and social progress, and provided for their delimitation and demarcation by 2012.<sup>11</sup> The AUBP is being implemented at national, regional and continental levels on the basis of the principle of respect of the sovereignty of Member States.

In the Kenya the borders that have been identified as requiring demarcation include the Kenya-Sudan border (Ilemi Triangle), Ethiopia-Kenya where the pillars that were there are

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<sup>10</sup> Declaration on the African Union Border Programme and its Implementation Modalities as Adopted by the Conference of African Ministers in Charge of Border Issues Held in Addis Ababa (Ethiopia) on 7<sup>th</sup> June 2007.

<sup>11</sup> Declaration and Decisions adopted by the Thirty Sixth Ordinary Session of the Assembly of the Heads of State & Government, Assembly of Heads of State and Government, 36<sup>th</sup> Ordinary Session/ 4<sup>th</sup> Ordinary Session of the African Economic Community 10-12 July, Lome Togo, (AHG/ Decl.1-6 (XXXVI) AHG/ Dec. 143-159 (XXXVI) AHG/OAU/AEC/Dec. 1(IV)).

destroyed, Kenya-Uganda at Lake Victoria and the Kenya-Somalia.<sup>12</sup> The Sudan-Kenya has been identified in the report prepared for IGAD as extremely difficult to demarcate physically because the 1909 pillars are not intact and have no descriptive report. At the same time the 1097 description of the boundary uses imprecise language that would be extremely difficult to trace on the ground.<sup>13</sup>

The mission of the AUBP is to prevent and resolve border-related disputes and to promote regional and continental integration, which constitute a tool in the structural prevention of conflicts in Africa. It aims to do this by facilitating and supporting the delimitation and demarcation of African boundaries where such exercise has not yet taken place; reinforcing the integration process, within the framework of the Regional Economic Communities (RECs) and other large-scale cooperation initiatives; building the capacities of member states in border management, as well as in border studies and research; and advising the Commission and other organs of the African Union on border-related matters.<sup>14</sup> The AUBP was justified based on three elements the important one being the persistent nature of African borders which have continued to be a constant source of conflict thereby hindering peace and security in the continent.<sup>15</sup> Therefore border delineation and demarcation has been considered a condition for successful integration by the AU.

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<sup>12</sup> Interview at the Ministry of Foreign Affairs with the officer liaising with the AU on the AUBP on 23<sup>rd</sup> September, 2011.

<sup>13</sup> International Boundary Demarcation in the IGAD Region: A Review of Existing Practice and Thoughts on Future Developments, Report prepared for the Intergovernmental Authority on Development, (April 2008), by the International Boundaries Research Unit, Durham University, UK p 37.

<sup>14</sup> Summary Note on the Implementation of the African Union Border Programme and its Implementation Modalities, Conference of African Ministries in Charge of Border Issues, Preparatory Meetings of Experts on the African Union Border Programme, Addis Ababa, 4<sup>th</sup> – 7<sup>th</sup> June, 2007.

<sup>15</sup> Ibid, p 4.

The demarcation and delineation process is to be guided by among others the principle of the respect of borders existing on achievement of national independence, as enshrined in the Charter of the Organization of African Unity (OAU), Resolution AHG/Res.16 (I) on border disputes between African States, adopted by the 1<sup>st</sup> Ordinary Session of the Assembly of Heads of State and Government of the OAU, held in Cairo, Egypt, in July 1964, and article 4 (b) of the Constitutive Act of the African Union.<sup>16</sup> Moreover, one of the specific objectives of the programme is delineating and demarcating African borders where the exercise has not yet been conducted, so that they may cease to be potential sources of problems, and therefore allow African States to develop cross-border cooperation.<sup>17</sup> In terms of the modalities of implementation as regards delineation and demarcation, the onus has been left to the states concerned sharing a common border to undertake the same. This should be done in conformity of the Cairo resolution on inviolability of colonial borders.<sup>18</sup> The RECs are required to conduct a general inventory of the status of borders and to follow-up on the evolution of the situation of Community borders. Further, they are required to support States in the mobilisation of the resources needed and even create specific regional funds, as well as encourage exchange of experiences and promote the least costly methods of delineation and demarcation of borders.<sup>19</sup>

Although the AUBP is a noble initiative, it may face possible obstacles during implementation due to several reasons. The first of the obstacles is the requirement that the delineation and demarcation of borders be guided by the Cairo resolution. By this fact, the programme presupposes that at independence all borders were marked clearly on the ground and yet that was not the case in some areas hence the constant conflicts in some borders. This

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<sup>16</sup> Declaration on AUBP, preamble I (c), (i).

<sup>17</sup> Summary note on the Implementation of the AUBP and its Implementation Modalities, p 7.

