

2016

Oil Under Troubled Waters?: Some Legal Aspects of the Boundary Dispute Between Malawi and Tanzania Over Lake Malawi

Tiyanjana Maluwa

Pennsylvania State University School of Law

Follow this and additional works at: <http://repository.law.umich.edu/mjil>

 Part of the [International Law Commons](#), [Legal History Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Tiyanjana Maluwa, *Oil Under Troubled Waters?: Some Legal Aspects of the Boundary Dispute Between Malawi and Tanzania Over Lake Malawi*, 37 MICH. J. INT'L L. 351 (2016).

Available at: <http://repository.law.umich.edu/mjil/vol37/iss3/1>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ARTICLES

OIL UNDER TROUBLED WATERS?: SOME LEGAL ASPECTS OF THE BOUNDARY DISPUTE BETWEEN MALAWI AND TANZANIA OVER LAKE MALAWI

*Tiyanjana Maluwa**

TABLE OF CONTENTS

INTRODUCTION.....	352
I. HISTORICAL BACKGROUND, FACTUAL ABSTRACT AND PRELIMINARY LEGAL QUESTIONS	356
A. <i>British and German Colonial Rule and the History of the Boundary: 1890–1967</i>	356
B. <i>Legal Significance and Probative Value of Maps in Boundary Disputes: An Excursus</i>	368
C. <i>Prelude to the Dispute: The Post–Independence Period, 1961–1967</i>	371
II. SIGNIFICANCE OF BOUNDARIES AND STATE SUCCESSION TO BOUNDARY TREATIES IN POST-COLONIAL AFRICAN STATE PRACTICE	374
A. <i>The OAU’s Resolution Concerning Boundaries: The Principle of Uti Possidetis Juris</i>	380
B. <i>The Determination of Boundaries in Contiguous Lakes and Sovereignty over Islands</i>	384
C. <i>Foibles, Failures, and Lapses in Colonial Boundary Demarcation</i>	390
D. <i>The Anglo-German Agreement of 1890: Boundary Treaty or Treaty of Sphere of Influence?</i>	393
III. COMPETITION OVER NATURAL RESOURCES AS A ROOT CAUSE OF BORDER DISPUTES.....	395
A. <i>Protection of Customary Rights in Boundary Zones and Borderlands</i>	398
B. <i>SADC’s Spatial Development Initiatives and Shared Management of Borderland Resources</i>	406
IV. PROSPECTS AND PROBLEMS OF THE SADC MEDIATION PROCESS	411
CONCLUSION	414

* H. Laddie Montague Chair in Law, Pennsylvania State University School of Law. I am indebted to Trevor P. Chimimba (Senior Legal Officer, Codification Division, United Nations, New York) for his insightful comments and suggestions, made in his personal capacity, on an earlier draft of this article.

INTRODUCTION

The latest round of the dispute between Malawi and Tanzania over ownership of part of the northeastern stretches of Lake Malawi or Lake Nyasa,¹ which erupted in mid-2012, may have come as something of a surprise to the international community.² The casual observer must have been puzzled by the spectacle of two apparently friendly neighboring countries suddenly threatening to fall out due to contested sovereignty over the lake. After all, their relations had improved considerably over the two decades since the end of the 30-year single-party rule of former dictator Dr. Hastings Kamuzu Banda in Malawi in 1994.³ More puzzling still, was the bellicose rhetoric that had not been heard since an earlier iteration

1. Throughout the colonial period the lake was known as Lake Nyasa. After its independence from Great Britain on July 6, 1964, Malawi renamed it Lake Malawi pursuant to the Alteration of Place Names Act, No. 2 of 1965. The Act was subsequently amended by the Regional and District Boundaries and Place Names Act, No. 42 of 1967, Cap. 18:04: *An Act to provide for the division of Malawi into Regions and Districts and for alterations to such divisions to provide for the conferring and altering of place names and for matters connected therewith*. The Act (Second Schedule, Item 1, First and Second Columns) reconfirms the name change from Lake Nyasa to Lake Malawi. For full text of the Act, see Blackhall's LAWS OF MALAWI, REVISED LAWS VOL. III: REGIONAL AND DISTRICT BOUNDARIES AND PLACE NAMES, www.malawilaws.com. As is commonly known, from all official maps and documents published in Tanzania and public pronouncements by Tanzanian officials, Tanzania has never accepted this name change and has maintained the name Lake Nyasa in the period since 1965. The lake is known as Lake Niassa in Mozambique. In this article, I generally use the name Lake Malawi even when discussing events relating to the period prior to the name change by Malawi. The appellation Lake Malawi is generally accepted and used by the rest of the international community. However, I also occasionally use the name Lake Nyasa where the context so requires.

2. The current standoff arose on July 30, 2012, when Tanzania asked Malawi to halt oil and gas exploration activities in the lake until the dispute between the two countries involving the lake boundary is resolved. Malawi rejected this demand and reasserted its claim that the international boundary between the two countries runs along the eastern shore of the lake and not the median line, as Tanzania claims. This development resuscitated an old dispute that had been dormant since 1968. See Naomi Kok, *Malawi: old border dispute with Tanzania flares up again*, INST. OF SECURITY STUD.: CONFLICT PREVENTION AND RISK ANALYSIS DAILY BRIEFINGS, Aug. 8, 2012, at 2.

3. Political tensions between the two neighboring countries had endured for the greater part of the 30-year period from 1964 to 1994, when President Kamuzu Banda lost power following the first democratic elections since the country's independence. The tensions were centered on three issues. First, the countries had contrasting attitudes and policies towards white minority regimes and the liberation struggles aimed at toppling them in Namibia, Rhodesia, South Africa and the Portuguese colonies of Angola and Mozambique. Second, President Banda suspected that Tanzania's President Julius Nyerere was aiding and abetting attempts by certain prominent Malawian politicians exiled in Tanzania to subvert his regime—these were former cabinet ministers who had broken ranks with Banda over policy differences within a few months of the country's independence and had fled into exile in Tanzania and Zambia after resigning or being dismissed from the cabinet. Lastly, there remained the unresolved dispute over the delimitation of the lake boundary between the two states. See James Mayall, *The Malawi-Tanzania Boundary Dispute*, 11 J. MOD. AFR. STUD. 611 (1973). Evidence of a thaw in the Malawi-Tanzania relations can be seen in the fact that, despite Malawi's continuing complaints about Tanzania's aid to President Banda's opponents, the two countries established diplomatic relations in 1985. Relations between the two countries were strengthened further in the immediate post-1994 period with the appointment

of the dispute.⁴ The dispute over the lake boundary had first surfaced in May 1967 and simmered for a while until September 1968. Since then, it had not been the subject of any public statements by either side until it flared up again in July 2012.

The current dispute can be traced to October 2011, when Malawi's late president Bingu wa Mutharika awarded a contract to a British company, Surestream Petroleum, to start gas and oil exploration on the eastern part of the lake, including in the area claimed by Tanzania.⁵ The likelihood of a positive outcome to the prospecting gave rise to objections on the Tanzanian side, encompassing other disagreements over the use of the lake. Towards the end of July 2012, Tanzania announced plans to purchase a new nine million dollar ferry to operate on Lake Malawi's waters. Tanzanian authorities claimed that Malawian fishing and tourist boats were encroaching on Tanzania's waters.⁶ This resurgence in the dispute was followed by a hurriedly arranged two-day meeting of top officials

of resident ambassadors to each other's capital, a situation that prevails to this day. See POLITICAL HANDBOOK OF THE WORLD 2014, 882 (Tom Lansford ed., 2014).

4. While senior authorities in both countries, including both former Malawian President Joyce Banda (in office from April 2012 to May 2014) and current Malawian President Peter Mutharika, and Tanzania's President Jakaya Kikwete, have variously proclaimed their determination to resolve the dispute peacefully and diplomatically, some authorities have also been reported in their respective local media expressing readiness to use armed forces to defend their sovereignty in relation to the disputed border. See, e.g., Courtney Meyer, *Who Owns Lake Nyasa?*, AFRICA JUSTICE FOUNDATION (Aug. 21, 2012), <http://africajusticefoundation.org/our-blog/news-articles/who-owns-lake-nyasa/> (quoting Edward Lowassa, chairman of Tanzania's parliamentary committee for defense, as saying, "[w]e expect this conflict will be solved diplomatically . . . Malawi is our neighbour and therefore we would not like to go into war with it. However, if it reaches the war stage then we are ready to sacrifice our people's blood and our military forces are committed in equipment and psychologically."). A similar message was delivered by the Tanzanian Minister of Foreign Affairs and International Cooperation previously in an address to the Tanzanian parliament. On the Malawian side, President Joyce Banda was quoted as declaring that she was ready to die for her people and her land over the lake dispute. See *I Shall Die For Malawi—President Banda*, NYASA TIMES (Aug. 11, 2012), <http://www.nyasatimes.com/2012/08/11/i-shall-die-for-malawi-president-banda/>. Subsequent reporting quoted President Kikwete assuring the people of both countries that talk of resort to war was just media sensationalism. See G. Matoga, *Border dispute won't end in war—Kikwete*, DAILY TIMES, (Aug. 16, 2012), <http://bntimes.com/index.php/daily-times/headlines/national/11267-border-dispute-wont-end-in-war-kikwete/>. The commitment to avoid military confrontation in favor of a peaceful solution to the dispute was repeated by both leaders prior to and following discussions they held on the margins of the thirty-second summit of the Southern African Development Community (SADC) in Maputo, Mozambique, on Aug. 17–18, 2012. Since succeeding Joyce Banda as president, Peter Mutharika has also ruled out going to war over the matter. See Rex Chikoko, *No War Plan against Tanzania over Lake*, THE NATION (Aug. 13, 2014), <http://mobile.nation.co.ke/news/No-war-plan-against-Tanzania-over-lake-says-Mutharika/-/1950946/2418414/-/format/xhtml/-/12xywbsz/-/index.html>.

5. Press Release, Surestream Petroleum Limited, Surestream Petroleum Awarded Exploration Licences in Malawi (Sept. 22, 2011), <http://surestream-petroleum.com/surestream-petroleum-awarded-exploration-licences-in-malawi/>.

6. Courtney Meyer, *Who Owns Lake Nyasa?*, GLOBAL POL'Y F. (Aug. 21, 2012), <https://www.globalpolicy.org/the-dark-side-of-natural-resources-st/other-articlesanalysis-and-general-debate/51849-who-owns-lake-nyasa.html>.

from both countries. During these talks, Malawi rejected Tanzania's demand that Malawi stop any exploration or research activities for oil and gas forthwith and its claim that this was likely to jeopardize the ongoing negotiations and pose a security threat.⁷ Following these preliminary negotiations, the two parties agreed to submit the dispute to third-party mediation under the auspices of the sub-regional organization, the Southern African Development Community (SADC).⁸ SADC mandated the head of the Forum for Former African Heads of State and Government, former Mozambican president Joaquim Chissano, to undertake the mediation.⁹

The gist of the dispute may be summarized as follows. Malawi asserts that it enjoys sovereignty over the entire lake up to the Tanzanian shoreline, as stipulated in Article I(2) of the Anglo-German Treaty of July 1, 1890 (hereinafter variously referred to as Anglo-German Treaty, Anglo-German Agreement, or 1890 Agreement).¹⁰ Tanzania's position is that, in accordance with international norms and practice, the border ought to be demarcated in the center of the lake, following the median line. Tanzania points out that this is in fact the case with the delimitation of the Malawi-Mozambique border on the southeastern half of the lake. Malawi counterclaims that the Portuguese colonial authorities, by treaty, bartered a portion of Mozambican territory by ceding sovereignty over two islands that lie on the Mozambican side of the median line of the lake to the British protectorate of Nyasaland in exchange for acquiring sovereignty over the southeastern half of the lake. In brief, Malawi argues that the 1890 Agreement specifically and deliberately departed from the presumption in international law in favor of locating the boundary along the median line of the lake.

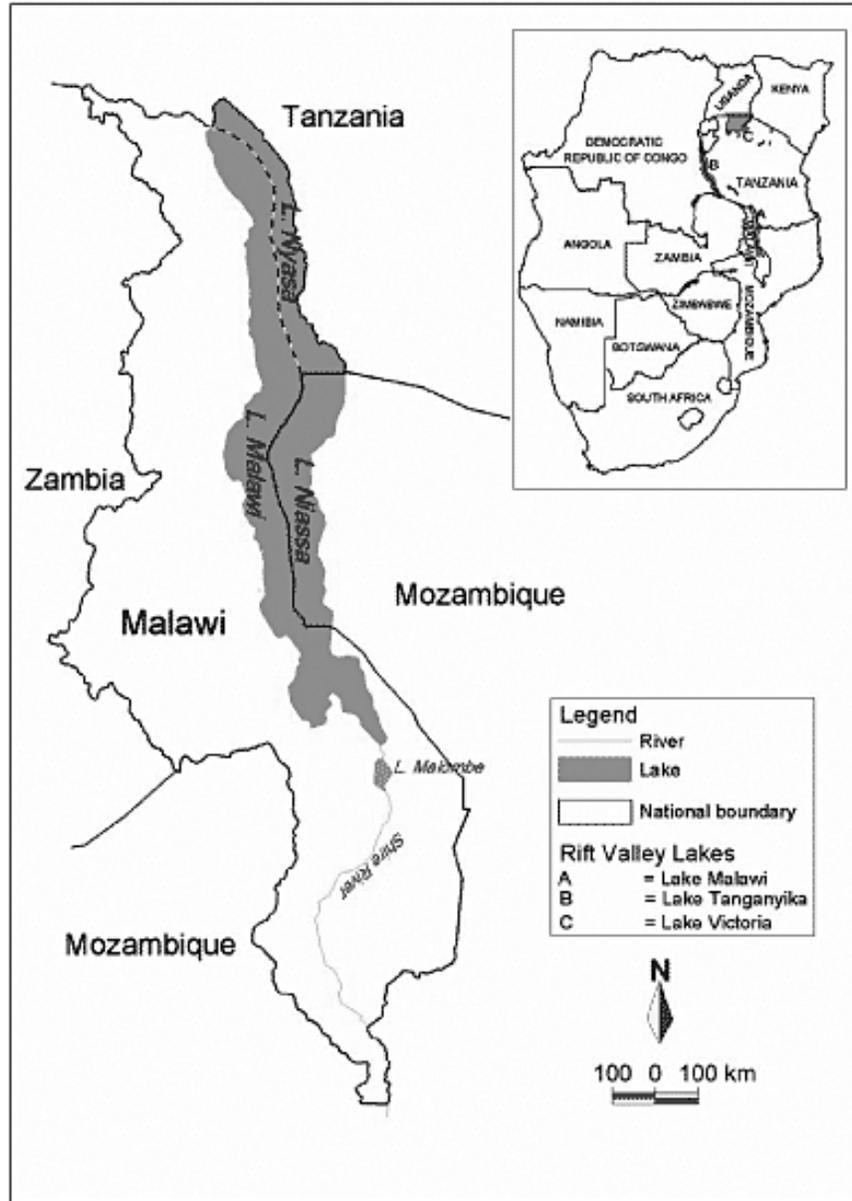
7. See Caroline Ngongondo, *Malawi, Tanzania Will Not Go to War*, THE NATION (Aug. 17, 2012), <http://mwnation.com/a%E2%82%AC%CB%9Cmalawi-tanzania-will-not-go-to-wara%E2%82%AC%E2%84%A2/> (reporting that Malawi's Foreign Minister Ephraim Chiume and his Tanzanian counterpart Bernard Membe had reiterated the commitment of their countries to resolve the dispute amicably even as Malawi rejected Tanzania's demand to stop oil exploration in the lake).

8. *Chissano Agrees to Mediate Malawi, Tanzania over Lake Dispute*, NYASA TIMES (Dec. 23, 2012), <http://www.nyasatimes.com/chissano-agrees-to-mediate-malawi-tanzania-over-lake-dispute/>.

9. Chissano was subsequently joined by former South African president Thabo Mbeki and the former president of Botswana, Festus Mogae, as members of the mediation team. See *Mbeki in Lake Dispute Team*, THE NATION (Feb. 19, 2013), <http://www.mwnation.com/mbeki-in-lake-dispute-team/>.

10. Also known as Heligoland-Zanzibar Treaty, this agreement, *inter alia*, recognized Tanganyika as a German colony; Britain ceded Heligoland, an island off the coast of Schleswig-Holstein in the North Sea, to Germany in return for Germany undertaking not to encroach into the British territory of Kenya. See 3 EDWARD HERTSLET, THE MAP OF AFRICA BY TREATY 899-908 (3rd ed. 1909, rep. 1967).

FIGURE 1. MAP OF MALAWI AND LAKE MALAWI/NYASA
(INSET: EAST AND SOUTHERN AFRICA)



Key:

— International boundary

- - - - Median line in Lake Malawi/Nyasa claimed by Tanzania

This article examines the legal aspects of the respective claims by the two claimants to the northeastern stretches of the lake: to the eastern shoreline by Malawi and to the median line by Tanzania (Figure 1). I proceed as follows. First, I sketch out the historical and political background of the dispute and examine some preliminary legal issues in Part I. Part II discusses the legal significance of boundaries, state succession to boundary treaties, and the relevance of post-colonial African state practice in this respect. A central aspect of this practice is the adoption by African states of the principle of *uti possidetis juris* (or, more commonly, *uti possidetis*) from the earliest days of their independence some fifty years ago. In Part II, I address three additional, related issues: attribution of sovereignty over islands in the disputed section of the lake, apparent lapses or failures in colonial boundary demarcation, and the question whether the 1890 Agreement is a boundary treaty or a treaty of sphere of influence. In Part III, I examine the issue of competition over resources as a factor in boundary disputes and the relevance of the concept of borderlands to this dispute. Part IV briefly assesses the prospects for SADC-sponsored third party mediation in light of the setbacks the SADC has already experienced, noting the wavering commitment to the process and apparent lack of trust displayed by one party. I argue that the failure of SADC mediation would not bode well for Tanzania, which prefers mediation to international judicial settlement. On the other hand, adjudication by the International Court of Justice (ICJ), which Malawi evidently favors, would likely validate Malawi's position. Notwithstanding the fact that the ICJ is not formally bound by its own precedents, it is reasonable to assume that the Court's decisions in previous boundary disputes involving other African states, some of which implicated the same Anglo-German Treaty, and its reaffirmation of the principle of *uti possidetis* in these cases, would suggest such an outcome. I conclude by reiterating the argument for a solution that upholds the principle of inviolability of borders, while allowing for shared management of border resources, consistent with the most recently developed norms of international law. This would transform the border from a barrier into a bridge, connecting the two states and their respective communities and serving as a shared environmental space. Such a solution would be in line with SADC's own approach to regional integration, as exemplified by the regional body's spatial development initiatives.

I. HISTORICAL BACKGROUND, FACTUAL ABSTRACT AND PRELIMINARY LEGAL QUESTIONS

A. *British and German Colonial Rule and the History of the Boundary: 1890–1967*

The present-day political entities of Malawi and Tanzania are British and German colonial creations, respectively. The dispute over the lake has its roots in the Anglo-German Treaty which, *inter alia*, defined the spheres

of influence of the two European powers in East Africa.¹¹ Article I(2) of the Treaty is generally regarded as having set out the British and German colonial territorial limits and thereby defined the boundary between Nyasaland and Tanganyika. The question of whether this was a boundary treaty *stricto sensu* or merely a treaty of spheres of influence is one that will be addressed later.

Lake Malawi is the third largest and second deepest lake in Africa, and the ninth largest in the world. In addition to the possibility of the existence of oil and gas resources in the lake, it has been confirmed as a habitat of more species of fish than any other body of freshwater in the world, including an estimated several hundred species of cichlids.¹² It is the third largest lake in Africa (after Lake Victoria and Lake Tanganyika) and has shorelines on western Mozambique, eastern Malawi, and southern Tanzania. The lake was first visited by European travelers in the mid-nineteenth century, notably by both the Portuguese trader Candido José da Costa Cardoso in 1846 and the Scottish missionary David Livingstone in 1859. Most of the territory to the west and south of the lake was subsequently claimed by Great Britain and formed into the Nyasaland protectorate. On their part, the Portuguese had already made territorial claims in Central Africa and established the colony of Portuguese East Africa (Mozambique).¹³ A treaty signed in 1891 between Great Britain and Portugal defined their respective spheres of influence in the region. Under this treaty, the latter's sphere of influence covered the portion of the eastern shore of the lake lying immediately to the south of the southern boundary of German East Africa (Tanganyika), about half way along the eastern side of the lake (Figure 1).¹⁴

It is fashionable to describe the Berlin Conference of 1884–85 as laying the groundwork for the colonial “scramble for Africa.” But, as a matter of historical fact, the colonial occupation and partition of the continent had already been underway by the time the conference was convened, on November 14, 1884, at the invitation of Chancellor Bismarck of Germany. The Berlin Conference was concluded on February 26, 1885 with the signing of the General Act of the Conference of Berlin, which, *inter alia*, set out the procedural requirements under Articles 34 and 35 to be observed

11. See 3 HERTSLET, *supra* note 10. In addition, the treaty also demarcated several other boundaries of colonial territories belonging to Great Britain and Germany elsewhere in Africa (e.g. between modern day Nigeria and Cameroon in West-Central Africa and Namibia and Botswana in Southern Africa).