<sup>18</sup> Summary note on the Implementation of the AUBP and its Implementation Modalities, p 9.

<sup>19</sup> Declaration on AUBP, art. 5.

requirement may not allow necessary opportunity for discussions that can lead to resolution of the conflict tending to be biased to status quo.

Separately, the onus has been left to the states to ensure that they demarcate their borders there seems to be no obligation on their part to do so. While this is good States have been reluctant to undertake the process and prefer to either maintain status quo or enter into conflicts with their neighbours. There seems to be no sanctions in place against states that choose to ignore this requirement especially since it has been a recurrent problem in Africa. On the other hand the involvement of RECs in this process is an added advantage. Member states may use this opportunity to appeal to their neighbours in the spirit of peace and stability in their region to undertake the process. This however does not guarantee that every country in the community will adhere to requests by their counterparts.

#### **The Case of Morocco and Algeria Border Conflict**

The Algerian-Moroccan border conflict provided the Organization of African Unity (OAU) with the first test of its machinery and procedures for peacekeeping and for the peaceful settlement of disputes.<sup>20</sup> The actual conflict erupted in July, 1962 when Moroccan troops tried to occupy various areas in the disputed frontier zones after the referendum that ushered in Algeria's independence. Morocco claimed that this area formed an integral part of its kingdom.<sup>21</sup> The governments of Algeria and Morocco inherited a difficult boundary problem from the era of French colonial administration. Prior to the French conquest of Algiers in 1830, there were no fixed boundaries in North Africa. While Morocco was a sovereign state at that time, Western concepts regarding boundaries had no meaning in the religiously oriented society of Morocco.

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<sup>20</sup> Wild, B. P., 'The Organization of African Unity and the Algerian-Moroccan Border Conflict: A Study of New Machinery for Peacekeeping and for the Peaceful Settlement of Disputes among African', *International Organization*, Vol. 20, No. 1 (Winter, 1966), pp. 18-36:18.

<sup>21</sup> Munya, M., 'The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation', *Boston College Third World Law Journal*, Vol. 19, No.2, (1999), p 556.



The Islamic Arab concept of territory is unrelated to considerations of geography and political organization.<sup>22</sup> Against this background French authorities concluded a number of boundary agreements with the sovereign Moroccan government between 1830 and 1912 defining the boundary between Morocco and Algeria. The Treaty of Lalla-Marnia of 1845 described in detail approximately 100 miles of frontier from the Mediterranean coast to the peak of Teniet-el-Sassi in the Atlas Mountains. South and southwest of Teniet-el-Sassi, within a region of the Sahara, the border was defined according to the tribes which inhabited the area. This method of delimitation really created frontier zones rather than a definite boundary. Subsequent treaties did not materially alter this situation.<sup>23</sup>

To serve their own interests, the French avoided demarcating the boundary between Morocco and Algeria and instead signed several treaties with Morocco without attempting to fix a boundary between Morocco and Algeria. This boundary issue and the Islamic concept of umma, denoting a nation as a community of believers, as distinguished from the Western concept of a nation with an ascertainable territorial entity, encouraged Morocco to harbor irredentist ambitions.<sup>24</sup> The Franco-Moroccan Treaty of 1912, establishing a French protectorate over Morocco, did not clarify the boundary situation. In the French view, most of the region south and southwest of Teniet-el-Sassi was uninhabitable, and its delimitation was unnecessary. When Morocco became independent in 1956, its border with Algeria remained only partially defined as it had been since 1845. This legitimate boundary problem was further complicated by the

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<sup>22</sup>Wild, B., 'The Organization of African Unity and the Algerian-Moroccan Border Conflict: A Study of New Machinery for Peacekeeping and for the Peaceful Settlement of Disputes among African' op cit (1966), p 19.

<sup>23</sup>Wild, 'The Organization of African Unity and the Algerian-Moroccan Border Conflict: A Study of New Machinery for Peacekeeping and for the Peaceful Settlement of Disputes among African' op cit (1966), p 19.

<sup>24</sup> Munya, M., 'The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation' op cit (1999), p 556.

discovery of important oil and mineral resources in the Sahara.<sup>25</sup> Between 1956 and 1962 the Moroccan government refrained from negotiating with France regarding the undefined border area, asserting that the delimitation of the frontier should await Algerian independence. However, in July 1961 the Moroccan government concluded a secret agreement with the provisional government of the Algerian Republic which recognized the territorial problem created by the delimitation imposed arbitrarily by France and which stated that this problem will be resolved through negotiations between the Kingdom of Morocco and the Government of Independent Algeria. In view of the unresolved border problem, skirmishes took place between Algerian and Moroccan troops immediately following Algeria's accession to independence in July 1962.

During that war of liberation, Morocco decided to submit the border dispute to the United Nations Security Council, while Algeria, favoring an African solution, took the dispute to the OAU. Morocco's allies within the Security Council persuaded it to seek an African solution first. Hence, Emperor Haile Selassie of Ethiopia and President Modibo Keita of Mali organized a meeting in Bamako to negotiate a cease-fire. Although the negotiated ceasefire was short-lived, the meeting produced the famous Bamako Communiqué which consisted of a five-point plan with the following goals: the immediate end of hostilities, the creation of a committee composed of Algerian, Moroccan, Ethiopian and Malian military officers which would define a demilitarized zone; the supervision of security and military neutrality in the demilitarized zone by Ethiopian and Malian observers; the request for an extraordinary meeting of the OAU Council

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<sup>25</sup>Wild, B. P., 'The Organization of African Unity and the Algerian-Moroccan Border Conflict: A Study of New Machinery for Peacekeeping and for the Peaceful Settlement of Disputes among African' op cit (1966), p 21.

of Ministers, for the purpose of creating a committee of arbitration to effect a definitive solution of the Algerian-Moroccan dispute and the cessation of hostile propaganda attacks.<sup>26</sup>

An extraordinary session of the OAU Council of Ministers was held at Addis Ababa in November 1963. The meeting had been officially summoned by the Organization on November 2<sup>nd</sup> after two-thirds of the member states had accepted the Bamako proposal. The legal basis of the meeting was Article XII, paragraph 2, of the OAU Charter. The Council then invited the Foreign Ministers of Algeria and Morocco to present their cases. While the Moroccan government based its case primarily on the non-existence of a boundary in the disputed area, the Algerians ignored that point of fact and presented their case in terms of the general problem of the maintenance of colonial borders. On the other hand, the boundary near Tindouf, object of Moroccan claims, was clearly defined. Only the combat area near Hassi-Beida and Tinjoub lay along an undefined frontier.

At the extraordinary meeting an ad hoc commission was established to study the border issue and make recommendations for settlement. During the following years, this commission held a dozen meetings with the disputants. As their claims were exclusive the commission made no effort to suggest substantive settlement but instead served as a vehicle for communications between the two. Within the setting of commission meetings, agreements were made for the withdrawal of troops, release of prisoners, and the restoration of diplomatic relations. In 1968 King Hassan of Morocco personally led his delegation to the OAU summit meeting held in Algeria. There he held private meetings with Algerian President Boumedienne. In direct negotiations that followed, the territorial issue was settled with agreement to maintain the

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<sup>26</sup> Munya, M., 'The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation', op cit (1999), p 558.

colonial boundaries while a jointly owned company would exploit the mineral resources of the area that had been in dispute<sup>27</sup>.

### **The Case of Nigeria and Cameroon over the Bakassi Peninsula<sup>28</sup>**

Cameroon and Nigeria are located on the Atlantic coast of Africa, on the cusp of Central and West Africa. They share a common border which is 1,700 kilometers long. To understand the difficulties relating to this border, it should be recalled that at the end of the nineteenth century and at the beginning of the twentieth century, Germany, France, and Great Britain signed several agreements to demarcate the borders of their respective colonial territories. The border between the territories of Germany and Great Britain was initially fixed by the 1893 and 1906 Agreements and the western part redefined by the London and Obokum Agreements of 1913, which clearly fixed Bakassi in German territory, and thus in Cameroon. After the First World War, the Treaty of Versailles divided all German territories in the region between France and Great Britain which were subsequently placed under British and French mandate by the League of Nations. It was therefore necessary to demarcate these territories.

After the Second World War, British and French mandates over Cameroon were replaced by trusteeship agreements under the United Nations (UN). On January 1, 1960, Cameroon's territory under France gained independence, followed by Nigeria on October 1, 1960. But Cameroon's future under the British remained at issue. During the plebiscites organized in the West and North Cameroons on February 11<sup>th</sup> and 12<sup>th</sup>, 1961, to determine the status of the populations of these territories, the population of West Cameroon decided to unite with the Republic of Cameroon. That of Northern Cameroon decided to join Nigeria. Cameroon then

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<sup>27</sup> Meyers, D., 'Intraregional Conflict Management by the Organization of African Unity', *International Organization*, Vol. 28, No. 3 (1974), pp. 345-373: 354.