12. A. J. Ribbink et al., *A Preliminary Assessment of the Cichlid Fishes of Rocky Habitats in Lake Malawi*, 18 S. AFR. J. ZOOLOGY 147, 149–51 (1983); see generally AD KONING, *AD KONINGS'S BOOK OF CICHLIDS AND ALL THE OTHER FISHES OF LAKE MALAWI* (1991).

13. See A. C. McEWEN, *INTERNATIONAL BOUNDARIES OF EAST AFRICA* 170–75 (1971).

14. Treaty between Great Britain and Portugal Defining the Spheres of Interest of the Two Countries in Africa, Eng.–Port., June 11, 1891, 83 Brit. and For. State Papers 27 (1890–1891); see also 3 HERTSLET, *supra* note 10, at 1016–26. See McEWEN, *supra* note 13, at 170–75, for a brief account of the negotiations between the British and Portuguese colonial authorities over the Mozambique-Malawi lake boundary.

by any European power taking possession of territory on the coasts of Africa, or seeking to establish a protectorate there.¹⁵ Under these provisions, any such occupying power was required to notify the other signatory states of such occupation, or establishment of protectorate, and to “recognize the obligation to [e]nsure the establishment of authority in regions occupied by them on the coasts of the African Continent sufficient to protect existing rights.”¹⁶

The hypocrisy and injustice underlying the colonial project cannot be overemphasized. The acquisition of radical title to territory in the newly declared African colonies was premised on the prevailing notion in colonial jurisprudence, based on the legal fiction of *terra nullius*, meaning “land belonging to no one,” which held that the native African populations did not own these territories. Occupation and use of the territories by native non-European communities was not regarded as rising to the level of sovereign acts at par with the colonial declarations of possession validated by the Berlin Act. Although it was claimed that for the most part, the acquisition of African territories and subsequent delimitations was based on prior treaties between the European colonial authorities and local African rulers, it is generally accepted that the European powers secured those treaties through a combination of coercion, inducement, and, in some cases, outright deceit. The doctrine of *terra nullius* formed the basis of European colonization and subsequent colonial land laws in Africa and other parts of the world that came under European conquest and occupation.¹⁷

The Berlin Act, and in particular Articles 34 and 35, which formed its core, thus institutionalized and legitimized the European acquisition of

15. General Act of the Berlin Conference, arts. 34–35, Feb. 26, 1885, 2 HERTSLET, THE MAP OF AFRICA BY TREATY 484–85 (3rd ed., 1909, reprt. 1967). See Matthew Craven, *Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade*, 3 LONDON REV. INT’L L. 31, 44 (2015); SYBIL EYRE CROWE, THE BERLIN WEST AFRICA CONFERENCE 1884-1885, at 176–191 (1970); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, at 123 (2001), for a discussion of Articles 34 and 35.

16. 2 HERTSLET, *supra* note 15, at 485; see also Annex I to Protocol No. 8 of the Conference: REPORT OF THE COMMISSION ON THE PROJECT OF DECLARATION RESPECTING NEW OCCUPATIONS ON THE COASTS OF AFRICA, Conf. 4361, 1884–85 B.P.P., Vol. LV, p. 214. According to R.J. Harrison Church, “between 1885 and 1904 most of the present political map was drawn, a process practically complete by 1919.” JEFFERY HERBST, *The Creation and Maintenance of National Boundaries in Africa*, 43 INT’L ORG. 673, 674 (1989).

17. A classic example of the jurisprudence articulating this doctrine is the Australian case of *Milirrpum v. Nabalco Pty. Ltd.* (generally known as the Gove land rights case), in which Justice Richard Blackburn ruled that, according to the prevailing law, Australia was *terra nullius* at the time of British colonization and, therefore, that the British Crown had the power to extinguish native title, if it existed: (1971) 17 FLR 141. Subsequent cases unsuccessfully challenged this judgment until it was overturned in 1992 by the High Court of Australia in the Mabo case, which introduced the doctrine of native title into Australian law and removed the fiction of *terra nullius*. See *Mabo and Others v. Queensland* [No. 2] (1992) 175 CLR 1 (Austl.).

territory on the African continent in total disregard of African agency.¹⁸ Under this treaty, the European powers in effect agreed amongst themselves that effective occupation by Europeans alone was to be the norm and the basis for the establishment of the Westphalian form of statehood in Africa.¹⁹ As historians, legal scholars, and other commentators have generally observed, this was a deliberate erasure of the subjectivity of non-European peoples in Africa.²⁰ The key instrument for the determination of the modern Malawi–Tanzania boundary, the Anglo–German Treaty of 1890, was one of several treaties adopted by European colonial powers in the aftermath of the Berlin Act. Specifically, in relation to the Nyasaland–Tanganyika boundary, Article I(2) of the Agreement described the limit of the “German sphere of influence . . . to the South” as follows:

To the south by a line which, starting on coast at the northern limit of the Province of Mozambique, follows the course of the River

18. See 2 HERTSLET, *supra* note 15, at 468. Article 34 is particularly pertinent in this respect. It provided that:

Any Power which henceforth takes possession of a tract of land on the coasts of the African Continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.

19. The Berlin Conference has been described as “an important moment in the formalization of the international legal structure of imperialism” and the importation of the notion of the modern territorial state into the purported *terra nullius* of Africa. CHINA MIEVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* 253 (2005); see also ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 90–6, 111–12 (2004) (noting that the effect of the Berlin Conference was “to transform Africa into a conceptual *terra nullius*,” and that, as such, “only dealings between European states with respect to those territories could have decisive legal effect”); CROWE, *supra* note 15, at 158–59; JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 263–69 (2nd ed., 2006) (discussing the legal personality of indigenous communities not regarded as states and the acquisition of territory from indigenous communities).

20. There is a copious literature by historians and legal scholars, in particular, on the role and significance of the Berlin Act in the scheme of the colonization of Africa and the development of international law. These range from nineteenth century commentators, such as JOHN WESTLAKE, *CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW* 129–89 (1894), to more modern writers, including THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA: 1876–1912* (1991); R. ANAND, *NEW STATES AND INTERNATIONAL LAW* 33 (1972); U. O. UMOZURIKE, *INTERNATIONAL LAW AND COLONIALISM IN AFRICA* 26 (1979); and KOSKENNIEMI, *supra* note 15, at 121–27. See also BISMARCK, *EUROPE AND AFRICA: THE BERLIN AFRICA CONFERENCE 1884–1885 AND THE ONSET OF PARTITION* (S. Förster, W. Mommsen & R. Robinson eds., 1988) (containing a number of perceptive essays on this subject, including Ronald Robinson, *The Conference in Berlin and the Future of Africa, 1884–1885*, at 1; Jorg Fisch, *Africa as terra nullius: The Berlin Conference and International Law*, 347, 354–60; John D Hargreaves, *The Berlin Conference, West African Boundaries, and the Eventual Partition*, 313); S. GROVOGUI, *SOVEREIGNS, QUASI-SOVEREIGNS AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW* 69–75 (1996); Andrew Fitzmaurice, *The Genealogy of Terra Nullius*, 129 *AUSTL. HIST. STUD.* 1, 10–11 (2001); Andrew Fitzmaurice, *SOVEREIGNTY, PROPERTY AND EMPIRE: 1500–2000* at 285–90 (2014).

Rovuma to the point of confluence of the Msinje; thence it runs westward along the parallel of that point till it reaches Lake Nyassa; thence striking northward, it follows the eastern, northern, and western shores of the lake to the northern bank of the mouth of the River Songwe. . . .²¹

The language of this provision is clear: the whole of the northern part of the lake was part of Nyasaland and not within the German sphere of influence. And, significantly, the shoreline boundary is shown clearly on a map referred to later in the text of this provision.²² The 1890 Agreement has never been amended by any subsequent international agreement, thus leading to the obvious conclusion that Article I(2) is the critical provision with regard to the disputed sovereignty over the lake. That said, it is also apt to note that the 1890 Agreement did not establish a precise boundary between adjacent sovereign territories. Rather, as its title makes clear, it delimited “spheres of influence,” leaving the actual delimitation of the boundaries subject to subsequent agreement. According to Article VI: “All the lines of demarcation traced in Articles II to IV shall be subject to rectification by agreement between the two Powers, in accordance with local requirements.”²³

In accordance with this provision, mixed boundary commissions were subsequently established to demarcate boundary lines on the ground. As it happened, the Mixed Boundary Commission (or Anglo-German Boundary Commission), established in 1898 to demarcate the Nyasa section of the Tanganyika-Nyasaland boundary, apparently commenced its work at the mouth of the Songwe River and proceeded westward to Lake Tanganyika without considering the shore boundary of Lake Nyasa. It is plausible that this was precisely what was intended: namely to focus only on the Lake Tanganyika–Lake Nyasa part, while treating the Lake Nyasa section as self-evident. On this interpretation, demarcation of the boundary in this disputed section was not supposed to be part of its remit. Thus, McEwen has suggested that “no doubt at the time it seemed obvious that a boundary defined in terms of a lake shore was self-demarcating and required no physical investigation.”²⁴ An alternative interpretation is that this was a lapse that laid the basis for the apparent ambiguity subsequently invoked by Tanzania in partial justification of its claim of sovereignty over the lake. I discuss such lapses in colonial boundary-making in Part II below.

21. 3 HERTSLET, *supra* note 10.

22. IAN BROWNLIE, *AFRICAN BOUNDARIES: A LEGAL AND DIPLOMATIC ENCYCLOPEDIA* 958 (1979).

23. 3 HERTSLET, *supra* note 10.

24. MCEWEN, *supra* note 13, at 179. See Protocol Containing the Decisions of the Commissioner Appointed to Delimit the Nyasa–Tanganyika Boundary, Br.–Ger., Nov. 11, 1898, 92 BRIT. AND FOR. STATE PAPERS 797 (1899–1900) (Brit.), reprinted in 3 HERTSLET, *supra* note 10, at 916–19.

Following the end of the First World War, the former German colony of Tanganyika was awarded to Great Britain under the League of Nations Mandate System in 1922.²⁵ As a result, Tanganyika's border with Nyasaland became an internal administrative division. From an international law perspective, Great Britain, as the Mandatory, could not have unilaterally changed the boundary without the authority of the Council, which is why the period preceding 1922 is crucial for the title. Tanganyika subsequently became a trust territory under the United Nations Trusteeship System, which replaced the Mandate System in 1945.²⁶ Thus, it has been suggested by Rosalyn Higgins that from 1922 until 1961, when Tanganyika became independent, the boundary with Nyasaland had been a matter of administrative convenience rather than political importance, at least from the British perspective, since Britain controlled both sides of the territory.²⁷ After Tanzania's independence, what had in effect been an internal administrative division under British rule reverted to being an international boundary.

Unsurprisingly, Higgins identifies the period 1890 to 1922 as particularly critical, "being marked at the outset by a Treaty between Great Britain and Germany and at the end by the institution of the League of Nations Mandate System."²⁸ Brownlie and McEwen are in agreement that title to the disputed territory must have been formed during this period, as no changes could thereafter occur without the consent of the League or later the United Nations.²⁹ Higgins categorically notes that no such consent was ever sought. Later materials thus go more to questions of evi-

25. See League of Nations Covenant art. 22(1). Germany lost its colonial possessions pursuant to the terms of Article 119 of the Treaty of Versailles of 1919. Great Britain and Belgium, whose troops occupied German East Africa during the war, took over the German colonies in East Africa under the League of Nations Mandate System. The Mandate System was proclaimed under Article 22(1) of the Covenant of the League of Nations. The German colonies and protectorates of Tanganyika and Ruanda-Urundi were designated as "Class B" Mandates and awarded to Great Britain and Belgium respectively.

26. U.N. Charter arts. 75, 77 ¶ 1(a), <http://www.un.org/en/charter-united-nations/>. The new Trusteeship System was established under Article 75 of the United Nations Charter to replace the League of Nations Mandate System. Under Article 77(1)(a) of the Charter, the territories held under [the League of Nations] mandate became trust territories, with the Mandate Powers maintaining their positions as the administering authorities of the trust territories under specific trusteeship agreements. Article 77(1)(a) provides: "The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: a. territories now held under [mandate]."

27. Rosalyn Higgins, *Lake Nyasa (Malawi) International Boundary: Legal Opinion 6* (1988) (unpublished paper) (on file with author). The legal opinion was commissioned by Mobil Oil Corporation, which wanted to explore for oil and gas on the lake through Tanzania. Dame Higgins prepared this opinion when she was a professor of international law at the London School of Economics, before she was elected to the International Court of Justice.

28. *Id.* at 2.

29. Ian Brownlie, *A Provisional View of the Dispute Concerning Sovereignty over Lake Malawi/Nyasa*, 1 E. AFR. L. REV. 258, 259-60, 272 (1968); BROWNLIE, *supra* note 22, at 956-57; see also, MCEWEN, *supra* note 13, at 175.

dence of understanding, or acquiescence, rather than to initial establishment of title.³⁰

However, there is no common agreement among these commentators on the interpretation and conclusion to be placed on the evidence of understanding or acquiescence. The issue of supposed acquiescence by the British authorities in German public acts relating to the disputed territory is discussed in another context below.

The non-demarcation of the boundary on the ground in the disputed section is compounded by another factor: notwithstanding some subsequent inconsistent cartographic representations and textual descriptions by British authorities, the eastern shoreline of the lake was never formally changed from an agreement on a “sphere of influence,” the formal title of the 1890 Agreement, to an agreement on a precise “boundary agreement.” Yet, neither Great Britain nor Germany regarded it as anything other than a boundary treaty, which also regulated various boundaries between British and German colonial possessions in central, eastern and southern Africa. Among the few writers and commentators who have addressed this dispute specifically, none have sought to draw any legal significance from the fact that the 1890 Agreement delineated spheres of influence rather than actual boundaries.³¹

In fact, another treaty was concluded by the same parties in 1901: the Agreement between Great Britain and Germany relative to the Boundary of the British and German Spheres of Interest between Lake Nyasa and Lake Tanganyika of February 23, 1901.³² The treaty accepted and incorporated the proposals of the 1898 Mixed Commission. Section 1 detailed precisely the line of demarcation running northwest from the mouth of the Songwe River in the northeast corner of the lake, but it did not affect the eastern shoreline.³³

The delineation of the Mozambique-Nyasaland boundary in the southern half of the lake was the subject of several treaties between Great Britain and Portugal, including: the 1891 Agreement mentioned earlier,³⁴ the Agreement relative to the Spheres of Influence north of the Zambesi of

30. Higgins, *supra* note 27, at 2.

31. Although the dispute has attracted some media attention and commentary since its current resurgence, especially in the two countries concerned, there has as yet been very little new substantive published scholarly discussion of it. See Mi Yung Yoon, *Colonialism and Border Disputes in Africa: The Case of the Malawi-Tanzania Dispute over Lake Malawi/Nyasa*, 1 J. TERRITORIAL AND MAR. STUD. 75 (2014) (providing an isolated example that is nonetheless too brief in scope and perfunctory in its analysis of, especially, the legal and historical aspects).

32. 95 BRIT. AND FOR. STATE PAPERS 780 (1901–02); see also 3 HERTSLET, *supra* note 10, at 925.

33. 3 HERTSLET, *supra* note 10, at 925–26 (Sec. 1 of the Agreement) (“The boundary shall take the following course, indicated on the annexed map by a black line, excepting where natural watercourses form the boundary.”).

34. See Treaty between Great Britain and Portugal Defining the Spheres of Interest of the Two Countries in Africa, *supra* note 14.

1893,³⁵ Exchange of Notes of 21 January, 1953,³⁶ and the Agreement regarding the Nyasaland-Mozambique Frontier of November 18, 1954.³⁷ Collectively these treaties, defining the respective spheres of the two powers in this part of east and central Africa, provided for a mutually agreed boundary running down the median line of Lake Nyasa, while recognizing two islands located within Mozambican waters in this section of the lake as part of the Nyasaland protectorate. Article 1(1) of the Agreement of 1954 provided that:

[The] frontier on Lake Nyasa shall run due west from the point where the frontier of Mozambique and Tanganyika meets the shore of the Lake to the median line of the waters of the same lake and shall then follow the median line to its point of intersection with the geographical parallel of Beacon 17 as described in the Exchange of Notes of the 6th of May, 1920, which shall constitute the southern frontier.³⁸

This provision was merely reaffirming an understanding between the United Kingdom and Portugal recorded in the Exchange of Notes of 1953, whose pertinent provisions had provided, in part:

1. I have the honor to state that Her Majesty's Government in the United Kingdom have given the most careful attention to the views expressed by the Portuguese representatives when in July 1951 they received the Governor of [Nyasaland].
2. In these conversations the Portuguese delegation expressed the hope that the United Kingdom, in consequence of the Portuguese proposal and in harmony with the point previously mentioned in the Embassy's Note of June 27, 1951, would be prepared to consider recognizing the frontier of Mozambique and Nyasaland in Lake Nyasa as running along the Median Line of its [waters].³⁹

35. Agreement between Great Britain and Portugal Relative to Spheres of Influence North of the Zambesi, Gr. Brit.–Port., May 31–June 5, 1893, Gr. Brit. TS No. 10 (1893).

36. Exchange of Notes Constituting an Agreement Between Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and the Portuguese Government Providing for Portuguese Participation in the Shire Valley Project, Gr. Brit.–Port., Jan. 21, 1953, 175 U.N.T.S. 14.

37. Agreement between the United Kingdom Acting on Its Own Behalf and on Behalf of the Federation of Rhodesia and Nyasaland and Portugal Regarding Nyasaland–Mozambique Frontier art. 2 ¶ 1, Gr. Brit.–Por., Nov. 18, 1954, 325 U.N.T.S. 307, 310; *see also* 161 BRIT. AND FOR. STATE PAPERS 173 (1954).

38. Agreement between the United Kingdom Acting on Its Own Behalf and on Behalf of the Federation of Rhodesia and Nyasaland and Portugal Regarding Nyasaland–Mozambique Frontier, *supra* note 40, art. 1.

39. Exchange of Notes Constituting an Agreement between Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and the Portuguese Government Providing for Portuguese Participation in the Shire Valley Project, *supra* note 36, at 14.

The attribution of sovereignty over the islands to the United Kingdom was *quid pro quo* for British cooperation with the Portuguese over projects affecting the Shire and Zambezi rivers, both of which flowed from the former's colonial territories into the latter's. Likoma Island, which was used as a mission station by Britain's Universities' Mission to Central Africa, and the nearby islet of Chizumulu, were thus incorporated into the Nyasaland protectorate.⁴⁰ Under Article 1(2) of the Agreement of 1954, the United Kingdom retained sovereignty over these islands with full, unrestricted and unconditional rights of access and sovereignty over a belt of water two sea miles wide surrounding each of the islands.⁴¹ To this day, the islands have remained uncontested lacustrine Malawian exclaves: Malawian territory surrounded by Mozambican waters.

On the basis of the foregoing, the conclusion that the 1890 Agreement remains the most relevant colonial-era treaty with a bearing on the current lake boundary dispute seems obvious and perfectly warranted. Conversely, it has been pointed out—and this could be part of Tanzania's argument, although it has not been publicly expressed before—that evidence of certain public acts by both the British and German governments in the post-1890 period points to an acceptance by both sides that the boundary between Nyasaland and Tanganyika was formed by the median line and not the eastern shore as stipulated in the 1890 Agreement. The evidence for this is sought in public (or sovereign) acts by the German authorities and cartographic representations in maps and official reports issued by both the British and German governments during the post-1890 period, and it is argued that these were sufficient to redraw an international boundary in the circumstances of uncertainty.⁴² But, the evidence is inconsistent.

(i) *Public (Sovereign) Acts*. The most notable public acts cited in the few published legal and historical commentaries on the Malawi-Tanzania boundary concern the launching by Germany of a steamer, the *Hermann von Wissmann*, in 1893 and subsequent vessels and its navigation activities on the northeastern section of the lake.⁴³ It has been argued that because Britain did not protest these activities within its territory, it must be assumed to have acquiesced to the virtual redrawing of the lake boundary from the eastern shore to the median line. Both Day and Brownlie point to these activities as evidence that German sovereignty was in practice

40. Agreement between Great Britain and Portugal Relative to Spheres of Influence North of the Zambesi, *supra* note 35, art. IV ("The Islands of Chisamulo and Lukomo, or Dikomo, and all other islands of Lake Nyasa farther to the south, shall be recognized as being within the British sphere of influence.").

41. Agreement between the United Kingdom Acting on Its Own Behalf and on Behalf of the Federation of Rhodesia and Nyasaland and Portugal Regarding Nyasaland-Mozambique Frontier, *supra* note 40, at 2.

42. Brownlie, *supra* note 29, at 259–61.

43. RUDOLF FITZNER, *KOLONIAL-HANDBUCH*, VOL. I 338–39 (1901).

established, and accepted by Britain, up to the median line.⁴⁴ Writing shortly after the dispute first arose when the post-colonial government of Tanzania made its claim over the lake in 1967, Brownlie categorically concluded that “[t]he evidence is, however, that the United Kingdom had accepted a middle line before the onset of the [League of Nations] Mandate and for a long while after 1922.”⁴⁵

Significantly, Brownlie changed his position somewhat a decade later when he conceded that Article VIII of the 1890 Agreement provided for the right of free navigation on the lake to both sides and concluded that “[the] provisions of Article VIII tend to render German activity less decisive as a matter of evidence.”⁴⁶ This being the case, it is pointless to read into the absence of British protest against German navigation on the lake as acceptance of German sovereignty over the lake. In fact, given that the ostensible reason for the launching of the *Hermann von Wissmann* was to assist in the suppression of the slave trade, Britain was unlikely to protest against activities that it also supported as a self-proclaimed champion of the anti-slavery crusade. Moreover, McEwen reports that following the capture of the *Hermann von Wissmann* by Britain at the beginning of the First World War, apparently due to the fact that the German authorities were then using it for commercial purposes, there does not appear to have been any other activities by vessels based on the eastern shore.⁴⁷ The alleged evidence of sovereign public acts by Germany in the contested waters seems both exaggerated and inconsistent.

On the British side, there was also a series of public acts, such as Orders-in-Council, contained in the Laws of Nyasaland before and leading to the proclamation of the Nyasaland protectorate.⁴⁸ While some Orders-in-

44. ALAN J. DAY ET AL., BORDER AND TERRITORIAL DISPUTES 140 (1982); Brownlie, *supra* note 29, at 259–61.

45. Brownlie, *supra* note 29, at 271.

46. BROWNLIE, *supra* note 22, at 959. Article VIII states, in part: “The two Powers engage to apply in all the portions of their respective spheres, within the limits of the zone defined by the Act of Berlin [of 1885]: The navigation of the lakes, rivers, and canals, and of the ports on these waters, is free to both [flags].” It is fairly clear that Brownlie’s earlier commentary on the dispute was more sympathetic to Tanzania’s claim. While nothing significant may be read into the fact that he wrote this at a time when he was based at the University of Dar es Salaam as a visiting professor, his “provisional view,” as he termed it, presumably reflected only a tentative assessment of the merits of a recently emergent dispute.

47. See McEWEN, *supra* note 13, at 192. In the post-colonial period, notwithstanding the unresolved dispute, Malawi and Tanzania have cooperated on some aspects of the use of the lake, including water transportation. In 1995, the two governments signed an agreement allowing ships to visit ports on the other’s shores, but without prejudice to the matter of the boundary. Article 2 of the Agreement provides as follows: “Notwithstanding anything contained in this Agreement or any other operational Agreements relating hereto nothing therein may be construed as affecting any territorial matters between the Contracting Parties.” Lake Shipping and Port Services Agreement between the Government of the United Republic of Tanzania and the Government of the Republic of Malawi art. 2, Tanz.–Malawi, Jan. 27, 1995, (unpublished treaty) (on file with author).

48. McEWEN, *supra* note 13, at 181–83.

Council had been inconsistent in the description of the Nyasaland boundary in the lake, later versions corrected the discrepancies, thus removing any presumption that the United Kingdom had acquiesced in the earlier German acts.⁴⁹

(ii) *Maps and Reports*. The period 1890–1922 saw the production of a number of maps in both Britain and Germany on which the boundary was variously shown as a median line or an eastern shoreline.

On the German side, a number of maps reproduced in a 1909 publication on the German colonial empire confusingly depicted both the median and shoreline.⁵⁰ Notably, an official map published in 1918, at the height of the First World War, marked the median line as the boundary.⁵¹ A subsequent publication in 1920 also depicted the median line as the boundary.⁵² McEwen, who discusses these maps in some detail, dismisses the latter maps as of little probative value given that they were published at a time when Great Britain and Germany were at war with each other or immediately following the war, and thus a time of heightened tension. It should also be noted that these maps did not explicitly purport to override the delimitation of the German sphere of influence provided for in Article I(2) of the Treaty of 1890.

The maps produced on the British side during this period are equally inconsistent in their depiction of the median line and the shoreline. An early map in the British Admiralty's *Handbook of German East Africa* of 1916 (hereinafter the *Handbook*), discussed in some detail by McEwen, showed the median line.⁵³ McEwen notes that the map is not dated and contains no reference to the cartographer. He further suggests that the map seems to be "essentially a sketch" and that the compilers may have been misled by the presence of German vessels on the lake, as noted in the *Handbook*, to assume that the international boundary ran along the median line.⁵⁴ Among other British maps produced during this period was that in the *Annual Report on Tanganyika* for 1922, which showed an eastern shoreline boundary and one that appeared in the *Times Survey Atlas of the World* for the same year showing the median line.⁵⁵

49. See *id.*, for a brief discussion of some of the inconsistencies in the Orders-in-Council.

50. 1 DAS DEUTSCHE KOLONIALREICH [THE GERMAN COLONIAL EMPIRE] 416 (Hans Meyer ed., 1909).

51. McEWEN, *supra* note 13, at 186 (citing DIETRICH REIMER, REICHSKOLONIALAMT, MITTELAFRIKA IN KARTEN [IMPERIAL COLONIAL OFFICE, MIDDLE AFRICA IN MAPS] (1918)).

52. See 1 DEUTSCHES KOLONIAL-LEXIKON (H. von Schnee ed., 1920) (maps). McEWEN notes that the maps are inconsistent with Dr. von Schnee's textual references the boundary agreements. See McEWEN, *supra* note 13, at 186.

53. British Admiralty War Staff Intelligence Division, *A Handbook of German East Africa* 7 (1916).

54. McEWEN, *supra* note 13, at 187.

55. *Id.* at 187–88.

The probative value of these maps is as doubtful as that of the maps produced on the German side. The uncertain provenance of the map—or “essentially a sketch”—in the *Handbook* and the non-official nature of the *Times Survey Atlas* make it difficult to conclude that the British had intentionally redelineated the boundary. Remarkably, the *Annual Reports on Tanganyika* from 1924 to 1932 referred to the median line as the lake boundary, but some confusion persisted.⁵⁶ In some cases, a map showing the median line as a boundary was submitted along with the report, but for the reports submitted in 1933 and 1934, the text continued to refer to a median line boundary, while the accompanying maps showed the eastern shoreline.⁵⁷ Yet, from 1935 to 1938 *both* the texts and accompanying maps of the reports indicated an eastern shoreline boundary.⁵⁸ This practice continued in the period of the U.N. Trusteeship when reports from 1948 to 1953 all showed a shoreline boundary.⁵⁹ In 1959, the British Government advised the Government of Tanganyika, then a self-governing territory, that it did not consider that any part of Lake Nyasa fell within the boundaries of Tanganyika. This position was subsequently reaffirmed in a statement by the Prime Minister of the newly independent government in 1962.⁶⁰

The inconsistent positions adopted by both Britain and Germany as reflected in various official and unofficial maps, reports, and publications spanned three periods: 1890 to 1922, prior to the establishment of the League of Nations Mandate; 1922 to 1945, during the Mandate; and after 1945, the period of the U.N. Trusteeship leading up to self-government and independence in 1961. These inconsistencies make it difficult to discern any intention on either side to amend the delimitation of the boundary in the 1890 Agreement. In any event, during the Mandate and Trusteeship, Britain, as Mandatory and Trust Power, could not have changed the boundary unilaterally, for that would have amounted to changing the terms of its Mandate and Trusteeship, its own status and powers, without the authorization of the Council of the League or the U.N. Security Council. In brief, there is no basis for reading into the maps produced on both sides any deliberate intention to change the boundary or line of sphere of influence from that agreed in 1890. The apparent ambiguities, contradictions, and lapses in these maps can be explained by any number of factors, including a lack of knowledge on the part of the cartographers responsible for the maps and mistaken assumptions about the actual location of the boundary.

56. Mayall, *supra* note 3, at 623.

57. See Aleck Che-Mponda, *The Malawi-Tanzania Border and Territorial Dispute, 1968: A Case Study of Boundary and Territorial Imperatives in the New Africa* 109 (1972) (unpublished Ph.D. thesis, Howard University) (on file with author).

58. *Id.*

59. Mayall, *supra* note 3, at 623. After becoming the Mandatory Power, Britain continued to submit the *Annual Reports* to the League of Nations.

60. See Che-Mponda, *supra* note 57, at 163. See also discussion in Section C, *infra*.

B. *Legal Significance and Probative Value of Maps
in Boundary Disputes: An Excursus*

It goes without saying that maps provide an invaluable aid to the interpretation of boundary agreements. Indeed, many boundary descriptions are almost unintelligible unless accompanied by a pictorial representation of the lines they purport to establish. Furthermore, it has been argued that the judicial approach to the assessment of the cogency of such cartographical evidence has undergone a shift over the years.⁶¹ Improvements in cartographic techniques have ensured that modern maps are more reliable representations of boundary delimitations than was ever the case in previous centuries. In several early boundary disputes, courts and tribunals were often presented with maps of doubtful authenticity and origin, which, in many instances, were found to bear inaccurate relationships to the geographical conditions they purported to portray. This is a problem that was, in fact, readily admitted and recognized by the British authorities. In these circumstances, there developed a general presumption in international law that in the event of inconsistencies between the textual descriptions of a boundary and a contemporaneous, or even a subsequent, map, the former prevails over the latter.

The *Island of Palmas Case (United States v. The Netherlands)*⁶² and the *Labrador Boundary case*⁶³ are among the earlier cases in which the relative evidentiary value of maps was examined. In the more recent *Rann of Kutch Arbitration*, the tribunal rejected the maps presented by India with the observation that “[p]ersuasive evidence though the maps showing a conterminous boundary may be at first glance [they are] in the circumstances of the present case not conclusive support for a positive claim to sovereign title on the part of the Kutch and the other Indian States abutting upon the Rann.”⁶⁴

Similarly, and even more to the point, Judge Moreno Quintana observed in the *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*⁶⁵ that there is a well-established rule of international law, exemplified by Article 29 of the Treaty of Versailles, which states that when there is a discrepancy concerning a frontier delimitation between the text of a treaty and a map, it is the text, and not the map, that prevails.⁶⁶

61. For a recent discussion of the evolving international judicial views on the probative value of maps in boundary disputes, see Hyung K. Lee, *Mapping the Law of Legalizing Maps: The Implications of the Emerging Rule on Map Evidence in International Law*, 14 PAC. RIM L. & POL'Y J. 159 (2005).

62. *Island of Palmas Case (U.S. v. Neth.)*, 2 R.I.A.A. 829 (1928).

63. *Re: Labrador Boundary (1927)*, 2 D.L.R. 401 (Can.).

64. *Rann of Kutch Arbitration (India v. Pak.)*, 7 I.L.M. 633, 695 (1968); see also *The Indo-Pakistan Western Boundary Between Indian and Pakistan (India v. Pak.)*, 17 R.I.A.A. 1 (1968) (providing the full text).

65. *Temple of Preah Vihear (Cambodia v. Thai.)*, Judgment, 1962 I.C.J. Rep. 6 (June 15).

66. *Id.* at 70 (Quintana, J., dissenting). On the question of the legal significance of maps in boundary disputes, see generally Sakeus Akweenda, *The Legal Significance of Maps*

The more recent decisions of the ICJ, both concerning boundary disputes involving African states, provide more significant and authoritative guidance. In the *Frontier Dispute Case (Burkina Faso v. Mali)*, the ICJ expressed the view that textual instruments constitute the primary source for determining and interpreting international boundaries.⁶⁷ Included in this category are: formal treaties between states, colonial decrees establishing or reconfiguring colonies, orders by the top colonial administrators and exchange of letters between them, etc.⁶⁸ As we have seen, no treaty or decree relating to the Nyasaland–Tanganyika boundary was signed following the Anglo–German Treaty of 1890 amending the provision in Article I(2) of that treaty regarding the Lake Nyasa section of the boundary. In the *Frontier Dispute Case*, the Court also expressed the view that maps and cartographical instruments only constitute ancillary or corroborative sources of evidence, and that maps cannot of themselves constitute a territorial title with intrinsic legal force.⁶⁹ Rather, the Court held that maps may acquire legal force *only* when they become physical expressions of the will of the state or states concerned, for example, when a map is annexed to an official text of which it forms an integral part. It is instructive to quote the relevant part of the Court’s judgment *in extenso*:

[Maps] merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.⁷⁰

The Court then went on to conclude categorically that, “maps can still have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps.”⁷¹

in *Boundary Questions: A Reappraisal with Particular Emphasis on Namibia*, 60 BRIT. Y.B. INT’L L. 205 (1989).

67. *Frontier Dispute Case (Burk. Faso v. Mali)*, Judgment, 1986 I.C.J. Rep. 554, 602 (Dec. 22).

68. *Id.* at 580–81.

69. *Id.* at 582–83.

70. *Id.* at 582.

71. *Id.* at 583.

A few years later, the Court pointedly recalled its decision and the above dicta approvingly in the *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*.⁷² In all these cases, it is obvious that, from the Court's point of view, the intention of the parties is the one critical factor underlying this question. A map that depicts the location of a boundary differently from an agreed textual instrument cannot of itself be presumed to amount to a unilateral declaration by the state concerned to change a legal or factual situation. Thus, in the *Frontier Dispute Case*, the Court reiterated its earlier view in the *Nuclear Tests Case (New Zealand v. France)*⁷³ that a declaration by one state concerning a legal or factual situation cannot create legal obligations except "when it is the intention of the State making the declaration that it should become bound according to its terms [and] that intention confers on the declaration the character of a legal undertaking."⁷⁴

Another analogous and relevant situation was presented in the *Argentina–Chile Frontier Case*.⁷⁵ One of the issues was whether Argentina was estopped from denying that the boundary should follow a particular course as a result of an erroneous depiction of the frontier on a map for which it was allegedly responsible. This case has been described as "authority for the proposition that the principles of estoppel, admission, and acquiescence are not applicable in the present circumstances."⁷⁶ All these highly authoritative judicial pronouncements only point to one conclusion: cartographic representations cannot override the express and unambiguous provisions of a treaty. This general proposition has been supported by other commentators.⁷⁷

It may be concluded, on the basis of the foregoing examination, that the erroneous depictions on the various colonial and post-colonial maps of the boundary, the inconsistencies in some British and German colonial-era reports, as well as more recent (and current) Tanzanian maps, cannot be held to have "constructively amended" Article I(2) of the Anglo-German Treaty. The territorial limit of the British protectorate of Nyasaland thus extended to the eastern shoreline of Lake Nyasa throughout the period from 1890 to its independence in 1964. On this reading, it is legitimate to conclude that Malawi does, in fact, have sovereignty over the disputed part of the lake as a successor to the former colonial power that exercised sovereignty over Nyasaland. The Agreement of 1890 is binding on both Malawi and Tanzania, in accordance with the rules of contemporary international law governing the succession of states to boundary trea-

72. Kasikili/Sedudu Island Case (Bots. v. Namib.), Judgment, 1999 I.C.J. Rep. 1045 (Dec. 13).

73. Nuclear Test Case (N.Z. v. Fr.), Judgments, 1974 I.C.J. 457, 472 (Dec. 20).

74. Frontier Dispute Case (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554, 573 (Dec. 22) (quoting Nuclear Test Case (N.Z. v. Fr.), Judgments, 1974 I.C.J. 457, 472 (Dec. 20)).

75. Argentine-Chile Frontier Case (Arg. v. Chile), 16 R.I.A.A. 109 (1966).

76. See Akweenda, *supra* note 66, at 249.

77. See generally Lee, *supra* note 61.

ties and the principle of *uti possidetis*, collectively adopted and recognized by African states, as I argue in Part II below.

C. *Prelude to the Dispute: The Post-Independence Period, 1961–1967*

The Government of Tanganyika accepted both before, and immediately after, independence that no part of the lake fell within its jurisdiction. The position that had been expressed early in 1959 by the British Government, as mentioned earlier in Section A(ii) of this Part ('Maps and Reports'), that the borders of Tanganyika remained as they were demarcated in 1890, was subsequently reconfirmed in a statement by the Minister for Lands and Mineral Resources to the Tanganyika Legislative Council in May of the same year. The issue of the proper location of the lake boundary was raised early in the life of the legislature of the self-governing territory. Responding to a question, the minister stated that:

In the Treaty of Peace made with Germany after the 1914-1918 War, the boundaries of Tanganyika followed those described in Article II [sic] of the Anglo-German Agreement of 1890. The description of the southern boundaries of Tanganyika, which include the boundaries of Nyasaland, are as follows: from the point of confluence of the Rovuma River with the Msinje River, the boundary runs westward along the parallel of that point until it reaches Lake Nyasa, thence striking northward it follows the Eastern, Northern and Western shores of Lake Nyasa to the northern bank of the mouth of the River Songwe; it ascends that river to the point of its intersection by the 33rd degree of east longitude.⁷⁸

The Council was informed again by the Tanganyika Attorney General on December 15, 1959 that, following consultations with the British Colonial Office: "[It] was the opinion of the legal advisers to the Secretary of State for the Colonies that the southern boundary of Tanganyika lies along the Eastern, Northern and Western shores of Lake Tanganyika [sic] and that therefore not a part of the Lake lies within the boundaries of Tanganyika."⁷⁹

Despite these unequivocal statements by the colonial authorities in the Tanganyika Legislative Council, some members of the Council persisted with the demand that, as a matter of justice and for the benefit of the people who depended on the lake for their livelihood, the Tanganyika Government should engage with the Nyasaland Government through her Majesty's Government in the United Kingdom with a view to secure a more equitable boundary. The charge was led by one Chief Mhaiki, a member of the Legislative Council from the Songea district adjoining the

78. Mayall, *supra* note 3, at 612 (quoting *Tanganyika Legislative Council, Official Report* (Dar es Salaam, May 26, 1959)).

79. *Id.* (quoting *Tanganyika Legislative Council, Official Report*). It is not clear whether the substitution of Lake Tanganyika for Lake Nyasa was in the original statement by the Attorney-General or was an editorial mistake in the report of the Legislative Council.

lake. Mayall notes that in a statement he made in the Council in October 1960, “Chief Mhaiki alleged that as a result of flooding in 1956, following the construction of the Kariba Dam, Tanganyikan houses and plantations were inundated and the owners had been unable to claim compensation.”⁸⁰ Since the Kariba Dam was constructed on the Zambezi River, and nowhere near Lake Nyasa, this claim was rather improbable and palpably factually incorrect, but seems to have gone unchallenged both in the Legislative Council and, more surprisingly, by at least one scholarly commentator.⁸¹

At any rate, Chief Mhaiki’s motion was not adopted. Not only did the colonial administration repeat its previous official interpretation of the boundary, but the Minister for Lands, Surveys and Water, an *ex officio* member of the Council, conceded that his department was responsible for the publication of the inconsistent maps showing a “median” line as the boundary, which he said was the result of “a mistaken impression that this was the correct and natural boundary in all inland waters.”⁸²

The most telling statement, however, came from Prime Minister Julius Nyerere himself. Although he conceded that there was justice in what had been claimed as the usual practice of dividing shared waters between neighbors, he spoke against the motion in categorical terms:

I must emphasize [again] there is now no doubt at all about this boundary. We know that not a drop of the water of Lake Nyasa belongs to Tanganyika under the terms of the agreement, so that in actual fact we would be asking a neighboring Government [to] change the boundary in favor of Tanganyika. Some people think this is easier in the case of water and it might be much more difficult in the case of land. I don’t know the logic about this.⁸³

Following this, the matter rested until after Tanganyika’s independence on December 9, 1961, when in June 1962, Chief Mhaiki raised the issue again in the National Assembly, which had replaced the Tanganyika Legislative Council, Rashid Kawawa, who had replaced Nyerere as prime minister, reiterated Nyerere’s earlier position in a three-point response. He affirmed that: (i) no part of Lake Nyasa fell within German East Africa; (ii) the boundary had not been altered by Great Britain after the assumption of the League of Nations mandate; and (iii) whatever the disadvantages to Tanganyika, the government could not contemplate negotiations with the authorities of the Central African Federation or Great Britain.⁸⁴ Rather, Prime Minister Kawawa concluded that if such negotia-

80. *Id.* at 614.

81. *Id.* Mayall merely reports the statement but fails to point out that this claim was quite improbable given the location of the Kariba Dam, on the Zambia–Zimbabwe border, relative to the alleged location of the flooding, a distance of well over 1,500 km.

82. *Id.* at 614 (emphasis added).

83. *Id.* at 614–15.

84. See Statement by Prime Minister Kawawa, quoted in MCEWEN, *supra* note 13, at 190. Formally known as the Federation of Rhodesia and Nyasaland, comprising Southern

tions were to take place, they would have to be with the future government of a fully independent Nyasaland.⁸⁵ It has taken fifty years, until the recent resurgence of the dispute, for any kind of negotiations to be undertaken through the ongoing mediation process.

As stated above, the lake boundary was first publicly disputed between the two neighbors from May 1967 to September 1968. While, as has just been seen, questions about Tanzanian sovereignty over this part of the lake had first been raised in 1961 in the Tanganyika Legislative Council, it has correctly been noted that a dispute could not as such have existed until after Malawi took a definite stand against the Tanzanian claim subsequent to its independence in 1964.⁸⁶ But, even then, there were no publicly expressed official positions on the matter by either party until May 1967. The claimant then, as now, was Tanzania or the United Republic of Tanzania, to give it its full official name. Tanzania had been created by the merger on April 16, 1964, of the mainland Republic of Tanganyika and the neighboring archipelago of the Sultanate of Zanzibar, which won independence from British rule on December 10, 1963.⁸⁷

The evolution of the dispute can be summarized in the following sequence of events. In a *Note Verbale* dated January 3, 1967, Tanzania officially notified Malawi of its view that the boundary followed the median line of the lake.⁸⁸ The Government of Malawi responded on January 21, 1967 by simply acknowledging Tanzania's *Note Verbale* and indicating that a further reply would follow. No such reply was ever issued. Subsequently, on May 31, 1967 President Julius Nyerere wrote to his Malawian counterpart, Kamuzu Banda, advising that Tanzania rejected the eastern shoreline boundary.⁸⁹ There was no written response from President Banda, but in

Rhodesia (Zimbabwe), Northern Rhodesia (Zambia), and Nyasaland; established on August 1, 1953 and dissolved on December 31, 1963.