<sup>28</sup> Kamto, M., 'The Bakassi Affair: Cameroon's Challenge for Peace', in 'The Pacific Settlement of Border Disputes: Lessons from the Bakassi Affair and Greentree Agreement', International Peace Institute, 2008, p 13.

became a bilingual country with an Anglophone and Francophone heritage and a long border with Nigeria, demarcated and left by the colonial powers. After independence, Cameroon and Nigeria accepted the colonial borders. But, Nigerian authorities decided in 1980 to question these borders. This protest degenerated into a military conflict and in 1981; there was a skirmish between a first attack in Cameroon's territorial waters.<sup>29</sup>

On December 21, 1993, Nigeria's armed forces crossed into Cameroon's border and took over Bakassi. This last invasion caused Cameroon to seek redress through the International Court of Justice (ICJ) at the Hague by a petition of March 29, 1994, supplemented by the additional petition of June 6, 1994, which extended the litigation to the entire border between the two countries because of Nigeria's formal claim over some localities on the land border as well as the villages occupied in the Lake Chad area. At the end of a process which lasted eight years, the ICJ rendered its final verdict on October 10, 2002: 1. It confirmed the demarcation by the Lake Chad Basin Commission (LCBC) and demanded Nigeria withdraws its administration, armed forces, and police immediately and unconditionally from Cameroon's territory, 2. It fixed the border between the two countries from Lake Chad to the Bakassi Peninsula, 3. It confirmed Cameroon's sovereignty over said peninsula, 4. And it proceeded with the demarcation of the maritime border between the two countries.

### **Kenya and Sudan**

The border issue between Kenya and Sudan lies at the Ilemi triangle. This is a tri-junction point joining Kenya, Sudan and Ethiopia.<sup>30</sup> Ilemi was a triangular piece of arid hilly terrain named after the Anuak Chief Ilemi Akwon and bordering on Ethiopia and Kenya. Its elastic size

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<sup>29</sup> Ibid, pp 15-16.

<sup>30</sup> Mburu. N., 'Delimitation of The Elastic Ilemi Triangle: Pastoral Conflicts and Official Indifference in the Horn of Africa' a. *African Studies Quarterly*, (2003), Vol. 12, [www.africa.ufl.edu](http://www.africa.ufl.edu), pp 15-37: 15.

varied between 4,000 and 5,400 square miles depending on the year and the surveyor<sup>31</sup>. Long before the drawing of the Anglo-Ethiopian Agreement of 6<sup>th</sup> December 1907, the Inyangatom, Didinga, Turkana, Toposa and Dassanech had traded and grazed in the Ilemi through intercommunity arrangements.<sup>32</sup> During the partition of Africa there was no urgency to delimit the Kenya-Sudan-Uganda boundaries since they were all part of British Empire. Ethiopia was independent and headed by Emperor Menelik II and had expansionist ambitions which included Lake Turkana which he called the Samburu Sea.<sup>33</sup> Britain disagreed with Menelik's proposal and insisted to run the Kenya-Ethiopian border along the Meridian as it had agreed with other European powers without consulting Ethiopia. However, both parties were refrained by logistical problems from establishing administration on the ground to back their territorial claims<sup>34</sup>. Britain went ahead and delineated its territory in order to curb other European countries and especially Ethiopia from territorial ambitions. This was undertaken in 1902-3 and marked the 'Maud line' which was recognized in a vague treaty in 1907 as the de facto Kenya-Ethiopia border.<sup>35</sup> It became the Kenyan Ethiopia border latter known as the 1914 Line.

In 1913, the British authorities in Uganda and Sudan finally decided to rectify the existing border drawn arbitrarily on a map in 1902 that had not reflected the patterns of transhumance and cultivation by Africans on the frontier. The expedition arbitrary delineated the traditional territory of the Turkana leaving it to be administered by Uganda while reserving for the Sudan access to Lake Rudolf. Known as the 1914 Line it remains the recognized

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<sup>31</sup> Collins, R., 'The Ilemi Triangle', *Annales d'Ethiopie*, (2005), Vol. 20, pp 5-12: 5.

<sup>32</sup> Mburu, N., 'Delimitation of The Elastic Ilemi Triangle: Pastoral Conflicts and Official Indifference in the Horn of Africa', op cit (2003), p 18.

<sup>33</sup> Marcus. H., *A History of Ethiopia*, University Press of California, (1994), p106.

<sup>34</sup> KNA:PC/NFD4/2/8, 'The work of the Kenya-Ethiopia Boundary Commission 1950-1957', in Northern Frontier District Report, p 1.