85. Mayall, *supra* note 3, at 615–16 (stating that Chief Mhaiki apparently accepted that under the 1890 Anglo–American Agreement the entire lake area fell within Nyasaland but wanted the Government of the newly independent Tanganyika to take steps to remove the disadvantages suffered by the people of Tanganyika living along the shore of the lake).

86. Brownlie, *supra* note 29, at 258.

87. The Sultanate of Zanzibar was a protectorate of the United Kingdom from 1890 (following the conclusion of the Anglo-German Treaty) until independence in 1963. The merger with Tanganyika followed the overthrow, in a bloody revolution barely a month after independence in January 1964, of the ruler Sultan Jamshid bin Abdullah and the Arab dynasty, which had politically dominated the sultanate. The revolution was led by Abeid Amani Karume, leader of the Afro-Shirazi Party, who also steered the merger with Tanganyika. See Ethan R. Sanders, *Conceiving the Tanganyika-Zanzibar Union in the Midst of the Cold War: Internal and International Factors*, 41 AFR. REV. 35, 35 (2014).

88. See N.V. No. FAC/B.70/8, Jan. 3, 1967 from Ministry of Foreign Affairs of the United Republic of Tanzania to Ministry of External Affairs of the Republic of Malawi, in PARL. DEBATES, NATIONAL ASSEMBLY, OFFICIAL REPORT, July 4, 1967, cols. 1311–12, Dar es Salaam, Tanzania.

89. See Che-Mponda, *supra* note 57, at 175. On the same day, May 31, 1967, President Nyerere for the first time publicly announced this new position in a speech at a school in Iringa, in southwestern Tanzania; see THE NATIONALIST (June 1, 1967), as cited in Che-Mponda, *id.*

the course of an address to the Malawi Parliament on June 27, 1967, he rejected Tanzania's claim as having no justification and reasserted that the lake had always belonged to Malawi.⁹⁰ For the next one and a half years, the two leaders continued to trade accusations of a personal nature that went beyond the original issue of disputed sovereignty of the lake. Meanwhile, Malawi ordered the deployment of patrol boats and Tanzania ordered the building up of communications and small arms before tensions died down and relations improved slightly towards the end of 1968.⁹¹

For the remaining period of President Banda's rule, diplomatic relations between the two countries remained generally cool until 1985, when a gradual thaw eventually led to the establishment of formal diplomatic relations in that year. But, a full blossoming of relations only occurred after Banda's exit from power in 1994.

Until its resurgence in July 2012, improved relations following the replacement of Banda's regime by the first democratically elected government since the country's independence seemed to have ushered in an unprecedented entente between Malawi and Tanzania and appeared to have consigned the dispute to the dustbin of history.

II. SIGNIFICANCE OF BOUNDARIES AND STATE SUCCESSION TO BOUNDARY TREATIES IN POST-COLONIAL AFRICAN STATE PRACTICE

The importance attached by nations to territorial ownership needs little demonstration or emphasis. It may be assumed that as the value of land increases, the need for greater precision in determining the extent of one's territory becomes more apparent, and, when it is comparatively worthless in economic terms, less attention need be paid to the establishment of precise boundaries. Yet, the *Rann of Kutch Arbitration (India/Pakistan)*, referred to earlier, amply demonstrated, in McEwen's words, that in reality "even relatively useless territory may be the subject of, or an adjunct to, international disagreement."⁹²

This was more recently validated by the dispute over a largely unproductive scuffle of land along the Eritrea-Ethiopia border that led to a senseless two-year war starting in May 1998.⁹³ Irrespective of the eco-

90. *Lake Claim Rejected*, MALAWI NEWS, June 30, 1967, at 1.

91. See Che-Mponda, *supra* note 57, at 162, 240; see also Mayall, *supra* note 3, at 619–20. The personal animus between Presidents Banda and Nyerere was no doubt fueled by the former's continuing suspicion that the latter was assisting former Malawian cabinet ministers exiled in Tanzania to overthrow his government or at any rate that the Tanzanian government was doing nothing to rein in their alleged subversive activities.

92. See McEWEN, *supra* note 13, at 4.

93. The war over the disputed area of Badme was fought from May 1998 to June 2000 at the cost of hundreds of dollars and tens of thousands of casualties. Yet the conflict resulted in minor border changes and the recommendations of the U.N. Eritrea–Ethiopia Boundary Commission have been ignored as Ethiopia continues to occupy the disputed territory. See generally Gilbert M. Khadiagala, *Reflections on the Ethiopia-Eritrea Border Conflict*, 23 FLETCHER FOREIGN WORLD AFF. 39 (1999).

conomic worth of the territory in question, international boundaries allocate territory to states and political units, which have an international status and contribute to the identification of national sovereignty and identity. Even neighboring states that enjoy the most amicable relations need to know the location of their common border in order to facilitate the proper application and enforcement of their respective laws. Thus, writing at the turn of the last century, the British statesman Lord Curzon aptly observed that:

[Boundaries] are indeed the razor's edge on which hang suspended the modern issues of war or peace, of life or death to nations . . . Just as the protection of the home is the vital care of the private citizen, so the integrity of her borders is the condition of existence of the State.⁹⁴

Boundaries, as Judge Huber impliedly noted in the *Island of Palmas* case,⁹⁵ mark the limits of state sovereignty and are themselves marked by acceptance by members of the international community. Similarly, Malcolm Shaw has stated that:

The importance of boundaries is that they demarcate State jurisdictions, and thus profoundly influence the regime, nationality, and cultural milieu of the inhabitants of such areas. Accordingly, the notion and existence of boundaries is closely allied with the concept of territorial integrity and plays a symbolic as well as a practical role.⁹⁶

It goes without saying, therefore, that the protection of the inviolability of boundaries has assumed an important role in the international system.⁹⁷ In Africa, as elsewhere, boundaries are “the definitive forms of statehood, the sites of citizenship, and the arenas of development.”⁹⁸ There is a commonly held view that for a boundary to be effective, it has to be accepted by the states concerned. Unrecognized unilateral boundary demarcations are likely to remain without international effect in the absence of acquiescence or recognition. It has thus been argued that the legal force of a boundary may be said to derive either from a treaty, by virtue of acquiescence, or recognition by the parties concerned.⁹⁹ This view was un-

94. GEORGE NATHANIEL CURZON, *FRONTIERS* 7 (1907).

95. See *Island of Palmas Case (U.S. v. Neth.)*, 2 R.I.A.A. 829 (1928).

96. MALCOLM SHAW, *TITLE TO TERRITORY IN AFRICA* 221 (1986).

97. The protection of the inviolability of boundaries ensures respect for the principle of territorial integrity, which, in turn, underpins the decentralized state-oriented character of the modern international system and reflects the sovereign equality of states enshrined as a fundamental principle in Article 2(1) of the U.N. Charter. U.N. Charter art. 2, ¶ 1.

98. Gilbert M. Khadiagala, *Boundaries in Eastern Africa*, 4 J. E. AFR. STUD. 266, 266 (2010).

99. SHAW, *supra* note 96, at 222.

derscored by Judge Bebler in his dissenting opinion in the *Rann of Kutch Arbitration*, where he stated that:

International boundaries have usually emerged by custom. They have become gradually well determined by mutual acquiescence and/or recognition by the neighbors concerned. [Mutual] acquiescence and mutual recognition are therefore the most general origin of existing international boundaries. Very many of them still nowadays have no other legal foundation for their validity. *Ex facto jus exitur*.¹⁰⁰

This view is no doubt true with respect to the older, mainly European, states that comprised the original members of the so-called international community at the time. But, even these have also been the outcomes of treaty arrangements over the centuries, ever since the Treaty of Westphalia in 1648.

In the case of Africa, and in particular the modern post-colonial African states, the origins of boundaries are located overwhelmingly in international treaties rather than in custom. Almost all African borders did not emerge on the basis of prescription over a period of time, but are rather the creation of European colonial treaties and arrangements.

The question of the validity and determination of these boundaries is, therefore, connected with the status in law of the particular treaties specifying such boundaries.¹⁰¹ This is not the place to engage in a detailed discussion of the legal status of boundaries in general. However, suffice it merely to observe that the conclusion that emerges from the various scholarly writings on African boundaries by such diverse writers as Brownlie,¹⁰² Crawford,¹⁰³ McEwen,¹⁰⁴ and Shaw,¹⁰⁵ among others, is that the search for legal solutions to international boundary disputes among African states must start with a factual and legal examination of the international treaties establishing such boundaries.

Two particular questions immediately present themselves in this regard. First, can it be argued that the demise of colonialism and the advent of the principle of self-determination have resulted in a fundamental change of circumstances as regards particular boundary treaties, thus terminating the treaty or enabling a party or a successor to a party to the treaty to terminate it? Second, in view of the dominant “clean slate” or *tabula rasa* doctrine governing the succession of new states to the rights and obligations of predecessor states, do such treaties lapse upon indepen-

100. 7 I.L.M. 698–99 (1968).

101. See SHAW, *supra* note 96, at 222.

102. See generally BROWNLIE, *supra* note 22.

103. See generally CRAWFORD, *supra* note 22.

104. See generally MCEWEN, *supra* note 13.

105. See generally SHAW, *supra* note 96, at 222.

dence?¹⁰⁶ These questions are implicated in the Malawi-Tanzania boundary dispute.

The first question is concerned with the operation of the doctrine of *clausula rebus sic stantibus*, that a party may unilaterally invoke as a ground for terminating or suspending the operation of a treaty the fact that there has been a fundamental change of circumstances from those that existed at the time of the conclusion of the treaty.¹⁰⁷ This question was raised by France in two cases before the Permanent Court of International Justice: *Nationality Decrees in Tunis and Morocco* case¹⁰⁸ and *Free Zones of Upper Savoy and District of Gex*.¹⁰⁹ In both cases, the Court did not proceed to consider the doctrine, because, on the facts, it was found to be unnecessary and irrelevant. What is more important here, however, is to note that the principle of *rebus sic stantibus* is now embodied in Article 62(2) of the Vienna Convention on the Law of Treaties (1969), which provides, in part, that “a fundamental change of circumstances [may] not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a [boundary].”¹¹⁰ This provision was the product of a long debate both within the International Law Commission and later in the 1968 U.N. Conference on the Law of Treaties, which considered the final text of the draft treaty that is now the 1969 Convention. The result is now that a state cannot, for example, invoke the occurrence of independence as a fundamental change of circumstances justifying the abrogation of a pre-independence boundary treaty.

The other question concerns the operation of the doctrine of state succession. This was the subject of copious scholarly and political debates in the 1960s and 1970s, especially in the context of the decolonization process in Africa and Asia. These debates resurfaced briefly in the early 1990s in the wake of the territorial fragmentation in central and Eastern Europe that produced new states following the collapse of the Soviet Union. In another discussion, I have noted that the post-independence practice of

106. See Tiyanjana Maluwa, *Succession to Treaties in Post-Independence Africa: A Retrospective Consideration of Some Theoretical and Practical Issues with Special Reference to Malawi*, 4 AFR. J. INT'L & COMP. L. 791, 800–02 (1992), for a more comprehensive discussion of the practice of African states in this regard.

107. *Clausula rebus sic stantibus* (or simply *rebus sic stantibus*) is variously described in the legal literature as a “legal doctrine” or a “general principle of law.” See Oliver J. Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 AM. J. INT'L L. 895 (1967); György Haraszti, *Treaties and Fundamental Change of Circumstances*, 146 COLLECTED COURSES HAGUE ACAD. INT'L L. 1 (1975); Egon Schwelb, *Fundamental Change of Circumstances: Notes on Article 59 of the Draft Convention on the Law of Treaties as Recommended for Adoption to the United Nations Conference on the Law of Treaties by its Committee of the Whole in 1968*, 29 HEIDELBERG J. INT'L L. 39 (1969).

108. *Nationality Decrees Issued in Tunis and Morocco (Fr. v. Gr. Brit.)*, Advisory Opinion, 1923 P.C.I.J. (Ser. B) No. 4 (Feb. 7).

109. *Free Zones of Upper Savoy and the District of Gex, (Fr. v. Switz.)*, Judgment, 1932 P.C.I.J. (Ser. A/B) No. 46 (June 7).

110. Vienna Convention on the Law of Treaties art. 62, ¶ 2, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980).

African states has been somewhat varied, but that, in any case, there has been a general tendency among most African states to regard themselves as being free to succeed to or opt out of certain treaties as a matter of choice.¹¹¹ The mechanisms employed by the new states have ranged from unilateral declarations acknowledging or rejecting the devolution of pre-independence treaties to the conclusion of inheritance or devolution agreements with the departing colonial power transferring all (or some) treaty rights and obligations to the successor state.¹¹²

On this matter, Malawi opted to follow what is termed the “Nyerere Doctrine” of state succession, so named after the unilateral declaration made in 1961 by the then Prime Minister of newly independent Tanganyika in a letter to the Acting Secretary-General of the United Nations which read, in part:

As regards bilateral treaties validly concluded by the Government of the United Kingdom on behalf of the territory of Tanganyika, or validly applied or extended by the former to the territory of the latter, the Government of Tanganyika is willing to continue to apply within its territory on a basis of reciprocity, the terms of all such treaties for a period of two years from the date of independence (i.e. until 8 December, 1963) unless abrogated or modified by earlier mutual consent. At the expiry of that period, the Government of Tanganyika will regard such of these treaties which could not by application of the rules of customary international law be regarded as otherwise surviving, as having terminated.¹¹³

Malawi’s declaration, made on November 24, 1964, followed verbatim Tanganyika’s, except that it shortened the transitional period by six months, stating in part that:

As regards bilateral treaties validly concluded by the Government of the United Kingdom or the Government of the former Federation of Rhodesia and Nyasaland on behalf of the former Nyasaland Protectorate, or validly applied or extended by either of the said Governments to the territory of the former Nyasaland Protectorate, the Government of Malawi is willing to continue to ap-

111. See Maluwa, *supra* note 106, at 802–07.

112. See Int’l Law Ass’n, *State Succession*, in REPORT OF FIFTY-SECOND CONFERENCE 557 (1966). The classic example of a unilateral declaration as a mechanism for succession to treaties by a newly independent state is the announcement by Malawi, in a letter from Prime Minister H. Kamuzu Banda to the Secretary-General of the United Nations, notifying him of the category of pre-independence treaties signed by the United Kingdom, the erstwhile colonial power, to which it considered itself bound for a stipulated period and under specified conditions. See Letter from H. Kamuzu Banda, *infra* note 114.

113. Earle E. Seaton & Sosthenes T. Maliti, *Treaties and Succession of States and Government in Tanzania 76–98* (1967) (unpublished paper presented at African Conference on International Law and African Problems held in Lagos, Nigeria, Mar. 14–18, 1967) (on file with author). For an extended discussion of Tanzania’s approach to treaty succession, see Earle E. Seaton & Sosthenes T. Maliti, *TANZANIA TREATY PRACTICE* (1973).

ply within its territory on a basis of reciprocity, the terms of all such treaties for a period of eighteen months from the date of independence (i.e. until 6 January, 1966) unless abrogated or modified by earlier mutual consent. At the expiry of that period, the Government of Malawi will regard such of these treaties which could not by application of the rules of customary international law be regarded as otherwise surviving, as having terminated.¹¹⁴

In essence this doctrine is really no more than a vague or general recognition that certain unspecified treaties do survive as a result of the application of the rules of customary law, coupled with an offer of a grace period in which treaties remain in force on an interim basis without prejudice to the declarant's legal position with a requirement of reciprocity.¹¹⁵

The view that a new state starts life with a clean slate and is thus not bound to succeed to pre-independence treaties except those establishing boundaries finds support in the Vienna Convention on Succession of States in Respect of Treaties (1978).¹¹⁶ Article 16 provides that a newly independent state is not bound to maintain in force or to become a party to, any treaty by reason only of the fact that at the date of succession of states the treaty was in force in respect of the territory to which the succession of states relates. However, Article 11 makes an exception for boundary regimes by providing that, "a succession of states does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary."

In adopting this position, the Convention was, in effect, both accepting the clean-slate theory of state succession over the competing absolute devolution theory and acknowledging boundary treaties as an exception to this general rule of non-devolution. In so doing, the Convention has followed the view propounded earlier by most writers, including those who generally advocated the clean-slate theory, namely that boundary treaties devolve upon successor states despite a change of sovereignty.¹¹⁷ The rationale behind this view is not hard to find: it is predicated on the need to maintain the stability and continuity of boundaries as an essential condi-

114. Letter from H. Kamuzu Banda, Prime Minister and Minister of External Affairs, to The Secretary General of the United Nations, *reprinted in* Int'l L. Ass'n, *THE EFFECT OF INDEPENDENCE ON TREATIES* 388 (1965).

115. In his excellent discussion of the subject, Makonnen characterizes the "Nyerere Doctrine" and its variants as together constituting "the eastern African optional doctrine of State succession." YILMA MAKONNEN, *INTERNATIONAL LAW AND THE NEW STATES OF AFRICA* 197-259 (1983); *see also* YILMA MAKONNEN, *THE NYERERE DOCTRINE OF STATE SUCCESSION AND THE NEW STATES OF EAST AFRICA* (1984).

116. *See* Vienna Convention on Succession of States in respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3 (entered into force Nov. 6, 1996).

117. *See, e.g.*, ARNOLD D. MCNAIR, *THE LAW OF TREATIES*, 656 (1961); A. P. Lester, *State Succession to Treaties in the Commonwealth*, 12 INT'L & COMP. L.Q. 475, 488 (1963); D. P. O'Connell, *Independence and Succession to Treaties*, 38 BRIT. Y.B. INT'L L. 84 (1962). For one commentator's view on African practice, *see* N. S. Rembe, *The Vienna Convention on State Succession in Respect of Treaties: An African Perspective on its Applicability and Limitation*, 17 COMP. & INT'L L. J. S. AFR. 131, 140-41 (1984).

tion for the coexistence of the various sovereign independent polities that comprise the international community. This essential condition, and basic reality, is encapsulated in the recognized principle of respect for the territorial integrity of states, even in circumstances where the origins of the borders may lie in the arbitrary acts and decisions of colonial administrators and cartographers of a past colonial era.¹¹⁸ And practice reveals that, in general, states have accepted the principle of succession to boundary settlements embodied in treaties. Probably the most famous expression of this view, in the African context, is the Resolution on Border Disputes Among African States adopted by the Organization of African Unity (OAU) at its first ordinary summit in Cairo, Egypt, in July 1964.¹¹⁹ A brief discussion of this historic resolution, whose adoption remains central to the question of the legitimacy of African boundaries in the post-independence era, would be in order.

A. *The OAU's Resolution Concerning Boundaries:
The Principle of Uti Possidetis Juris*

Prior to 1960, most of the political parties or movements fighting for the independence of the various African colonies advocated for an eventual alteration of the existing colonial boundaries to accord more closely with the wishes of local inhabitants. Indeed, “[t]he All-African Peoples Conference, held under the stewardship of Kwame Nkrumah in Accra, Ghana, in December 1958, adopted a resolution calling for an early abolition and alteration of existing boundaries,” as a preliminary step towards the declared objective of creating a united Africa.¹²⁰ But, this resolution was passed at a time when only a handful of African states had obtained independence and a modification of this attitude was soon to be displayed at the first international conference of independent African states, which led to the establishment of the OAU, held in Addis Ababa, Ethiopia, in May 1963. Here, “[t]he vast majority of delegates took the view that whatever might be the moral and historical argument for a readjustment of national boundaries, any practical attempts to reshape them might well prove to be disastrous.”¹²¹ This sentiment was quite apparent in the various delegates’ speeches. Thus, the President of the Malagasy Republic noted:

118. SHAW, *supra* note 96, at 233–34.

119. Org. of African Unity [OAU], *Border Disputes Among African States*, AHG/Res. 16(I) (July 17–21, 1964), <http://www.peaceau.org/uploads/ahg-res-16-i-en.pdf>. Cf. Org. of African Unity [OAU], *Resolution on Peace and Security in Africa Through Reservation by Somalia Negotiated Settlement of Border Conflicts*, CM/Res. 1069 (XLIV) (July 21–26, 1986), <http://www.peaceau.org/uploads/cm-res-1069-xliv-e.pdf> (adopted over two decades later and enshrining the principle of peaceful settlement of border conflicts between states through negotiations).

120. McEWEN, *supra* note 13, at 23.

121. *Id.* at 24. See also Modibo Keita, Address delivered at the Summit Conference of Independent African States CIAS/GEN/INF/33, in 1 PROCEEDINGS OF THE SUMMIT CONFERENCE OF INDEPENDENT AFRICAN STATES, Sec. 2, (May 1963) [hereinafter Modibo Keita Address].

[I] am not unaware that, when our colonizers set boundaries between territories, they too often ignored the frontiers of race, language and ethnicities. [It] is no longer possible, nor desirable, to modify the boundaries of nations, on the pretext of racial, religious, or linguistic criteria. [Indeed] should we take race, religion or language as criteria for setting our boundaries, a few States in Africa would be blotted out from the map.¹²²

A more poignant note was struck by the President of Mali, Modibo Keita, who stated:

[We] must take Africa as it is, and we must renounce any territorial claims, if we do not wish to introduce what we might call black imperialism in Africa. [African] unity demands of each one of us complete respect for the legacy that we have received from the colonial system, that is to say: maintenance of the present frontiers of our respective States. [If] we desire that our nations should be ethnic, speaking the same language and having the same psychology, then we shall find no single veritable nation in Africa.¹²³

The near consensus that arose from these debates was subsequently given expression in the resolution adopted by the Cairo summit referred to above. After noting that “the borders of African States, at independence, constituted a tangible reality,” the Assembly of Heads of State and Government went on solemnly to “[declare] that all Member States pledge themselves to respect the borders existing on their achievement of national independence.”¹²⁴ It is apt to note here that it was, in fact, President Nyerere who first proposed and introduced the resolution to retain the colonial boundaries at the Cairo summit.¹²⁵ The adoption of the resolution was a reaffirmation of the principle already enshrined in Article III of the Charter of the OAU, adopted in Addis Ababa on May 25, 1963, by which the Member States affirmed and declared their adherence to “[r]espect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence.”¹²⁶ This principle has been replicated more clearly in the Constitutive Act of the African Union, which superseded the OAU Charter when it entered into force on May 26, 2001. Article 4(b) provides for, as one of the AU’s foundational principles, “respect of borders existing on achievement of independence.”¹²⁷ This provision

122. See Modibo Keita Address, *supra* note 121.

123. *Id.*

124. Org. of African Unity [OAU], *Border Disputes Among African States*, AHG/Res. 16(I), operative ¶ 2 (July 17–21, 1964), <http://www.peaceau.org/uploads/ahg-res-16-i-en.pdf>.

125. See GODFREY MWAKIKAGILE, *NYERERE AND AFRICA: END OF AN ERA* 355 (2007).

126. Org. of African Unity [OAU] Charter art. 3, ¶ 2, http://www.au.int/en/sites/default/files/OAU_Charter_1963_0.pdf.

127. African Union [AU], *Constitutive Act of the African Union*, art. 4(b), http://www.au.int/en/sites/default/files/Constitutive_Act_en_0.htm.

establishes a binding treaty obligation upon Malawi and Tanzania, as they are both parties to the Act.

The colonial partition of Africa following the Berlin Conference introduced the Westphalian model of territoriality and statehood across the continent. Largely eviscerating the colonial project, this model replaced and reconfigured pre-existing African centralized states, kingdoms, and stateless communities. One of the enduring legacies of colonialism was that it left the African continent with borders that were drawn by European powers, based on their limited and, in some cases, non-existent knowledge of the precolonial history, ethnicity, and geography of Africa. The project of nation-building in the post-colonial period, as evident in the statements quoted above, did not seek to challenge the colonially created territorial entities. Rather, the core of this enterprise has entailed the consolidation and domestication of the borders inherited from colonialism, a process that was formally validated by the leaders of the newly independent African states at the Cairo summit in 1964.¹²⁸ This may seem utterly unconscionable to today's critics of the imperial international law that was employed to justify the dismemberment of African communities in the service of colonialism.¹²⁹ But, the nationalists and political leaders who both led the fight for independence and championed the idea of a united Africa had to deal with the undesirable but "tangible reality" of the inherited colonial boundaries and accept that jettisoning these boundaries in favor of redrawing the political map and territorial division of the continent was not a viable proposition.

Mutua has offered one of the most powerful critiques of present-day African borders. He questions the legitimacy of the post-colonial African state and attacks the imperial cartography that delineated the borders that produced these states.¹³⁰ He also questions the logic and sincerity of the OAU Cairo summit decision to keep colonial boundaries as they stood at independence.¹³¹ Mutua argues that these inherited borders are an imposed identity that bequeathed to Africa a legacy of false statehood and contrived citizenry, and advocates for the abandonment of the principle of *uti possidetis*.¹³² Yet, Mutua's own proposal to redraw the map of Africa to reduce the current fifty-odd continental states to a mere thirteen is itself open to criticism. For the boundaries of his proposed states are themselves drawn on the basis of criteria that do not entirely escape the charge of

128. See Modibo Keita Address, *supra* note 121.

129. See generally Makau Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

130. *Id.* at 1116, 1142–50.

131. *Id.* at 1164.

132. *Id.* at 1142–47, 1175. Cf. MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* (1996). He posits a different critique of the African postcolonial state. One of his central arguments is that the problem is not the post-colonial borders, but the colonial administrative legacy within those borders that is impeding the modern African state. He focuses on the obstacles to democracy posed by the structure of the postcolonial state.

arbitrariness directed at colonial-era boundary-making. In some respects, Mutua's redrawn map of Africa similarly cuts across demography, topography, and ethnicity in a manner that would replicate, rather than eliminate, the legacy of colonial borders.¹³³ But this is a minor quibble, and his proposed redrawn map could be read as a parody of colonial cartography. There can be no doubt that Mutua's critique of the (territorial) identity of the post-colonial African state has injected a refreshing and original tone into the discourse on African borders and boundary studies, as part of the wider debates about post-coloniality and critical approaches to international law.

The OAU resolution of 1964 is sometimes interpreted as, indeed equated with, the principle of *uti possidetis*, which is derived from Roman law. Under Roman law, *uti possidetis* was one of the Praetorian possessory interdicts; in essence, a prohibition by the Praetor against interference with the possession of immovable property, with the purpose of deciding which of the rival claimants should be placed in possession, and thereby occupy the favored position of defendant in the *actio vindicatio*.¹³⁴ This Roman law principle was analogically imported into international law by Latin American states in the nineteenth century, for the purpose of regulating the boundary cases that arose among the newly independent states following the collapse of the Spanish and Portuguese colonial empires in South and Central America.¹³⁵

The objective behind the application of the principle to the new states was to transform previously internal administrative provincial boundaries (in the case of the Spanish colonies) as they stood at the time of independence into stable international boundaries. The contemporary usage of the principle—often loosely translated as “keep what you have”—in modern international law is quite different from its original Roman law context. For, whereas in Roman law *uti possidetis* was the award of interim possession, as a preliminary step to the establishment of ownership, in its modern formulation, it is understood as an attempt at consolidating and affirming state sovereignty over inherited and existing territorial boundaries. At least this is the sense in which the OAU resolution is generally interpreted. In fact, it is for this reason, and with this meaning in mind, that *uti possidetis* has come to be regarded by some commentators as an expression of a rule of regional international law among African states.¹³⁶

133. Mutua, *supra* note 129, at 1117 (proposing a redrawn African map with thirteen reconfigured and renamed states as follows: Algeria, Angola, Benin, Congo, Egypt, Ethiopia, Ghana, Kusini, Libya, Mali, Nubia, Sahara, and Somalia).

134. See H.F. JOLOWICZ & BARRY NICHOLAS, A HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 273–74 (1952); BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 63, 100, 125 (1962). See also Enver Hasani, *International Law under Fire: Uti Possidetis from Rome to Kosovo*, 27 FLETCHER FOREIGN WORLD AFF. 85 (2003).

135. Antonio T. Serra, *History of the Law of Nations, Regional Developments: Latin America*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, VOL. 7, 231, 234 (Rudolf Bernhardt ed., 1984).

136. See, e.g., GINO J. NALDI, THE ORGANIZATION OF AFRICAN UNITY: AN ANALYSIS OF ITS ROLE 9–11 (1989). It is also instructive to note that the principle of *uti possidetis* was

But, of course, whether one accepts or rejects this notion of *uti possidetis*, or even its alleged status as a principle of international law, the reality is that boundary disputes have not ceased to exist or arise between African states. What is clear in all these disputes is that, by and large, the issues turn not so much on a rejection of the general principles of international law discussed in this essay, but on the factual interpretation or construction of the actual boundary treaties in question. In some cases, there may well be two or more treaties or agreements that are regarded by the different parties concerned as awarding the same territory to the opposing claimants. In other cases, the problem may arise as a result of an apparent conflict or uncertainty in the interpretation of a single boundary treaty or agreement. The crux of the present dispute, however, follows neither of these scenarios. Rather, it turns (1) on the claim by one party that the location of the boundary as stipulated in the critical treaty—whose sole relevance to the dispute is not disputed—is not in conformity with established international norms and is, for that reason, unfair, inequitable, and unjust, and (2) a rejection of that position by the other party and the argument that, on the contrary, the departure from the international norm in Article I(2) of the Agreement of 1890 is a permissible treaty variation, and that the adoption of *uti possidetis* as a treaty obligation in the AU Constitutive Act enjoins both parties to respect the inherited boundary.

B. *The Determination of Boundaries in Contiguous Lakes and Sovereignty over Islands*

The question of where the exact boundary line is to be located in the case of contiguous lakes that separate the territories of two or more states is closely linked to two other pertinent issues in international law. The first relates to the determination of the rights of the riparian states in respect of such lakes. The second concerns the attribution of sovereignty over islands located in the lake. This question arises here in relation to three small uninhabited islands located close to the Tanzanian shore: Lundu, Papia, and Ngkuko (or Ngkoko), the largest of which is only 70 acres.¹³⁷ In reality both questions are connected to the larger question of the right to the management and exploitation or utilization of resources located in or under shared international watercourses (rivers, lakes, and land-locked

discussed by the International Court of Justice in the *Frontier Dispute Case (Burkina Faso v. Mali)* where the Court had to delimit the common frontier between Burkina Faso and Mali. Both parties specifically requested the Court to take into account the principle of the inviolability of colonial boundaries enshrined in the OAU resolution quoted above; the Court recognized the importance of the principle not only to the parties, but to African states as a whole, and declared that the principle was now one of universal application. *Frontier Dispute Case (Burk. Faso v. Mali)*, 1986 I.C.J. Rep. 554 at 565. *But see* Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 600 (1996) (providing a different view of *uti possidetis*, stating: “[It] is not a norm of *jus cogens*, and precludes states neither from altering their borders nor even from creating new states by mutual consent”).

137. See HIRAN JAYEWARDENE, *THE REGIME OF ISLANDS IN INTERNATIONAL LAW* 248–49 (1990); *see also* McEWEN, *supra* note 13, at 197–99.

seas). Under general international law, the determination of contiguous lake or river boundaries is dependent upon the characterization of the particular lake or river as navigable or non-navigable. This characterization determines, in turn, the choice of the *thalweg*, or the line defining the deepest points along the length of a waterway, or the *medium filum aquae* as the line of delimitation down the lake or river. However, states are at liberty to depart from this general presumption by providing for specific arrangements relating to the location of a lake or river boundary. A treaty may provide, for example, that the boundary between two adjacent riparian states should be placed along one of the lake shores or river banks, thereby attributing exclusive territorial sovereignty over the entire lake or river to one of the two states.¹³⁸ Or a treaty may provide that sovereignty over an island located in a boundary lake or river should be awarded to one state or the other even while adopting the *thalweg* or median line as the boundary.¹³⁹ Brownlie cites Oppenheim's view on this point in his discussion of the earlier iteration of the current boundary dispute finding that:

There is a great deal of authority and practice in support of the view that the boundary line runs through the middle of boundary lakes and land-locked seas unless a treaty provides otherwise or a lake has a definite "thalweg" or mid-channel. The middle line has considerations of equity, stability and simplicity in its favor.¹⁴⁰

Some legal scholars' writing more recently has supported this view, but with some qualification. Thus, for example, Vinogradov and Wouters note that:

The rules governing the delimitation (and demarcation) of the boundaries of an international lake are not universally accepted. Although State practice has varied on this issue, the prevailing view is that all States bordering an international lake are entitled to a share of it In the case of contiguous lakes, the respective parts are generally determined through the use of a median line, but there have been significant exceptions to this rule

[In] summary, the delimitation of international lakes is not at present governed by an established set of rules, *nor are there uni-*

138. *E.g.*, The French-Liberian Agreement of Jan. 13, 1911 relating to the Makona River on the Guinea-Liberia boundary, in International Boundary Study No. 131 (Guinea-Liberia Boundary), Off. Geographer (1972).

139. *See e.g.*, Treaty of the Rio de la Plata and its Maritime Limit art. I(A), Arg.-Uru., Apr. 7, 1961, 635 U.N.T.S. 98. *See also* discussion in Part I(A) regarding the incorporation of Likoma and Chizumulu Islands into the Nyasaland Protectorate under various United Kingdom-Portugal treaties, *supra* notes 38-41.

140. Brownlie, *supra* note 29, at 271 (citing 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 533 (H. Lauterpacht ed., 8th ed., 1963)).

*versally accepted customary norms based on uniform State practice.*¹⁴¹

Lee also advances the view that shared ownership of an international lake is not automatic unless specified by a treaty, as the legal regimes of lakes are based on specific agreements.¹⁴² This contrasts with the position of Oppenheim and Brownlie, as indicated above.

Because the *thalweg* is a term used to refer to the main navigable channel, it has more relevance in navigable boundary rivers where the main navigable channel may not coincide with the median line. The *thalweg* is unlikely to be an issue in large lakes, such as Lake Malawi, with several navigation channels and no definite mid-channel.¹⁴³ The presumption in international law that the international boundary in contiguous lakes follows the median line was seemingly reflected in, or coincided with, some sections of popular opinion in Tanzania in the period immediately preceding and following the attainment of independence. Chief Mhaiki's repeated motions in the Tanganyika Legislative Council in October 1960 and in the National Assembly in June 1962 reflected a popular sentiment, at least among people in the Songea district adjoining the lake, which McEwen has captured in the imaginary and somewhat rhetorical question: "Why, it is asked, were other great African lakes, such as Victoria, Tanganyika, Albert, and Edward, divided, more or less equally, between neighboring states, while Nyasa alone forms the exception?"¹⁴⁴

International boundaries that follow the shores of lakes are rare.¹⁴⁵ One of the most obvious problems created by shoreline boundaries, as was noted by an early writer on this subject decades ago, is that they leave the other riparian state with no control over its water frontage and no right to build wharves or breakwater in the lake.¹⁴⁶ Another obvious problem is the difficulty that may be experienced in identifying the precise location of the boundary. In tidal lakes the shore is commonly understood as the land lying between the lines of high and low water. By their nature, even non-tidal lakes usually experience periodic rise and fall of water levels, which

141. Sergi Vinogradov & Patricia Wouters, *The Caspian Sea: Current Legal Problems*, 55 HEIDELBERG J. INT'L L. 604, 615 (1995).

142. Yusin Lee, *Towards a New International Regime for the Caspian Sea*, 52 PROBS. POST-COMMUNISM 37, 39 (2005).

143. Most of the literature tends to treat "thalweg" and "mid-channel" as synonymous terms. But as was shown in the *Case Concerning Kasikili/Sedudu Island (Bots. v Namib.)*, which concerned a disputed boundary also governed by the same Anglo-German Treaty of 1890, there was interpretive ambiguity as to whether the terms specified in Article III(2), "centre of the main channel" in the English version and "thalweg" in the German, meant the same thing. See *Case Concerning Kasikili/Sedudu Island (Bots. v Namib.)*, Judgment, 1999, I.C.J. Rep. 4, ¶ 15 (Dec. 13) (Weeramantry, J., dissenting).

144. McEWEN, *supra* note 13, at 200.

145. *Id.* at 201; S. WHITEMORE BOGGS, INTERNATIONAL BOUNDARIES: A STUDY OF BOUNDARY FUNCTIONS AND PROBLEMS 177 & n.3 (1940).

146. STEPHEN B. JONES, BOUNDARY MAKING: A HANDBOOK FOR STATESMEN, TREATY EDITORS, AND BOUNDARY COMMISSIONERS 141 (1945).

necessarily affect the precise location of the water's edge. Thus, in boundary lakes, the shifting shoreline will likely produce unequal territorial effects on the riparian states, depending on the slope and the geological formation of the respective banks.¹⁴⁷ This could be of considerable significance where islands are located in shoal waters and in close proximity to the shore, as is the case with the three islands mentioned above: Lundu, Papia, and Ngkuko.

It has been noted that where a lake shore forms an international boundary, one state has sovereignty over the waters of the lake to the exclusion of the other. This seems logical enough.¹⁴⁸ Consequently, the state having sovereignty over the waters of the lake will also have sovereignty over the islands in the lake, as they lie on its side of the boundary, unless otherwise provided by a boundary settlement. This would appear to be the situation created by the 1890 Agreement since, as already noted, the boundary established incorporated the three islands into the Nyasaland protectorate, despite the fact that they lie at distances ranging from only one-quarter to one-and-a-half miles of the Tanzanian shore.¹⁴⁹

There is some uncertainty about the history surrounding their presumed attribution to the British sphere of influence in the 1890 Agreement and their current status. McEwen has suggested that, because of their small size, these islands were probably unknown to the British and German authorities when the Anglo-German Treaty was negotiated and that, in any case, a strict interpretation of the treaty would suggest that they did not fall within the German sphere of influence and have thus never been part of Tanzania.¹⁵⁰ On the other hand, Brownlie has asserted that “[t]here was, for example, German control and administration of the small islands: Lundu, Papia and Ngkoyo,”¹⁵¹ but does not cite any authoritative historical evidence for this view.

Probably because of their size, the islands do not appear to have ever been inhabited or occupied for any significant period of time, except possibly for occasional use as resting stations by local fishermen. There are suggestions that, in this context, historically Tanzania appears to have had closer links with the islands because of their proximity, and that Malawi may have acquiesced in the Tanzanian claim since it has not formally claimed the islands nor disputed Tanzania's claim.¹⁵² But, the argument that Malawi may have acquiesced in Tanzania's claim by not *formally* claiming the islands for itself seems odd. From its point of view, Malawi has no need to formally claim sovereignty over islands that are, in terms of the 1890 Agreement, already part of its territory.

147. *Id.* at 138; McEWEN, *supra* note 13, at 100.

148. *See* JAYEWARDENE, *supra* note 137.

149. *Id.*

150. *See* McEWEN, *supra* note 13, at 197–99.

151. *See* BROWNLIE, *supra* note 22, at 966.

152. *See* McEWEN, *supra* note 13, at 198.

In any case, assuming the shoreline boundary were to remain unchanged, but sovereignty over the islands were granted to Tanzania through negotiations or by arbitral or judicial settlement, the islands would become Tanzanian enclaves within Malawian territorial waters. On the other hand, if the boundary were changed to the median line in accordance with Tanzania's claim while sovereignty over the islands remained unchanged, this would result in an enclave solution in favor of Malawi, in much the same way that Likoma and Chizumulu Islands are Malawian territories within Mozambican waters. Considerations of equity, not presumptions of acquiescence or estoppel, would favor the former option, if only because of the historically closer association of the islands with Tanzania and their relationship to local communities.

Another suggestion is that the British and German colonizers, boundary delimiters, and map makers may not have been aware of the existence of these small islands at the time of the conclusion of the 1890 Agreement confirms two commonly held views prevalent during the era of colonization of Africa.¹⁵³ The first was the idea of Africa as a dark, unknown continent whose territory was fair game for European colonization even when the colonizer had limited or no knowledge of the extent of the territory being colonized. The second was the denial of agency to the native Africans and the non-recognition of their title to the territories being acquired under the prevailing imperial international law.¹⁵⁴ These two ideas underpinned the dubious European claim that, for the most part, the African territories were *terra nullius*, and that use and occupation by the local African populations did not create a legal title and thus presented no obstacle to their acquisition by European states, as discussed in Part I(A) above.¹⁵⁵ In this colonial project, what mattered was the subjective intention by a colonizing European state to own the territory and exercise sovereignty over it in total disregard of the presence of African people on the territory. To the extent that the native Africans belonged to a state, it was the new colonial entity constituted by the European state on the Westphalian model. This process, which essentially denied African peoples their autonomy and dignity, was given legal expression through the treaties establishing broadly defined spheres of influence, such as the 1890 Agreement, or boundary treaties that more definitively marked out the extent of the newly acquired territories. In his insightful commentary, apposite to this discussion, Gathii has argued that, in cases involving territorial disputes between African states, Africa has been treated with geographical Hegelianism, as an unhistorical and unconscious geographical entity that

153. James Thuo Gathii, *Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, 15 LEIDEN J. INT'L L. 581, 583–84, 595 (2002) (quoting Patrick Brantlinger, *Victorians and Africans: Genealogy of the Myth of the Dark Continent*, in P. BRANTLINGER, *RULE OF DARKNESS: BRITISH LITERATURE AND IMPERIALISM, 1830–1914*, at 173 (1988)).