<sup>35</sup> KNA: DC/ISO/2/5/3, 'The Kenya-Ethiopia Boundary', Northern Frontier District Handbook, (1917), Frontier Records, pp 93-94.

international border to this day.<sup>36</sup> It was assumed that the 1914 Line would be amended to accommodate the reality of local circumstances when the true limit of Turkana grazing was known. In April 1924 representatives of the Sudan, Uganda and Kenya convened at Kitgun Uganda to discuss their outstanding border problem that perhaps would require rectification of the frontier. Kenya and Uganda sought to persuade Sudan to redraw the boundary to include the northern limits of the Turkana grazing grounds across the 1914 Line ceding the territory either to either country to enable them provide protection for the Turkana. However, Sudan had no authority to surrender unilaterally Sudanese territory without consent of its co-domini Egypt. On February 1926, the Rudolf province of Uganda was transferred to the Kenya colony together with the unresolved Turkana and boundary problems of Ilemi that had plagued Ugandan officials. In 1928, Kenya was given permission by the Sudan to send liminary units from their new post at Lokitaung across the 1914 Line to protect the Turkana and punish Dassanech and Nyangatom raiders.<sup>37</sup>

In 1931 the District Commissioners from Kenya's Turkana district and Mongalla Province in the Sudan came to an informal agreement defining traditional grazing grounds of the Turkana in the Ilemi Triangle. This line was drawn in red on the existing maps. The line therefore represented the authority of the Kenya government. The Red Line however did not represent change in the existing international boundary established in 1914. Few months later in 1932, another line green in colour was drawn further north allowing Turkana access to pastures and waterholes where Dassanech and Nyangatom had established their right. These lines had no standing in international law and were simply delineated on various maps to illustrate the limits to which Kenya could extend its provisional administration. Even with the independence of

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<sup>36</sup> Collins, R., 'The Ilemi Triangle', op cit (2005), p 7.

<sup>37</sup> Collins, R., 'The Ilemi Triangle', op cit (2005), p 8.

Sudan, the government had not administered much of the Ilemi triangle. In 1964, officials from Kenya and Ethiopia met to discuss a readjustment of their boundary that resulted in an exchange of frontier posts particularly Namuruputh to Kenya. Three years later President Kenyatta formally sought to enlist British support for his proposal to the Sudan government to substitute their present boundary the 1914 Line with the Red Line in Ilemi but nothing came out of it. Official maps of both governments of Kenya and Sudan had always delineated the Ilemi triangle by a dotted line clearly marked provisional/ administrative boundary. After 1978, the 1914 Line disappeared on Kenya maps and dots of the Red Line became solid line conferring Kenya ownership.<sup>38</sup> The problem of Ilemi has remained so and no cession of territory has ever taken place.<sup>39</sup> Sudan has argued that delineation by the Maud Line of 1902-3 should be the basis of determining its boundary in Kenya. Surveyors of the Ilemi Triangle ignored local opinion and often used impermanent objects and vague vocabulary to describe the border which has become a source of technical difficulties to both administrators and local herders.<sup>40</sup> To date this issue is yet to be resolved especially now that South Sudan gained independence it will need a way forward.

The findings from the above cases indicate that the OAU was not an effective agent for conflict management its limitations were clearest in internal disputes because it was guided by the principle of non-interference of internal affairs of a state as seen in the Sudan and Ethiopian-Eritrea case. The AU is also guided by the same principle of non-interference even though its objectives entail promotion of peace, stability and security. This is very vital because post-independence Africa continues to witness many internal conflicts that undermine the very

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<sup>38</sup> Discussion with a government officer working with the NSIS on the Ilemi Triangle (Identity of the officer withheld) on 20<sup>th</sup> September, 2011.

<sup>39</sup> Collins, R., 'The Ilemi Triangle', op cit (2005), pp 10-11.

<sup>40</sup> Mburu., N., 'Delimitation of The Elastic Ilemi Triangle: Pastoral Conflicts and Official Indifference in the Horn of Africa', op cit (2003), p 25.



objectives it purports to embrace. The AU has a department for conflict resolution for borders which has done very little if anything at all going by the case of Eritrea-Ethiopia, Sudan and Kenya-Sudan. Going by the large number of intra-state conflicts it will be necessary to work with other organizations especially at the regional level and support them financially, technically and logistically. For instance the IGADD involvement in Sudan in which the regional organization played a very key role in resolution. The AU where necessary should also strengthen its mediation mechanism which can go a long way in assisting to resolve some of these conflicts between states and constituents of each respective conflict. There will be need for the AU to revisit this principle in light of the changing circumstances.

### **Borders and Conflict**

The location of states, their proximity to one another and whether or not they share borders emerge time and again as key variables in studies of international conflict.<sup>41</sup> This is because borders play a role in international relations (I.R) since they are part of the structural characteristics that affect interaction opportunities of nations. Borders present the highest level of proximity that is the touching of territory.<sup>42</sup> Further, territory serves two distinct purposes in I.R: it indicates the physical/ geographic distance between units and as a place where people live it is a component of group identity as it also provides real resource value to people. It thus takes on value across many dimensions and therefore becomes a source of conflict and raises the stake of any conflict.<sup>43</sup>

The relationship between borders and conflict is guided by the opportunity and willingness framework. Most and Starr argue that opportunity for interaction is a necessary

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<sup>41</sup> Starr, H. & Thomas, D., 'The Nature of Borders and International Conflict: Revisiting Hypotheses on Territory', *International Studies Quarterly*, (2005), pp 123-139: 123.

<sup>42</sup> Ibid, (2005), p 125.

<sup>43</sup> Ibid, (2005), p 125.

condition for the positive spatial diffusion of violent conflict between countries and borders provide such opportunity.<sup>44</sup> They conceptualize borders as an interaction opportunity based on the notion of closeness or proximity which contributes to an awareness of other nations and to the perception that they are somehow important.<sup>45</sup> They however emphasize that it is not borders per se that cause war but they contribute to the potential outbreak of violence because the more borders a nation has the greater the number of risks and opportunities, the likelihood that the nations' territory will be viable and the level of that nation's uncertainty.<sup>46</sup> In addition, borders also have an impact on the willingness of decision makers to choose certain policy thereby acting as indicators of areas of great importance or salience. Consequently activities in these areas are particularly worrisome and can create uncertainty and thus deserve attention.<sup>47</sup>

Starr and Thomas<sup>48</sup> in *'The Nature of Borders and International Conflict: Revisiting Hypotheses on Territory'* argue that territory per se is neither a necessary nor sufficient reason for conflict nor does it automatically create a greater opportunity for conflict. Also, that contiguous land border may not adequately reflect the possibility of a conflict. This is after testing Vasquez hypothesis that natural frontiers and borders seen as having little importance are less likely to generate conflict unlike those seen as having high importance and Deutsch's hypothesis that ease of interaction may generate both opportunities for conflict but also integration therefore less willing to fight. They concluded that conflict is most likely where the expected utility of the conflict is greatest that is in the middle where states have both the

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<sup>44</sup> Silverson, M. & Starr, H., 'Opportunity, Willingness, and the Diffusion of War', *The American Political Science Review*, Vol. 8, No.1, (1990), pp 47-67: 49.

<sup>45</sup> Starr, H. & Most, B., 'The Substance and Study of Borders in International Relations Research', *International Studies Quarterly*, Vol. 20 (1976), pp 581-620: 588.

<sup>46</sup> Silverson, M. & Starr, H., 'Opportunity, Willingness, and the Diffusion of War', op cit (1990), p 50.

<sup>47</sup> Starr, H., & Thomas, D., 'Opportunity, Willingness, and the Diffusion of War' op cit (2005), p 125.

<sup>48</sup> Starr, et al, 'The Substance and Study of Borders in International Relations Research' op cit (1976), p 125.

opportunity and willingness to engage in conflict.<sup>49</sup> In their paper they operationalize opportunity and willingness to mean ease of interaction and salience/ importance respectively. The ease of interaction can vary along any single border that a state has with a contiguous neighbour. Any particular portion of the border can thus be characterized as to its degree of permeability. While some parts of some borders would make interaction highly likely others would make it much less likely. On the other hand willingness is concerned with the importance or value of territory along or behind the border. The salience or importance of a border area is determined by places of population concentration, state capitals, airfields and selected cultural features located within a 50km buffer of the region's borders.<sup>50</sup> This assists in making sense as to why some borders are seen as more important than others and why changes or events across some borders are likely to create more uncertainty than others. The two when put together introduce the existence of a vital border.

In their findings, vitalness of a border affects the likelihood that the border will become an enduring rivalry border. Enduring rivalries are less likely than expected to take place across borders with measures of ease of interaction. Further, the occurrence of enduring rivalries between parties with contiguous land borders does appear to be directly related to the nature of the shared border. Governments appear less likely to act/ react in a conflictual manner over low salience border areas. These include borders that exhibit relatively low population concentrations and compared with the length of the border, a dearth of infrastructure. The length of a border cannot explain why a government does not act/ react over low salience border areas. High border salience makes dispute escalation to military conflict unlikely. Governments rely on other means of resolving disputes with countries they share vital border areas. Governments are less likely to

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<sup>49</sup> Starr et al, 'Opportunity, Willingness, and the Diffusion of War' op cit (2005), p 136.

<sup>50</sup> Starr et al, 'Opportunity, Willingness, and the Diffusion of War' op cit (2005), p 129.

turn to military action where there is a physical constraint on mobility. States appear much less likely to escalate a dispute to military action with neighbouring states sharing porous borders.<sup>51</sup>

Therefore government dispute behaviour is affected by the degree of border vitalness. Countries sharing less vital border likely receive less government attention and fewer events including conflict are unlikely to occur. Where they share border areas of high vitalness, integration and interdependence comes in but where the vitalness falls in the middle range, that is where the highest level of conflict are experienced.<sup>52</sup>

### **Conclusion of the Study**

This section highlights in summary whether the objectives as stated in chapter 1 have been met, whether the research problem has been addressed and whether the theoretical framework has been useful. The study was guided by the following objectives: assessing the validity of the principle of *uti possidetis* as the guiding principle in border demarcation in Africa, assessing the implication of self-determination on border diplomacy in Africa, and examination of the border framework of border making in Africa.