154. See Fisch, *supra* note 20, at 364–69.

155. *Id.*

the colonizing states opened up to commerce and civilization, denying the African communities the right to assert title to their own territories.¹⁵⁶

The confirmation of the *uti possidetis* principle in both the 1964 OAU Cairo Declaration and Article 4(b) of the AU Constitutive Act, as well as its acceptance by the ICJ in such cases as the *Frontier Dispute Case (Burkina Faso v Mali)* and the *Case Concerning Kasikili/Sedudu Island (Botswana v Namibia)*, is predicated on this notion of geographical Hegelianism. In both of these cases, the Court followed the logic of the principle of *uti possidetis* by refusing to alter the boundaries as they were established in the relevant colonial-era treaties, although it did not explicitly rely on the principle as grounds for the decisions.¹⁵⁷

While not bound by the doctrine of judicial precedent, it is inconceivable that, if the current dispute came before it, the ICJ would opt not to follow its approach in these previous cases. On the other hand, how the Court would address the matter if Tanzania's claim over the three islands formed a core part of its case can only be a matter for conjecture. Unlike the Kasikili–Sedudu Island situation, aspects of which are discussed below, Tanzania's case would not be based on the claim of continuous, or even periodic, use and occupation of the islands by any community on its side. The issue here would not be because there is a lack of settled occupation, evidenced by such indicia as settled housing or ordered agriculture, in a manner “known to Western jurisprudence and tradition,” to borrow from Judge Weeramantry's dictum in the *Kasikili–Sedudu Island* case,¹⁵⁸ but rather it would be the difficulty Tanzania would have in overcoming Malawi's superior legal claim, based on a treaty provision that enclosed the apparently unknown islands within its territory. For it was long ago accepted in the *Legal Status of Eastern Greenland Case (Denmark v Norway)* that even slender proof of occupation may satisfy a court of the exercise of sovereign rights in cases of thinly populated or unsettled territory, but only where the other party cannot make out a superior claim.¹⁵⁹ Moreover, even if it is the case that Malawi has never occupied the islands nor shown effective control of them—the test famously enunciated by Arbitrator Huber in the *Island of Palmas Case (United States v. The Netherlands)*—it is also acknowledged that the requirement of effective control applies differently for inhabited as opposed to uninhabited territories, and between accessible and inaccessible regions. As Arbitrator Huber stated, in part, “apart from the consideration that the manifestations of sover-

156. Gathii, *supra* note 153, at 581, 582, 606, 613, 615–20.

157. In another case, *Frontier Dispute Case (Benin v. Niger)*, the Court applied the principle because in their Special Agreement referring the dispute to the Court, both parties had stated that “they are in agreement on the relevance of the principle of *uti possidetis juris* for the purposes of determining their common border.” *Frontier Dispute Case (Benin v. Niger)*, Judgment, 2005 I.C.J. Rep. 90 ¶ 23 (July 2005).

158. *Kasikili/Sedudu Island Case (Bots. v. Namib.)*, Judgment, 1999 I.C.J. Rep. 1045, ¶ 32 (Dec. 13).

159. *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

eighty over a small and distant island . . . cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period.”¹⁶⁰

The absence of effective control or occupation of the three islands by Malawi is thus of no consequence and does not diminish Malawi’s legal title to them.

C. *Foibles, Failures, and Lapses in Colonial Boundary Demarcation*

Many countries are characterized by natural features such as rivers, lakes, or the watershed of a mountain range as their international boundaries. The reason is obvious: as boundaries, such natural features are often regarded as self-demarcating, and, even if imperfectly explored and mapped, they appear to offer themselves as physical landmarks the geographical identity of which is beyond doubt.¹⁶¹ However, it has been cautioned that the adoption of natural boundaries may be ill advised unless the delimitation instrument makes it clear which feature is intended and precisely where in that feature the line must be drawn.¹⁶² Moreover, as discussed above, borders defined by geographical features, such as rivers and watersheds, or lake shores, are susceptible to shifting due to fluctuating water levels.¹⁶³

The Lake Malawi boundary dispute is in part a reflection of the errors, ambiguities, and uncertainties that attended colonial boundary-making that supposedly followed self-demarcating physical features. In this respect, the work of the Mixed Commission of 1898 comes to mind. Of this, Donaldson has commented that the boundary commission [of 1898] delineating this colonial border placed emphasis on the use of natural features, with the exception of a 29-mile section out of the 250-mile boundary. He further observed that the predominance of natural features allowed the commission to use only twenty-three pillars as markers along this entire boundary.¹⁶⁴ Okumu, following Donaldson, suggested that colonial-era boundary delimitation preferred natural features, such as streams and rivers, simply because they required fewer boundary pillars.¹⁶⁵ He has argued that the choice of natural features also made the

160. See *Island of Palmas Case (U.S. v. Neth.)*, 2 R.I.A.A. 867 (1928).

161. See A. O. CUKWURAH, *THE SETTLEMENT OF BOUNDARY DISPUTES IN INTERNATIONAL LAW* 19–22 (1967) (discussing boundaries in mountain ranges, swamps, watercourses, etc.).

162. See A. C. McEwen, *The Demarcation and Maintenance of International Boundaries* 2 (2002) (paper prepared for the Canadian Commissioner of the Canada-United States International Boundary Commission and presented at the July 8–10, 2002 Training Workshop on the Demarcation and Maintenance of International Boundaries) (on file at the University of Durham); see also BROWNLIE, *supra* note 22, at 4.

163. See Yoon, *supra* note 31, at 78.

164. John W. Donaldson, *Pillars and Perspective: Demarcation of the Belgian Congo-Northern Rhodesia Boundary*, 34 *J. HIST. GEOGRAPHY* 471, 485 (2008).

165. Wafula Okumu, *Resources and Border Disputes in Eastern Africa*, 4 *J. E. AFR. STUD.* 279, 286 (2010).

work of boundary demarcation commissions easier and speedier. In his reading, expediency and cost were thus critical factors in such demarcations.¹⁶⁶ It is widely accepted that, for the most part, demarcation of African colonial territories remained an uncompleted task. A further challenge was the fact that, as various writers have noted, boundaries had to be delimited in the absence of any real knowledge of what existed on the ground: in most cases borders were drawn by government representatives based in metropolitan capitals with little or no geographical knowledge of the territories concerned.¹⁶⁷ Moreover, colonial officials might have also been reluctant to undertake complete demarcation in remote and inaccessible areas in which boundary pillars often stood the risk of destruction by local populations. Khadiagala has aptly summarized the context of colonial boundary-making.¹⁶⁸ Although the following observations concern colonial patterns of boundary-making in East Africa, they have a wider relevance for the rest of Africa. According to Khadiagala:

This process followed a sequence whereby boundaries were defined on maps, delimited by treaties, and demarcated on the ground by colonial officials. Most of these boundaries were delimited between 1884 and 1910, and starting in the 1920s, colonial powers made attempts at demarcation, a process that has not ended

After the juridical delimitation, the colonial powers confronted the challenge of demarcation on the ground and the establishment of administrative structures that furnished meaning to these acquisitions.¹⁶⁹

An earlier commentary by Kapil on the potential for disputes over Africa's inherited colonial boundaries also bears reproducing here:

It is obvious that in the absence of demarcation and, more important, of administration, any boundary will remain simply a mute symbol of legal title on maps and documents, possessing no relevance to the life of the zone it bisects Because of the time gap between formal delimitation of jurisdictional limits and the taking effect of political-administrative consequences of this jurisdiction, most of the inherited boundaries of Africa can be said to have

166. *Id.*

167. *See generally* Adekunle Ajala, *The Nature of African Boundaries*, 18 AFR. SPEC. TRUM 177, 180 (1983); *see also* Peter Collier, *The Colonial Survey Committee and Mapping of Africa* (2006) (paper presented at the International Symposium on "Old-New Worlds": The History of Colonial Cartography, 1750–1950, at Utrecht University, The Netherlands, Aug. 21–23, 2006), http://www.icahistcarto.org/PDF/Collier_Peter_-_The_Colonial_Survey_Committee.pdf; BROWNLIE, *supra* note 22, at 6; Ieuan Griffiths, *The Scramble for Africa: Inherited Political Boundaries*, 152 GEOGRAPHICAL J. 204, 205 (1986).

168. *See generally* Khadiagala, *supra* note 98.

169. *Id.* at 267–68.

been operationally nonexistent for the major portion of their history.¹⁷⁰

Four decades after Kapil's telling observation, the African Union finally established a mechanism to address the problem of the absence of and incomplete boundary demarcations in Africa. At its eleventh ordinary session, held in Accra from June 25–29 of 2007, the AU Executive Council adopted a decision to establish an African Union Border Program (AUBP). The decision, which was an endorsement of a declaration adopted earlier by the first ever Conference of African Ministers in Charge of Border Issues, held in Addis Ababa on June 7, 2007, was itself endorsed by the eighth ordinary session of the AU Assembly, also meeting in Accra, on June 30–31 of 2007. One of the objectives, indeed the primary one, of the AUBP is to support and facilitate the delimitation and demarcation of African boundaries where such exercise has not taken place.¹⁷¹

In the case of the disputed Lake Malawi boundary, it is highly plausible that the colonial boundary demarcation officials made the assumption that a boundary represented by the shoreline, as stipulated in the 1890 Agreement, did not need any physical demarcation and the placement of boundary pillars on the ground. Indeed, this theory is borne out by the task of the Mixed Commission of 1898, to focus on the sections between Lake Tanganyika and Lake Nyasa. As Brownlie puts it, the failure to delimit “may have little significance since a shoreline may not have been considered susceptible to further delimitation.”¹⁷² In practical terms, survey maps utilizing natural features undoubtedly presented a better tool for the busy—or perhaps lazy—administrator tasked with the responsibility of resolving boundary disputes on the ground. In this vein, Donaldson has noted that:

The rigorous marking of colonial boundaries would have required regular maintenance from local colonial surveyors or administrators who were not often available in these peripheral areas of the Empire, particularly in the early decades of colonial administration. It was far easier and more cost-effective for British colonial administration to simply “know” or “imagine” the extent of colonial territory in Africa through boundary maps than to make those boundaries evident on the ground for local borderland populations.¹⁷³

170. Ravi L. Kapil, *On the Conflict Potential of Inherited Boundaries in Africa*, 18 *WORLD POL.* 656, 660 (1966).

171. Commission of the African Union?Department of Peace and Security, *Delimitation and Demarcation of Boundaries in Africa: The User's Guide*, at 9 (2013), <http://www.peaceau.org/uploads/au2013-en-delim-a-demar-of-bound-gen-iss-a-studies-elec2.pdf>.

172. Brownlie, *supra* note 29, at 259 (citing Hertslet, I., map facing p. 1, on progress of delimitation, Jan. 1909).

173. See Donaldson, *supra* note 164, at 486.

Donaldson concluded that rigorous demarcation was much less a priority than surveying and mapping. In this reading, colonial boundaries on the ground were thus seldom as precise as they appeared on the maps that purported to delineate the extent of territorial sovereignty. But, as discussed above, the maps or cartographical instruments produced by the colonial powers purporting to show the extent of their territorial boundaries—as in the case of the Nyasaland-Tanganyika lake boundary—were sometimes inconsistent, and thus of doubtful probative value. Yet, these same boundaries and colonial maps were inherited and largely accepted as sacrosanct by Africa's newly independent states.

D. *The Anglo-German Agreement of 1890: Boundary Treaty or Treaty of Sphere of Influence?*

The foregoing discussion has proceeded on the assumption that the 1890 Agreement is a boundary agreement *stricto sensu*. An alternative view, as noted above, would be that as a treaty marking out spheres of influence rather than delimiting boundaries, it was not determinative of the Nyasaland-Tanganyika boundary in 1890 and the subsequent period. To be sure, as noted in Part I, this view has not been advocated by any leading legal commentators who have expressed themselves on the issue.

The question, however, was addressed in another context by the dissenting Judge Weeramantry in the *Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia)*. In my view, his approach has a particular relevance to the Lake Malawi boundary dispute. Unlike the majority, Judge Weeramantry raised the question whether the 1890 Agreement, which was also at issue in this case, was an international boundary treaty or a sphere of influence treaty?¹⁷⁴ He concluded that it was the latter, citing in support of this position the authoritative views of leading publicists, such as Oppenheim, who wrote that sphere of influence treaties arose from “the uncertainty of the extent of an occupation, and the tendency of colonizing states to extend an occupation constantly and gradually into the interior or ‘hinterland’ of an occupied territory.”¹⁷⁵ Judge Weeramantry followed Brownlie in positing that, because a treaty of sphere of influence is imprecise and provisional, it gave a colonial power only a “moral claim” to the territory in question, and that an exact boundary would crystallize into a “true right” once the colonial power had established control and possession of the territory.¹⁷⁶

This approach led Judge Weeramantry to conclude that the 1890 Agreement gave the Court “flexibility in the definition of the boundary

174. See *Kasikili/Sedudu Island Case (Bots. v. Namib.)*, Judgment, 1999 I.C.J. Rep. 1045, ¶ 94 (Dec. 13) (Weeramantry, J., dissenting).

175. *Id.* (citing 1 OPPENHEIM'S INTERNATIONAL LAW 691 (Robert Jennings & Arthur Watts eds., 9th ed., 1992)).

176. *Id.* ¶ 95 (citing Brownlie's work in *supra* note 22, at 8–9). Brownlie does not, as such, reject the status of the Anglo-German Treaty as a boundary treaty even if he inclines towards Tanzania's claim for a median line boundary.

[without] departing from the terms of the Treaty.”¹⁷⁷ In the case at hand, it meant that, in Judge Weeramantry’s view, the Court could, for example, “[make] provision for the integrity and preservation of important features such as environmental preserves” and “[take] into account such factors as that one interpretation will draw a line between a given people and the land which they have traditionally used over a long period of time, while the other will not.”¹⁷⁸

Three points may be noted here. First, Judge Weeramantry was appealing to the Court to use its power to decide a case *ex aequo et bono* to ensure that the delimitation of the boundary both recognized the rights of the people who had occupied and used the disputed island from time to time over a long period and protected the integrity of the island as one comprehensive wildlife habitat and environmental preserve. Second, Judge Weeramantry’s opinion was without prejudice to the principle of *uti possidetis*, already recognized in African state practice and, as noted above, given a judicial imprimatur by the ICJ in earlier decisions, including the 1986 decision in the *Frontier Dispute Case (Burkina Faso v Mali)*.¹⁷⁹ Judge Weeramantry was not oblivious to the fact that, although the Court had acknowledged the applicability of equity as a principle in boundary delimitation in the earlier case, it had also noted that equity “[could] not be used to modify an established frontier in the sense of a settled border.”¹⁸⁰ He, however, did not accept that there was a settled boundary in relation to the Kasikili/Sedudu Island.¹⁸¹ Third, it cannot be overemphasized that the specific context of Judge Weeramantry’s opinion was a disputed boundary over land territory that could be physically occupied and used in the most obvious senses of these terms. The argument cannot be applied with equal force and facility to a dispute involving sovereignty over a mass of water that cannot be occupied in the physical sense and in which the only land outcrops are three small uninhabited islands.

Thus the appeal to the Court’s equitable powers to avoid an outcome insensitive to people living on a disputed island or communities who speak the same language, share a similar culture, history, and environmental resources, but have been split into two different states by arbitrary colonial-

177. *Id.* ¶ 98.

178. *Id.*

179. The ICJ has considered the principle of *uti possidetis* in series of cases over the years involving border disputes from Africa, Asia, Europe, Latin America, and the Middle East. See, e.g., Brian T. Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L.J. 1779 (2004); P. Mwet Munya, *The International Court of Justice and Peaceful Settlement of Disputes: Problems, Challenges and Prospects*, 7 J. INT’L L. & PRAC. 159 (1998) (discussing how the ICJ has used *uti possidetis* to decide boundary disputes in Africa); Naldi, *supra* note 136; Ratner, *supra* note 136. See also Andrew Rosen, *Economic and Cooperative Post-Colonial Borders: How Two Interpretations of Borders by the I.C.J. May Undermine the Relationship Between Uti Possidetis Juris and Democracy*, 25 PA. ST. INT’L L. REV. 207 (2007).

180. See *Kasikili/Sedudu Island Case (Bots. v. Namib.)*, Judgment, 1999 I.C.J. Rep. 1045, ¶ 105 (Dec. 13) (Weeramantry, J., dissenting).

181. *Id.*

era treaties does not readily hold in respect of the Malawi-Tanzania lake boundary. This is not to suggest that these considerations are wholly without significance. They may be taken into account, as I argue in Part III(A) below, when it comes to protecting the customary rights of the communities on Tanzania's side of the border who have traditionally depended on the resources of the lake for their livelihoods due to their proximity to the border. In fact, in contrast to Judge Weeramantry's dissent, the decision in the *Case Concerning Kasikili/Sedudu Island* noted that "[w]hile the treaty in question is not a boundary treaty proper but a treaty delimiting spheres of influence, the Parties nonetheless accept it as the treaty determining the boundary between their territories."¹⁸² Similarly, Tanzania has never claimed that the 1890 Anglo-German Treaty is *not* a treaty determining its boundaries with Malawi and its other neighbors. Rather, its contention was that the treaty wrongly or unfairly placed the boundary on the shoreline when it should have been located along the median line of the lake, which in Tanzania's view would be more equitable and in accordance with the normal practice in international law.¹⁸³ But, even this position only emerged after years of repeated official acknowledgement and acceptance of the location of the boundary as described in Article I(2).

III. COMPETITION OVER NATURAL RESOURCES AS A ROOT CAUSE OF BORDER DISPUTES

The resurgent dispute between Malawi and Tanzania is only one of several recent border disputes in the Eastern African region. The region has recently witnessed heightened tensions and increasing potential for interstate conflicts due to growing discoveries, or rumors of the existence, of natural resources on borders or in borderlands.¹⁸⁴ The price boom witnessed during the past decade for these commodities is particularly attributed to the rapid economic development and transformation in China and its insatiable demand for these resources. The competing efforts to access African minerals and other extractive resources have been described as leading to a new scramble for Africa. This race has, in turn, led to an increase in the value of territories that had hitherto been neglected or marginalized, resulting in the increased phenomenon among governments in Africa to partition the land into concessionary blocks awarded to mainly Chinese and Western companies to prospect for natural resources,

182. *Id.* ¶ 43.

183. This view was first clearly expressed by President Nyerere on May 31, 1967 when he addressed high school pupils at Iringa, a town in the central highlands of Tanzania, and declared that Tanzania could no longer accept the shoreline as the boundary, but instead recognized the median line, which was more equitable and fair. *See* Mayall, *supra* note 3, at 617.

184. *See, e.g.,* Okumu, *supra* note 165, at 279; Khadiagala, *supra* note 98, at 272-73, 275-76.

such as oil, gas, and precious minerals. I argue that the prospecting for gas and oil in Lake Malawi is part of this trend.¹⁸⁵

An early commentator located the source of the earlier phase of the Malawi-Tanzania boundary dispute in 1967–68 not in territorial claims, but in the deteriorating bilateral relations arising from Malawi's close relations with the white minority regimes in southern Africa at the time. Mayall suggested that, given Kamuzu Banda's close relationship with the Portuguese colonial regime in Mozambique, Tanzania feared that the northern part of the lake might be used as an infiltration route for the Portuguese to pursue FRELIMO freedom fighters who were based in sanctuaries across the Rovuma River, which forms the Tanzania-Mozambique international boundary.¹⁸⁶ While this may be true, there can be no doubt that today, competition for resources is clearly the major reason and trigger for the resurgence of the dispute. It is estimated that just over two million people—about 1.5 million Malawians and 600,000 Tanzanians—depend on Lake Malawi for their livelihoods. Subsistence fishing and agriculture constitute the major activities for the affected communities in the coastal regions bordering the lake.¹⁸⁷

Mining, commercial agriculture, tourism, and energy production would enhance the economic exploitation of the natural resources offered by or associated with the lake. Surestream Petroleum, which, as mentioned earlier, was awarded oil and gas exploration licenses by the Malawi Government in 2011, is only one of four companies that have since been granted exclusive prospecting blocks on the lake.¹⁸⁸ The Malawi-Tanzania boundary dispute confirms the common observation that the economic potential of border territories previously considered marginal tends to raise

185. There has lately emerged a fair amount of literature on China's quest for natural resources and its rising presence in Africa. For brief but instructive studies, see Chris Alden & Anna C. Alves, *China and Africa's Natural Resources: The Challenges and Implications for Development and Governance, Occasional Paper No. 41*, S. AFR. INST. OF INT'L AFF. (Sept. 2009); Kent Butts & Brent Bankus, *China's Pursuit of Africa's Natural Resources*, Cent. for Strategic Leadership, U.S. Army War College, June 2009. See also Okumu, *supra* note 165, at 279.

186. Mayall, *supra* note 3, at 616 (suggesting that as President Nyerere became resigned to President Banda's position on southern Africa's liberation struggle and his continuing friendship with the racist minority regimes in Mozambique and South Africa, the question of Lake Malawi disappeared from Tanzania's national agenda).

187. Mavvuto Banda, *Two Million People Hold their Breath over Lake Malawi Mediation*, INTER-PRESS NEWS AGENCY (Mar. 3, 2013), <http://www.ipsnews.net/2013/03/two-million-people-hold-their-breath-over-lake-malawi-mediation/>.

188. The Malawi Government has awarded exclusive prospecting licenses, under the Petroleum and Exploration Act of 1983, for six blocks on the lake to four companies as follows: Block 1: SacOil (12,265 square kilometers, north-western block bordering Tanzania and Zambia, awarded in 2012); Block 2 and 3: Surestream Petroleum (20,200 square kilometers, north and central blocks, awarded in 2011); Block 4 and 5: RakGas LL.C. (awarded in 2013); and Block 6: Pacific Oil and Gas (awarded in 2013). See Press Release, *supra* note 5; see also Rachael Etter-Phoya, *Two Additional Companies Awarded with [sic] Exploration Rights by Malawi amid Unresolved Lake Dispute*, MINING IN MALAWI (Nov. 20, 2013), <http://www.mininginmalawi.com/2013/11/15/two-additional-companies-awarded-with-exploration-rights-amid-unresolved-lake-dispute/>.

the stakes even among the best of neighbors, which of course Malawi and Tanzania have never been. An unnamed Tanzanian member of parliament, who participated in the earlier rounds of negotiations between the two countries, is reported to have remarked that if there were only fish in the lake, the border might not be such a tense issue between them.¹⁸⁹

Contested sovereignty over resource-rich borderlands is not uncommon in Africa. The dispute between Cameroon and Nigeria over the Bakassi Peninsula, settled by the ICJ in 2002, is perhaps the best known among recent boundary disputes in Africa.¹⁹⁰ These developments have in some cases compounded pre-existing bad situations. Two historical factors lie behind these situations. First, most colonial-era boundaries inherited at independence were, and remain, improperly delimited and poorly demarcated. Reference has already been made to the fact that the Mixed Commission established in 1898 did not demarcate the boundary in the now disputed section of the Nyasaland-Tanganyika border in terms of Article VI of the Agreement of 1890. Second, most post-colonial African governments either procrastinated in correcting the historical legacies and errors in colonial boundary-making, or simply did not appreciate the urgent need to do so. The Tanganyikan authorities, both during the period of internal self-government from May 1959 until independence in December 1961 and in the period following independence, not only failed to challenge the status quo, but publicly and officially confirmed acceptance of the boundary as defined in 1890. Moreover, although Prime Minister Kawawa had indicated that, in the event that it wished to negotiate the issues raised by Chief Mhaiki in 1962, Tanganyika would only negotiate with the government of an independent Nyasaland, the government of the newly established United Republic of Tanzania procrastinated for three full years after Malawi's independence on July 6, 1964 before raising its objection in May 1967. It may be pointed out in passing that President Nyerere was supposed to go on a state visit to Malawi shortly after Malawi's independence in 1964, but the visit was cancelled presumably because of his objection to a recent visit to Malawi by Ian Smith, the prime minister of Southern Rhodesia (now Zimbabwe). This was just before the Malawi cabinet crisis referred to at the outset of this discussion.¹⁹¹ One can only speculate as to whether it might have been part of Nyerere's idea to negotiate about the lake with Banda as "independent equals" during this visit.

189. Yoon, *supra* note 31, at 83.

190. See generally Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v. Nigeria), 2002 I.C.J. Rep. 303 (Oct. 10). The Botswana–Namibia dispute over Kasikili/Sedudu Island was also, at bottom, about the economic interests of the parties; the disputed island was regarded not only as a potential resource for wildlife-based tourism, but also as an agrarian interest for the pastoral Masubian community. See Kasikili/Sedudu Island Case (Bots. v. Namib.), Judgment, 1999 I.C.J. Rep. 1045 (Dec. 13) (Weeramantry, J., dissenting).

191. Mayall, *supra* note 3, at 1 n.1; COLIN BAKER, REVOLT OF THE MINISTERS: THE MALAWI CABINET CRISIS 1964–1965 115 (2001).

Although, in my view, Malawi has the better legal claim, at a bilateral level both Malawi and Tanzania would do well to consider less absolutist solutions to the dispute. With an estimated two million people from some of the most vulnerable countries in the world depending on the lake, as indicated earlier, a resource management solution that takes into account the sustainability of the livelihoods of these communities will ultimately be beneficial to both countries and the region as a whole. This suggests that a solution that puts in place a joint mechanism for the shared management and use of transboundary and borderlands resources would better serve the interests of the two neighbors than an interminable and uncertain fight over the absolutist delimitation of the lake boundary. The outcomes of the Cameroon-Nigeria dispute over the Bakassi Peninsula and the Botswana-Namibia dispute over Kasikili/Sedudu Island are evidence that even when a judicial settlement awards disputed territory to one party against the other, a political mechanism may still need to be put in place for the shared management of border resources that gave rise to the dispute in the first place.¹⁹² These cases also demonstrate that respect for the principle of *uti possidetis* and the protection of the sanctity of borders need not mean the maintenance of a status quo that refuses to acknowledge the shared needs of affected local populations within the border areas.

A. *Protection of Customary Rights in Boundary Zones and Borderlands*

Another issue that calls for a brief comment here concerns the question of customary rights enjoyed by foreign nationals in boundary zones or borderlands. It is acknowledged that historically the nationals of Tanzania have always exercised certain territorial rights in the disputed part of the lake with respect to the use of the lake's waters for their subsistence needs.

192. Despite the fact that Botswana was awarded judgment in its dispute against Namibia, the two states agreed through subsequent bilateral diplomatic negotiations to allow Namibians to have access to the river (for fishing). A more pertinent post-ICJ diplomatic mechanism was that established through the UN Secretary-General's good offices in the *Cameroon v. Nigeria* case. Following Nigeria's rejection of the ICJ judgment, Secretary-General Kofi Annan intensified his mediation efforts, which he had started in September 2002 in anticipation of a rejection of an unfavorable decision by either party, to get both states to agree to implement the judgment. At a meeting in Geneva on November 15, 2005, barely five days after the Court's decision had been made public, the leaders of the two countries agreed to establish a mixed commission consisting of Cameroonian and Nigerian representatives, chaired by the U.N. For a number of years following its inception in November 2002, the mixed commission met multiple times, alternating between the capitals of the two countries, Abuja and Yaounde, overseeing, *inter alia*, the withdrawal of Nigeria's administrative, military, and police personnel in the disputed Lake Chad and Bakassi Peninsula areas and the eventual transfer of authority to the Cameroon. As Secretary General Kofi Annan remarked subsequently, Cameroon and Nigeria had demonstrated that given timely and appropriate U.N. support, African states can wind down conflicts and resolve their differences peacefully. The present writer participated in the initial meetings of the mixed commission in 2003 in Abuja and Yaounde as part of the UN team. See United Nations Office for West Africa [UNOWA], *Cameroon-Nigeria Mixed Commission*, <http://unowa.unmissions.org/Default.aspx?tabid=747>.

Putting aside the issue of ownership of the three uninhabited islands, the question that might plausibly be posed is whether the enjoyment and exercise by Tanzanians of such rights in Malawian territory—the water area and the three small uninhabited islands—could establish a prescriptive title that can legitimately be relied upon by Tanzania in its claim for sovereign ownership of the lake. The issue of the existence or survival of local customary rights enjoyed by foreign nationals within a disputed boundary zone has been addressed by international judicial tribunals before: in the *Case Concerning the Right of Passage over Indian Territory*,¹⁹³ the *Anglo-Norwegian Fisheries Case*,¹⁹⁴ and the *Rann of Kutch Arbitration*,¹⁹⁵ referred to above. The issues in these cases were admittedly different from those calling for consideration here, but Judge Bebler's dissenting opinion in the last-mentioned case is relevant and instructive. Judge Bebler observed, in relation to the grazing of cattle by Pakistan nationals in the disputed territory, that, "being a purely private activity, [it] would not constitute display of State authority. It might constitute the basis of a claim for an international servitude in the neighbor's territory, but, Pakistan did not formulate such a claim."¹⁹⁶

The existence of local customary rights, for example, those relating to fishing, navigation, and the use of the water for agriculture, is significant because of the probative value attached to such rights in determining the location of a boundary. However, the classical view is that customary rights granted to and enjoyed by private individuals cannot as such provide a basis for a claim of sovereign title by the national state of the individuals over the foreign territory in which they enjoy those rights exercised. This view, captured in Judge Bebler's dictum above, has quite correctly been criticized by some commentators in more recent times. In his critique of the ICJ judgment in the *Kasikili/Sedudu Island Case*, Gathii has noted, regarding the Court's treatment of the implications for title to the disputed island of the Masubian community of Namibia, how the law of title to territory in Africa today still embeds within it a colonial and imperial imprint. He goes on to argue that:

This colonial and imperial imprint is mostly evidenced by the treatment of territory as mere geographical and economic spheres in respect of which colonial states entered into transactions, such as treaties, with each other. Consequently, in relation to claims arising during European colonization, it is these geographical, economic and transactional relations between European powers that foreground the determination of boundary and territorial disputes at the expense of African presence on the territory. African presence on the territory as an independent evidentiary basis for

193. *Case Concerning Right of Passage over Indian Territory* (Port. v. India), Judgment, 1960 I.C.J. Rep. 6 (Apr. 12).

194. *Fisheries Case* (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116 (Dec. 18).

195. *Rann of Kutch Arbitration* (India v. Pak.), 7 I.L.M. 633 (1968).

196. *Id.* at 702.

the determination of territorial title or boundary delimitation is de-emphasized as merely “acts of private persons” occupation and use and/or occupation without a belief that such use and occupation arises from original title to territory.¹⁹⁷

The argument that the colonial acquisition of territory in Africa denied African agency and that it gave no recognition to the rights of the African peoples in occupation or use of the territories in question legal title is not new, and has been referred to above.¹⁹⁸ But, of course, this argument becomes relevant where the issue of grounding title in the customary use and occupation of the land arises. As already noted, this does not appear to be the basis of Tanzania’s claim, since it also accepts that, generally speaking, the three islands have always been uninhabited. Besides, as far as the present writer is aware, like Pakistan in the *Rann of Kutch Arbitration*,¹⁹⁹ Tanzania has not formulated its argument in terms of an international servitude. This dispute presents a situation whereby the delimitation of the boundary is in any case expressly governed by treaty provisions and is not left to be determined simply on the basis of considerations of acquiescence, estoppel, good faith, and customary usage. The analogy with the Masubian situation in the *Kasikili/Sedudu Island Case* is, therefore, of passing relevance only.

The question of whether or not Malawi should continue to guarantee Tanzanian nationals access to the territory and resources of the disputed islands is one for political and diplomatic, rather than legal, determination. This would be an aspect of the suggested solution rooted in the combined concepts of shared management and utilization of borderlands resources and shared international watercourses. Here, again, it may be instructive to turn to some of the dicta in the *Kasikili/Sedudu Island Case*. It may be recalled that in his dissenting opinion, Judge Weeramantry invoked the Court’s powers to decide a matter *ex aequo et bono* both to avoid an outcome insensitive to people living on the disputed island and to apply principles of international environmental law to ensure that any boundary delimitation does not undermine the integrity of the disputed island “[as] one comprehensive whole.”²⁰⁰ While acknowledging that the Court was not a boundary-maker, he encouraged it to nevertheless take into account certain environmental concerns under “modern international law,” interpreting and applying the 1890 Agreement.²⁰¹ I return to a discussion of the shared management of borderlands resources in the context of SADC regional integration and development policy below.

This “modern international law” was more specifically identified in another dissenting opinion in the same case by Judge Kooijmans, who

197. See Gathii, *supra* note 153, at 606.

198. See Anghie, *supra* note 19.

199. *Rann of Kutch Arbitration*, 7 I.L.M. 633, 689–90 (1968).

200. See *Kasikili/Sedudu Island Case (Bots. v. Namib.)*, Judgment, 1999 I.C.J. Rep. 1045, ¶¶ 100–01 (Dec. 13) (Weeramantry, J., dissenting).

201. *Id.* ¶ 103.

made reference to Article 5 of the U.N. Convention on the Law of the Non-navigational Uses of International Watercourses of 1997, which enshrines the principle of equitable and reasonable utilization of international watercourses.²⁰² Here, Judge Kooijmans held that the fact that the Convention was not yet in force “does not mean that [principles] which are formulated in the convention have not become part of the corpus of international law,”²⁰³ and argued that the principle of equitable and reasonable utilization codified an existing customary international norm.²⁰⁴ Since neither Malawi nor Tanzania is a party to the Convention, it may be tempting to conclude that it is not applicable to their dispute. But, to the extent that it codifies customary international law in some aspects, this fact is irrelevant. If the matter came before it, the application by the ICJ of principles of equity, as permitted under Article 38(2) of its Statute, or principles of international environmental law to the dispute would be consistent with the view that territorial sovereignty is no longer an absolute doctrine that allows for no exceptions.²⁰⁵

202. GA Res. 51/229, art. 5 (July 8, 1997). Article 5 introduces the new concept of equitable participation and sets forth what is regarded as the cornerstone of the law of international watercourses, namely the principle that a state must use an international watercourse in a manner that is reasonable and equitable vis-à-vis other states sharing the watercourse. According to Article 5, equitable and reasonable use means that the use must also be consistent with adequate protection of the watercourse from pollution and other forms of degradation. This concept was essentially confirmed by the ICJ barely four months after the adoption of the U.N. Convention in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovak.)*, Judgment, 1997 I.C.J. Rep. 92, ¶ 85 (Sept. 25). The term “watercourse” is defined in Article 2 of the Convention as a “system of surface waters and groundwater constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.” See STEPHEN C. McCaffrey, *THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIONAL USES* (2001) for a general discussion of the evolution of the modern law of international watercourses. Professor McCaffrey served as a special rapporteur for the International Law Commission’s draft articles on the law of the non-navigational uses of international watercourses, which formed the basis for the U.N. Convention. The Convention influenced the adoption of the 2000 Revised Protocol on Shared Watercourses of the Southern African Development Community.

203. See *Kasikili/Sedudu Island Case (Bots. v. Namib.)*, Judgment, 1999 I.C.J. Rep. 1045, ¶ 31 (Dec. 13) (separate opinion by Kooijmans, J.).

204. *Id.* The U.N. Convention on the Law of the Non-navigational Uses of International Watercourses on the Law of the Non-navigational Uses of International Watercourses, which entered into force on August 17, 2014, establishes basic standards and rules for cooperation between watercourse states on the use, management, and protection of international watercourses. A relevant regional treaty to which Malawi, Mozambique, and Tanzania are signatories is the Revised Protocol on Shared Watercourses in the Southern African Development Community adopted in Windhoek, Namibia, on Aug. 7, 2000. However, it is not yet in force. Revised Protocol on Shared Watercourses in the Southern African Development Community Aug. 7, 2000, http://www.sadc.int/files/3413/6698/6218/Revised_Protocol_on_Shared_Watercourses_-_2000_-_English.pdf.

205. Arguably, the ICJ’s decision in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovak.)* referred to in the preceding note already provides an indication of how it would likely approach the question. For a long period, four major theories dominated international water law: absolute territorial sovereignty (also known as the Harmon Doctrine, which gave complete freedom of action to an upper riparian state); absolute territorial integrity (no action by upper riparian states that might affect downstream riparian states);

The relevance of international environmental law to this dispute is self-evident. Since the award of the first concession to Surestream Petroleum, environmental concerns have been voiced by local communities in the coastal areas in Malawi and by the international community. Partly in response to these concerns, which are real and legitimate, the Malawi government's Environmental Affairs Department and some local civil society and environmental non-governmental organizations have been conducting public hearings on the environmental and social impact assessment presented by Surestream Petroleum on the seismic operations for the exploration of oil in the lake.²⁰⁶ At the international level, the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Centre and the International Union for the Conservation of Nature (IUCN) have also become involved, given the lake's status as a UNESCO World Heritage site with the establishment of the Lake Malawi National Park in 1984.²⁰⁷ In their joint assessment of the situation in early 2013, the two organizations noted that, whilst the area where oil exploration activities have been approved lies outside the World Heritage property, the risks associated with oil drilling anywhere in the lake could affect the entire lake ecosystem and represent a significant threat to the unique assemblage of endemic fish species, other biodiversity, and associated evolutionary processes, which are the basis for the property's inscription on the World Heritage List. On the basis of these considerations, the World Heritage Committee adopted the following decision on May 17, 2013:

The World Heritage Committee expresses its concerns about oil exploration activities in Lake Malawi, and considers that oil drilling poses a potentially severe risk to the integrity of the entire

limited territorial sovereignty (obligation on each riparian state not to use territory in such a way as to cause harm to other states); and community of interest (shared use by the community of states sharing the watercourse). In his analyses of these theories, McCaffrey comes to the conclusion that the doctrine of limited territorial sovereignty appears to come closest to describing the actual situation produced by state practice, while also noting that the community of interest theory appears in international legal instruments establishing joint institutions for managing shared watercourses. See *Case Concerning the Gabcikovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 92, 171 (Sept. 25). For some earlier discussions of these theories, see Dante A. Caponera, *Patterns of Cooperation in International Water Law: Principles and Institutions*, 25 NAT. RESOURCES J. 563 (1985); David J. Lazerwitz, *The Flow of International Water Law: The International Law Commission's Law of the Non-Navigational Uses of International Watercourses*, 1 GLOBAL LEGAL STUD. J. 247 (1993); Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property*, 18 COLUM. J. INT'L L. 27 (1993). See also Stephen McCaffrey, *The Contribution of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses*, 1 INT'L J. GLOBAL ENVTL. ISSUES 250 (2001).

206. See, e.g., Rachel Etter-Phoya, *Public Hearings for Surestream Petroleum Seismic Operations for Oil Exploration in Lake Malawi*, MINING IN MALAWI (Jan. 17, 2014), <http://mininginmalawi.com/2014/01/17/public-hearing-for-surestreampetroleum-seismic-operations-for-oil-exploration-in-lake-malawi/>.

207. The Lake Malawi National Park was inscribed to the World Heritage List in 1984 by the UNESCO World Heritage Committee. World Heritage Committee, 8th Sess., *Report of the Rapporteur*, SC/84/CONF.004/9 (Nov. 2, 1984).

lake ecosystem, including the aquatic zone and shoreline of the property and reiterates that mining, oil and gas exploration and exploitation are *incompatible* with World Heritage status. The Committee further requests the State Party of Malawi to submit to the World Heritage Centre, by 1 February 2014, a report on the state of conservation of the property, including the requested information on the oil exploration activities, for examination by the World Heritage Committee at its 38th session in 2014.²⁰⁸

The World Heritage Committee followed up the adoption of this decision by sending a fact-finding mission, the first of its kind since Lake Malawi's inscription to the World Heritage List in 1984, from March 30 to April 4, 2014 to assess the likely environmental impact of oil drilling in the lake on the eco-habitat and local populations. One important recommendation emanating from this mission is for Malawi to consult with Mozambique and Tanzania on the environmental implications of any drilling activities in the lake and to expand the protected area (property) to the lake shores and islands.²⁰⁹ This recommendation is most appropriate. Irrespective of the outcome of the disputed ownership of the northern reaches of the lake, from the environmental perspective, the lake must be treated, to borrow the words of Judge Weearamantry in the *Kasikili/Sedudu Island Case*, "as one comprehensive whole." As a shared environmental space, the management of potential adverse environmental effects of any drilling activities in the lake will necessarily require a cooperative, multilateral approach. This is all the more so because, as the UNESCO/IUCN report noted, Malawi is not a party to the International Convention on Oil Pollution Preparedness Response and Cooperation of 1990, which requires parties to establish measures for dealing with pollution incidents either nationally or in cooperation with other countries.²¹⁰ Both Malawi and Tanzania are signatories to the Revised Protocol on Shared Watercourses in the Southern African Development Community of 2000 (Revised SADC Protocol), which obligates state parties individually or, where appropriate, jointly to protect and preserve the ecosystem of a shared watercourse (under Article 4(2)(a)), but it is not yet in force. In the absence of treaty obligations, principles of customary international law relating to transboundary pollution are the only applicable law.

Trans-border or cross-border cooperation is necessary for the management of transboundary environmental hazards. Economic and border co-

208. World Heritage Committee, 37th Sess., at 23 WHC-13/37.com/7B.Add. (May 17, 2013), <http://whc.unesco.org/archive/2013/whc13-37com-7B-Add-en.pdf>. See also World Heritage Committee, 37th Sess., Decision, WHC-13/37.com/7B.5 (May 3, 2013), <http://whc.unesco.org/archive/2013/whc13-37com-7B-en.pdf> (showing Malawi did not meet the stated submission deadline).

209. IUCN & UNESCO, *Mission Report: Reactive Mission to Lake Malawi National Park (Malawi)*, WHC.14/38.com/ (May 2014).

210. International Convention on Oil Pollution Preparedness, Response and Cooperation art. 1 ¶ 1, Nov. 30, 1990, 1891 U.N.T.S. 78, <https://treaties.un.org/doc/Publication/UNTS/Volume%201891/volume-1891-I-32194-English.pdf>.

operation is also mutually beneficial to advance economic activities. Rosen has discussed the concept of economic and cooperative post-colonial borders through an examination of the *Kasikili/Sedudu Island Case* and other ICJ decisions involving boundary disputes in which it was asked to apply, explicitly or implicitly, the principle of *uti possidetis*. Like Gathii, he also focuses on Judge Weeramantry's proposal that instead of delineation, "certain disputed border regions may be cooperatively governed based on each country's obligations to an external treaty regime or international obligations," (for example, international environmental treaties or the U.N. Convention on Non-Navigational Uses of International Watercourses, as mentioned above).²¹¹ While characterizing it as an interesting proposal, Rosen admits that it may not be feasible, which Judges Weeramantry and Kooijmans both implicitly recognized in their dissenting opinions. But his conclusion is categorical, stating that:

Perhaps most apparent . . . is that post-colonial borders are increasingly under attack, both legally and diplomatically, over present or future economic interests These new disputes are not over politics. Nor are they over conflicting identities of the polities within post-colonial borders. Rather, they are over resources.²¹²

The concept of borderlands has been the focus of recent boundary studies. Borderlands are described as those regions whose economic and social life is directly and significantly affected by proximity to an international boundary. Scholarly discourses in this area have articulated the concept of borderlands as denoting those administrative regions of a country that coincide with the country's international boundaries and the idea of borderlands of prosperity.²¹³ The concept of borderlands has been in-

211. Rosen, *supra* note 179. Rosen also discusses Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahr.*), Judgment, 2001 I.C.J. Rep. 40 (Mar. 16); Land and Maritime Boundary Between Cameroon and Nigeria (*Cameroon v. Nigeria*), Judgment, 2002 I.C.J. Rep. 303.