With regard to the first objective the research established that the principle of *uti possidetis* was a foreign concept that was adopted by the OUA to deal with armed conflicts over the international boundaries of the state and also to suppress any secessionist attempts that had been coming-up. In addition, the principle supports territorial integrity of colonial borders as at independence at the expense of the will of the claims of the minority. The problem with this practice is that it encourages ethnic groups to further divide existing territories into new states from the secessionist claims due to the colonial boundaries that divided the ethnic communities

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<sup>51</sup> Starr et al, 'Opportunity, Willingness, and the Diffusion of War' op cit (2005), pp 132-135.

<sup>52</sup> Starr et al., 'Opportunity, Willingness, and the Diffusion of War' op cit (2005), p 136.

and divided others into different territory and further where such new states are established there will still exist minorities who will not support this where their rights are not guaranteed. This aspect thereby poses challenges for border diplomacy in Africa. It was also established that the Berlin Conference brought about creation of modern state systems in Africa generated after the Peace of Westphalia. In international law, states have rights and duties towards other states and also the people they govern. The duties towards the individuals comprising the minority include protection and promotion of their human rights which includes self-determination. The concept of territorial integrity of the state also came about and can cease to be sacrosanct where systemic human rights violations occur undertaken by government against minority groups.

The second objective sought to assess the implication of self-determination on border diplomacy in Africa. It was established that the principle of self-determination manifested in Africa as a means of decolonization. The right to self-determination was considered as a means of freeing African states from foreign occupation and rule. It was also established that the OAU and the AU have made the case that the right meant only freedom from alien rule and could not be extended to other situations. Indeed when Eritrea advanced claims of self-determination the OUA refused to get involved. Therefore the support for self-determination applies to self-determination to foreign rule as opposed to internal or post colonial self-determination. In practice however, this is different seeing that secession has been supported for the case of Eritrea and Sudan. Further, Africa may not support internal or post colonial self-determination and yet it is recognized in the African Charter on Human and Peoples' Rights to which all states are signatories. It is clear that where the principle of *uti possidetis* has locked minorities into territory that does not protect their rights, secessionist claims based on internal self-determination will not go away and the validity of current *uti possidetis* generated borders will remain pertinent in the

issue of demarcation of African borders. It was also established that the AU like the OAU is at doctrinal cross-roads because the AU still recognizes the old concept of self-determination for fear of secession and yet in practice there have been secession attempts that have been successful and supported.

Objective three examined the border making framework in Africa and established that the basis of the current borders in Africa was as a result of the adoption and application of the principle of *uti possidetis* in border diplomacy as a way of legitimizing existing borders. This is the same for the case of the AU which has called upon states to demarcate their borders using the principle as a guiding framework. Sub-regional organizations will also come in to play a role in the demarcation process. It has been established in chapter two that application of the principle of *uti possidetis* has raised some issues in the past especially of human rights and only time will tell if the programme will be successful through the adoption of the principle as the guide. It has also been established that the principle will not be helpful in the demarcation process because for most of the borders conflicts occur because the pillars either cannot be physically traced on the ground or the treaties used language that was vague. Lack of precision creates uncertainty which in turn creates room for conflict. In highlighting the case studies of African states that have witnessed border conflicts, the chapter established that the two organizations have not been effective in handling them because of the fact that they did not interrogate the root causes of these conflicts and hence administered the wrong medication. This therefore necessitates that the AU revisit the principle since it seems more of obsolete.

From the findings presented in chapter two, three and four it addresses the research problem which was seeking for a re-visit of the use of the principle of *uti possidetis* in African

diplomacy in light of the human rights problems it raises. It was shown that the rationale of the principle then was used to deal with an issue that was internal and not within states as the case was to be. It further shows how currently the principle is in conflict with the right to internal self-determination which is also a principle that is held dear in African diplomacy. It also shows that the principle of *uti possidetis* as was then applied was the wrong remedy to deal with secessionist claims and the OAU did not come out to address the root-causes of those claims. Chapter three highlights this position very well and goes ahead to highlight two case studies that can be used to explain the issue further. The issues identified will require a different approach in the way they will be handled. They include the reasons of secession based on denial of human rights, the existence of the new concept of self-determination and the aspect of the uncertainty on the ground with an opportunity to create conflict between states.

The theoretical framework has been useful in the study. It was based on international law. It was useful in explaining why definitive borders are important for a state in international law. In addition the framework also assisted in explaining that boundary regime is premised on signing of treaties therefore explaining how territory was acquired in Africa. Further it helped conceptualize the origin of *uti possidetis* by explaining why when state succession took place and territory acquired the borders of the independent African state remained untouched. Further, it was also highlighted that succession does not affect a boundary established by treaty or obligations and rights established by a treaty and relating to the regime of a boundary. Thus it explained why on what basis the independent African states had to remain with their colonial boundaries.

## **Chapter Five**

### **Conclusions**

The research has raised several issues brought about by application of the principle and it is against this background that conclusions below are made. The researcher recommends that the principle of *uti possidetis* taking into account the human rights issues it raises should based on the rationale of its application, be done away with. It should not be adopted as a blanket solution to border conflicts between states because conflicts presented are more intra-state based on human rights. The AU should encourage member states to adopt good governance principles that will go a long way in securing the rights of the minorities in states. What was adopted was a principle that had nothing to do with secession claims.

In terms of dealing with border conflicts, the AU needs to encourage more of bilateral negotiations between states in the resolving of border conflicts. The AU can also consider encouraging member states to adopt the diplomacy of *bon voisinage* to deal with border conflicts. Diplomacy of *bon voisinage* is distinct from traditional capital to capital diplomacy carried out at national centers, with little or no reference to national peripheries can occur at any or all of three levels. The first, and highest, is the level of summit meetings, or direct encounters between national political leaders. Not uncommonly, these take place at border locations. Such sites at or near the political boundaries between countries may be, symbolically if not geometrically, midway between the two centers, making it possible for the leaders to meet each other halfway, for reasons of convenience as well as regard for dignity. These meetings remain, however, essentially center-to-center encounters. The halfway sites chosen may not be at formal boundary lines at all but, rather, at the common edges of their respective spheres of control-that is, geopolitical equilibrium points. Sometimes they may be at military fronts, where armies meet.



When leaders' meetings take place at settled borders of already recognized state domains, they gain additional resonance there-from. The border location enhances their presence, just as the boundary, as a line between equal sovereign ties, is reconfirmed by their being there. The second or middle level, of a direct diplomacy of *bon voisinage* is that which occurs through ministerial or sub-ministerial contacts. These, too, are often regularized, and sometimes even institutionalized. The ministries typically involved, besides ministries of foreign affairs, are those other departments or agencies of national government having an interest in border-related policy matters, particularly commerce and immigration but also issues related to the environment, public health, and crime.

At this sub-summit level or, generally, intermediate level there should also be included the continuing transactions of such treaty-based binational or international commissions as have been established, more permanently, for the management of physical problems that may develop on borders, including possible adjustment of the borderline itself. The third, and lowest, level is the sub-national level. "Diplomacy" at this level may be conceived to include consultations that take place across national lines between state (or provincial) and also municipal authorities as well as discussions that occur between nongovernmental or private-sector groups desirous of good-neighborly relations<sup>1</sup>.

The AU should also encourage member states to develop 'soft borders' which will allow free movement of people, access to resources among other opportunities thereby alleviating conflicts over borders by the communities that live around the borders. With the current trend of globalization borders with time will cease to create so much pandemonium as they do.

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<sup>1</sup> Henrikson, A., 'Facing across Borders: The Diplomacy of *Bon Voisinage*', *International Political Science Review*, Vol. 21, No. 2, (2000), pp. 121-147: 126 & 127.

In addition the AU through the sub-regional organizations should ensure that states have their borders demarcated and delineated to avoid conflicts in future as a result of ambiguities and uncertainty on the ground. These sub-regional organizations could provide avenues for non-binding dispute settlement such as offering good offices, mediating in bilateral negotiations or assist in the formation of conciliation commissions that could make no-binding recommendations for settlement.

A holistic approach should be adopted when resolving the conflict that will include all constituents of the conflict such as the community concerned. Traditional methods of resolving the conflict that were used before and were successful can be adopted with modifications to flow with the current times. Further, that states should periodically review their borders on the ground and not leave them in abeyance for such a long period that the beacons disappear thereby creating room for conflict.

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#### **Interviews**

Mr. J. Yohanes, Head of Security, Eritrean Embassy, Nairobi

Camilo Gatmai, Southern Sudanese National, Nairobi

Interview at the Ministry of Foreign Affairs with the officer liaising with the AU on the AUBP

Dr. Godfrey Musila (PhD), International Law Consultant

Dr. Osogo Ambani, (PhD), Lecturer of Law, Moi University

### **Interview Guide – Key Informants**

1. What role did *uti possidetis* play in post-independence Africa and international law?
2. In what context today can the principle be adopted?
3. Did the principle play its intended role at that time?
4. What options can the AU adopt to handle conflict over boundaries?
5. What recommendations would you give the AU as concerns having the principle provided for in the Constitutive Act?
6. What options do countries have and can use to deal with secessionist claims?