212. Rosen, *supra* note 179, at 249.

213. The following discussions generally provide comparative perspectives on the concept of borderlands as applied to other African situations in which the issue of shared exploitation and management of border resources is relevant. These situations offer relevant examples for the multilateral arrangement for the shared management of the Lake Malawi basin/borderlands between Malawi, Mozambique, and Tanzania proposed in this essay. See A.I. Asiwaju, *Borderlands in Africa: A Comparative Research Perspective with Particular Reference to Western Europe*, in *AFRICAN BOUNDARIES: BARRIERS, CONDUITS, AND OPPORTUNITIES* 253–65 (Paul Nugent & A.I. Asiwaju eds., 1996); see also NILES HANSEN, *THE BORDER ECONOMY: REGIONAL DEVELOPMENT IN THE SOUTHWEST passim* (1981); DEVELOPMENT OF BORDER REGIONS: NIGERIA AND PROXIMATE NEIGHBORS IN WEST AND CENTRAL AFRICA, PROCEEDINGS OF THE NATIONAL WORKSHOP HELD AT AFRICAN UNIVERSITY INSTITUTE, IMEKO, NIGERIA, DEC. 5-7, 2006 (A.I. Asiwaju ed.); Wafula Okumu, *The Purpose and Functions of International Boundaries: With Specific Reference to Africa*, in *DELIMITATION AND DEMARCATION OF BOUNDARIES IN AFRICA: GENERAL ISSUES AND CASE STUDIES* 37 (2013); A.I. Asiwaju, *The Factor of Affected Local Populations*, in *DELIMITATION AND DEMARCATION OF BOUNDARIES IN AFRICA: GENERAL ISSUES AND CASE STUDIES* 136 (2013).

voked as particularly appropriate for addressing resource-driven boundary conflicts. It has been observed, for example, that “[b]orderlands where mineral resources are being explored or exploited are experiencing increasingly frequent disputes over land claims, delimitation disputes . . . and bitter political exchanges between governments.”²¹⁴ In his study of boundaries in eastern Africa, Khadiagala has distinguished between two contrasting spatial trajectories: frontiers of insecurity and borderlands of economic prosperity.²¹⁵ He has identified the “sharing of maritime resources in Lakes Victoria, Tanganyika, and Malawi” as belonging to the latter category.²¹⁶ However, there is a significant difference between Lakes Victoria and Tanganyika, on the one hand, and Lake Malawi on the other. Tanzania’s international boundaries with her riparian neighbors on these lakes follow the median lines. These boundaries have never been contested and, on paper at least, it should be easier for the concerned states to agree upon arrangements for shared development and exploitation of the boundary maritime resources. Lake Malawi presents a different challenge.

As noted at the outset of this discussion, the current dispute was triggered by Malawi’s decision to award contracts for exploration of oil and gas in the lake.²¹⁷ Tanzania’s apparent desire to control or participate in the exploitation of these maritime resources—at least in the part of the lake that it lays claim to—is understandable. Beyond the perceived potential of oil and gas production, there also remain the other economic activities that the local populations on the eastern shore of the lake have customarily enjoyed: subsistence fishing, agriculture, tourism, and other uses of the waters of the lake. All these activities could be further developed to a commercial scale for the benefit of the riparian communities on both the Malawian and Tanzanian sides. In this sense the Malawi-Tanzania border dispute has echoes of the dispute between Cameroon and Nigeria over the Bakassi Peninsula, which at heart was a dispute over control of the area’s rich mineral, oil, gas, and fisheries resources. Over the decades, Africa has witnessed resource-driven border disputes, some of which have resulted in limited armed conflicts. A notable example was the dispute between Chad and Libya over the Aouzou Strip, a strip of land in northern Chad along the border with Libya rich in mineral resources.²¹⁸ It is salutary that Malawi and Tanzania remain committed to resolving their dispute peacefully.

214. Okumu, *supra* note 165, at 281.

215. Khadiagala, *supra* note 98, at 267.

216. *Id.* at 276.

217. See Kok, *supra* note 2.

218. The dispute led to a brief outbreak of armed hostilities from August to September 1987 when the OAU intervened to broker a tentative ceasefire. For a brief discussion of the dispute, see Gino J. Naldi, *The Aouzou Strip Dispute—A Legal Analysis*, 33 J. AFR. L. 72 (1989). The dispute was finally settled in favor of Chad by the ICJ in 1994. Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad), Judgment, (1994) I.C.J. Rep. 6.

B. *SADC's Spatial Development Initiatives and Shared Management of Borderland Resources*

The issues discussed in the foregoing section lead to the following question: beyond supporting the mediation effort, what role can SADC proactively play to facilitate the integration of the disputed lake boundary region into its spatial development initiatives, whatever the outcome of the dispute? The economic vision of SADC is to transform its fifteen member states from operating as individual fragmented markets into a single integrated economic space and a globally competitive market characterized by free movement of goods, services, capital, and labor. Underlying this vision is the principle of forging closer economic cooperation as a means of promoting economic development within the context of the global economy. Among the strategies devised for achieving this vision are the spatial development initiatives (SDIs) and development corridors.²¹⁹ One of the first to be established was the Mtwara Development Corridor, involving Malawi, Mozambique, Tanzania, and Zambia.²²⁰

The primary objectives of the Mtwara Development Corridor have been described as: first, to develop a transportation corridor to link the southern regions of Tanzania with Malawi and Zambia across Lake Malawi and Mozambique; second, to provide strategic access for Malawi to the Tanzanian port of Mtwara; and third, to mobilize investment in support of the utilization of the Mtwara Development Corridor's tremendously rich natural resource base.²²¹ The corridor's planning area includes parts of the central region of Malawi, the northern areas of Mozambique, the southern and southwestern regions of Tanzania, and the eastern and northeastern provinces of Zambia. Aside from the focus on the development of transportation links, the Mtwara Development Corridor has also led to the development of other initiatives. Of immediate relevance to this discussion is the Mtwara Development Corridor Conservation Initiative,²²² which aims to develop a resource management framework that both addresses the problems that development will bring and maximizes its opportunities. The inherent development potential of the area is very

219. G.R.M. de Beer, R.A. Mmatli, A.C. Mahumane, S.C. Nyathi, & F.H. Soares, *Spatial Development Initiatives and the Future Development of the Southern African Borderlands* (1998) (unpublished manuscript prepared for Maputo Corridor Company Policy Research Programme, Nelspruit, South Africa) (on file with author).

220. First conceived in 1998, the Mtwara Development Corridor Agreement was signed by the heads of state of Malawi, Mozambique, Tanzania, and Zambia in Lilongwe, Malawi, on December 14, 2004. See *Mtwara Development Corridor Conservation Initiative*, WWF GLOBAL http://wwf.panda.org/who_we_are/wwf_offices/tanzania/wwf_tanzania_our_solutions/index.cfm?uProjectID=9F0793.

221. See G.R.M. de Beer, *Regional Development Corridors and Spatial Development Initiatives—Some Current Perspectives on Potentials and Progress* (2001) (paper presented at the Conference on Meeting the Transport Challenges in Southern Africa, South Africa, July 16-20, 2001, at 8-11).

222. For a brief description on the initiative, see *Mtwara Development Corridor Conservation Initiative*, WWF GLOBAL http://wwf.panda.org/who_we_are/wwf_offices/tanzania/wwf_tanzania_our_solutions/index.cfm?uProjectID=9F0793.

high. All four countries have very good agricultural, mining, and tourism development potential, which provide a potentially sound basis for a wide range of economic activities. There are a number of particularly impressive economic projects that have been identified. They include mining, power generation, development of gas reserves, coastal and inland fisheries development, agriculture, wildlife, and tourism.²²³

The commitment of the SADC member states to regional integration and collaboration as a means of promoting greater levels of economic growth and development is not in doubt. It is equally clear that these countries also acknowledge the opportunity for broader based economic development that could accompany the rehabilitation of the transportation infrastructure. In my view, an approach to the shared management and exploitation of borderlands resources that is consistent with the borderlands concept described above would fall squarely within SADC's SDIs and development corridor objectives and strategies. Although it still remains a work in progress, there can be no doubt that the potential socio-economic impact of the Mtwara Development Corridor on the local populations, in particular, is very substantial.

As has been noted by Bootsma, until fairly recently there was virtually no coordination among the riparian countries, Malawi, Mozambique, and Tanzania, regarding research and management in the lake and its catchment area.²²⁴ Recognizing this need, in 2003 the three countries, with support from the Food and Agricultural Organization (FAO), developed a draft convention on the sustainable development of the lake and its basin.²²⁵ The draft proposed the establishment of a Lake Malawi/Niassa/Nyasa Basin Commission, modelled along the lines of similar riparian organizations elsewhere, such as the Lake Victoria Basin Commission, established under the auspices of the East African Community through the Protocol for Sustainable Development of Lake Victoria Basin, adopted on November 29, 2003. The draft convention envisaged a strong mandate for the commission that would include disseminating data and research related to the lake and water resources, monitoring environmental conditions in the lake basin, and enhancing cooperation among various governmental and non-governmental agencies, as well as private sector entities, involved in activities related to natural resources management in the lake. Unlike the Protocol for Sustainable Development of Lake Victoria

223. *Id.* For a report on "anchor projects" of the MDC in Malawi, see generally NEIL GARDEN, *MTWARA DEVELOPMENT CORRIDOR: A REGIONAL SPATIAL DEVELOPMENT INITIATIVE* (2006).

224. See H. A. Bootsma & Sven Erik Jorgensen, *Lake Malawi/Nyasa: Experience and Lessons Learned Brief*, in INTERNATIONAL ENVIRONMENT COMMITTEE FOUNDATION, *LAKE BASIN MANAGEMENT INITIATIVE: EXPERIENCE AND LESSONS LEARNED BRIEFS* 259–76 (2005), http://iwlearn.net/iw-projects/1665/experience-notes-and-lessons-learned/lake_malawi_nyasa_2005.pdf.

225. See *Report of Lake Malawi/Niassa/Nyasa Donors and Partners Meeting*, May 12–13, 2003, Mangochi, Malawi, Annex F: The Convention on the Sustainable Development of Lake Malawi/Niassa/Nyasa and its Basin, http://www.ramsar.rgis.ch/pdf/mtg/mtg_malawi_wwf_2003_annex1.pdf.

Basin and the Convention on the Sustainable Management of Lake Tanganyika, also adopted in 2003, the Lake Malawi/Niassa/Nyasa draft convention has never seen the light of day and appears to have been definitively abandoned, for reasons that are not altogether obvious.²²⁶ A possible explanation might be the competing demands placed upon the three riparian states to subsume this project within the broader SADC shared watercourses initiative and the Revised Protocol on Shared Watercourses in the Southern African Development Community of 2000, which, as was noted earlier, is not yet in force.²²⁷ In any event, I argue that a coordinated approach by Malawi and Tanzania to the joint development and utilization of the borderland resources within the area, including Lake Malawi, would advance both the national interests of the two parties and SADC's agenda of regional integration and economic development. It would also strengthen the environmental management of a geographical region that must, as suggested earlier, be treated as one comprehensive whole with a unified spatial regional strategy.

In practical terms, how can the resources in the disputed territory be equitably managed and utilized by the two parties and other riparian states? Two points should be noted. First, the shared management and utilization of the resources of an international watercourse does not mean co-ownership of the resources, still less joint sovereignty over the territory in which they are located. The 1997 U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses and other international treaties regulating the shared management and utilization of international watercourses, such as the Revised Protocol on Shared Watercourses in the Southern African Development Community of 2000, are premised on this understanding. Second, while I argue that a collaborative, multilateral approach would produce the most efficient outcome to the dispute, this is not the place to lay out in great detail a concrete proposal for the institutional mechanism or arrangements needed to achieve this objective. The nature and structure of such a mechanism will vary in its detail from one watercourse system to another. Each arrangement has to be designed with regard to its own specificity, the nature of resources in play, and the shared policy objectives of the riparian or basin states involved, among other considerations. Only a few broad suggestions will be offered here.

The notion of shared management of international watercourse is not new. Admittedly, the earlier institutional arrangements involving riparian states for managing their common watercourses, including boundary rivers and lakes, were mostly concerned with navigation and rarely dealt with non-navigational uses. The earliest of these were the "river commissions,"

226. Unlike the Protocol for Sustainable Development of Lake Victoria, the Convention on the Sustainable Management of Lake Tanganyika was not adopted under the East African Community, as it includes state parties that are not members of the Community. The two instruments entered into force in December 2004 and September 2005, respectively. The Lake Tanganyika Authority is the implementing body of the Convention.

227. See *Mission Report: Reactive Mission to Lake Malawi National Park*, *supra* note 209; Revised Protocol on Shared Watercourses, *supra* note 204.

established for the Rhine²²⁸ and Danube²²⁹ in Europe in the early and mid-nineteenth century. These were replicated in Africa more than a century and a half later in the post-independence period: for example the Niger River Commission, the Lake Chad Basin Commission, and the Organization for the Development of the Senegal River, established to regulate the shared management and utilization of these watercourses for both navigational and non-navigational uses.²³⁰ More recent arrangements in Africa include those for Lake Victoria and Lake Tanganyika.²³¹ The Lake Victoria Basin Commission and Lake Tanganyika Authority are intended to regulate and oversee collaborative and multilateral initiatives for the management of these shared watercourses for both navigational and non-navigational uses by the riparian states. As such, they may provide a template for a similar institutional mechanism for Lake Malawi. Indeed, the FAO-initiated Draft Convention for the Sustainable Development of Lake Malawi/Niassa/Niassa and its Basin provides for an institutional framework composed of a commission (Articles 4 to 6); organs of the commission comprising a council of ministers, a steering committee, and standing committees (Articles 7 to 11); and a permanent secretariat (Articles 15 and 16). As is common with these treaties and institutional mechanisms, the objectives of the proposed commission are set out only in broad terms. Thus, the proposed commission is intended to “[foster] cooperation among Contracting Parties, harmonize national measures for conservation, management, sustainable development and utilization of the resources of the Lake and its Basin.” (Article 4(2)). Article 13 provides for national consultations and coordination and exchange of information on activities concerning the Lake and its basin. The activities envisaged include, but are not limited to, fisheries, scientific research, environment, agriculture, forestry, water resources, planning, mining industry, development, energy, tourism, and finance (Article 13(2)(a)).

All this is premised on the principles of equitable and reasonable utilization and participation and the theory of limited territorial sovereignty which, as noted earlier, underpin the modern law of international watercourses. Article 19(1) encapsulates another principle of utmost importance in the law of international watercourses: the obligation on contracting parties to take appropriate measures “[when] utilizing the resources of the

228. The Central Commission for the Navigation of the Rhine, established in 1816 following the adoption of the Final Act of the Congress of Vienna in 1815. For the background context to the evolution of the Rhine River legal regime, see BÉLA VITANYI, *THE INTERNATIONAL REGIME OF RIVER NAVIGATION* 50 (1979).

229. The European Commission of the Danube, established under the Treaty of Paris in 1856, 2 F. ISRAEL, *MAJOR PEACE TREATIES OF MODERN HISTORY 1648–2000*, 947–59 (2002).

230. See Tiyanjana Maluwa, *The Origins and Development of International Fluvial Law in Africa: A study of the international legal regimes of the Congo and Niger Rivers from 1885 to 1960*, 29 NETH. INT'L L. REV. 368 (1982); Tiyanjana Maluwa, *Legal Aspects of the Niger River under the Niamey Treaties*, 28 NAT. RESOURCES J. 671 (1988); Tiyanjana Maluwa, *The Development of International Fluvial Law in Post-Colonial West Africa: the Senegal Regime*, 67 REVUE DE DROIT INT'L 1 (1989) (Fr.).

231. See Bootsma & Jorgensen, *supra* note 224.

Lake and its Basin and other areas communicating with the Basin, in their jurisdiction” to prevent causing significant environmental harm to other parties. This is the well-known customary law principle of *sic utere tuo ut alienum non laedas*, so use your own property as not to injure your neighbor’s.²³² Article 19(2) also enjoins the parties to take into account the vital economic, social, and cultural interests of other parties. Finally, Article 20 outlines a non-exhaustive list of areas and activities for which parties shall be required to develop and harmonize their laws and policies for the conservation and sustainable utilization of the lake, its basin, and its ecosystems, including the prevention of pollution and dumping of wastes into the lake, and regulating the transportation of hazardous wastes by boat or other water vessels. As noted earlier, both of these have been identified by concerned local populations and the UNESCO World Heritage Committee as potential hazards from any activities that may be undertaken if Malawi proceeds with its plans to prospect for and, possibly, extract gas and oil in the lake, if available.

Other potential challenges of establishing an integrated approach to the management of the resources of the lake and its basin have been the subject of at least one study.²³³ Moreover, helpful comparisons may also be drawn from a study and recommendations I have made elsewhere for another international watercourse.²³⁴ It goes without saying that the exact model for the multilateral management and utilization of the shared resources of the lake would have to be worked out more in detailed arrangements on a case by case basis, depending on the particular resource in question, but within the framework of applicable international law. In this respect, it is important that all the three riparian states, Malawi, Mozambique, and Tanzania, as well as other states in the wider basin not only be encouraged to ratify the Revised SADC Protocol and ensure its expeditious entry into force, but that they also accede to the U.N. Convention on the Law of Non-Navigational Uses of International Watercourses. Both these treaties provide a sound basis on which concrete institutional mechanisms and arrangements can be developed for implementing the proposed collaborative, multilateral approach. Such concrete details would include, *inter alia*, distribution of responsibilities, modalities for sharing costs and benefits, equitable access to and use of resources, acknowledgement of sovereignty and jurisdictional authority over the territory in which resources are located and, most crucially, an understanding

232. For one of the earliest expositions of this principle in the context of international water law, see C. B. Bourne, *The Right to Utilise the Waters of International Rivers*, 3 CAN. Y.B. INT’L L. 187 (1965).

233. See generally Tiyanjana Maluwa, *Towards an Internationalization of the Zambezi River Regime*, 25 COMP. & INT’L L.J. S. AFR. 20 (1992), Alexander E. Bulirani, *The Challenges of Developing an Integrated Approach to the Management of Lake Malawi/Niassa and its Catchment Resources*, in THE RAMSAR CONVENTION ON WETLANDS: LAKE MALAWI/NIASSA/NYASA ECOREGION REPORT ON THE DONORS AND PARTNERS MEETING (Alaphia Wright & Jonas Chaofoa eds., 2003).

234. See generally Maluwa, *Towards an Internationalization of the Zambezi River Regime*, *supra* note 233.

that shared management and equitable and reasonable utilization do not translate into co-ownership of the resources and joint sovereignty over the territory in which those resources are located. Given that all the riparian and basin states involved here are member states of the SADC, the institutional mechanism and regulatory framework envisaged in the Revised SADC Protocol offers the most obvious basis for the collaborative approach that I advocate in this essay.

IV. PROSPECTS AND PROBLEMS OF THE SADC MEDIATION PROCESS

This dispute, as with all disputes of this nature, is amenable to three possible solutions: first, a political solution through diplomacy; second, a legal solution through adjudication or arbitral settlement by a court or arbitral tribunal; and third, a military solution, which is of course the most extreme foreign policy instrument. It goes without saying that the choice of the solution to be pursued is a prerogative of the states and political elites or decision-makers in both countries, and not a choice to be made by the local border populations. The decision is also usually a function of the stakes involved in the conflict for the parties. The initiation of the SADC mediation process was recognition of the absence of a judicial mechanism in the regional body to deal with this kind of dispute. Yet, the process has been beset with delays, controversy, and confusion. At the same time, attempts at bilateral negotiations alongside the mediation have not fared any better. Malawi has at various times appeared to question the integrity of the mediation process, and on more than one occasion former President Joyce Banda announced Malawi's intention to refer the dispute to the ICJ.²³⁵ Malawi also simultaneously sought the intervention of the AU²³⁶ and the U.N. Secretary-General in the matter.²³⁷

An incident in April 2013 best illustrates Malawi's ambivalence towards the mediation. Malawi dramatically announced its withdrawal from the process, citing bias by a SADC official, John Tesha. According to the Malawian authorities, Mr. Tesha, a Tanzanian national and the Executive Secretary of the Forum for Former African Heads of State and Government tasked with assisting the chief mediator, had forwarded Malawi's

235. For example, at a meeting with mediators Joachim Chissano and Thabo Mbeki on July 14, 2012, President Banda told them that Malawi would not accept an interim deal on the dispute and reiterated her earlier position that if no resolution was reached by September 30, 2013, Malawi would take the matter to the ICJ. The deadline passed without Malawi taking any action, and it was subsequently reported that the mediators had asked for a new unspecified time frame to resolve the dispute. See Mabvuto Banda, *JB warns she will take lake dispute to ICJ*, THE NATION (July 15, 2013), <http://www.mwnation.com/jb-warns-she-will-take-lake-dispute-to-icj/>.

236. See, e.g., *Malawi 'refers lake border dispute with Tanzania to AU'*, BBC NEWS (Oct. 17, 2012), <http://www.bbc.com/news/world-africa-19978968>.

237. See *Malawi asks UN to mediate border dispute with Tanzania*, NYASA TIMES ONLINE (Oct. 13, 2012), <http://www.nyasatimes.com/2012/10/13/malawi-asks-un-to-mediate-border-dispute-with-tanzania/>.

submission to the mediators prematurely to the Tanzanian government.²³⁸ Although Malawi was persuaded to return to the mediation barely a month later, apparently following promises (which remain unfulfilled) of Tesha's recall by the Tanzanian government, there remains a certain degree of skepticism, if not outright distrust, of the mediation process in some quarters.²³⁹ I argue that from the outset, Malawi has been a somewhat reluctant party to the SADC mediation effort, and its hot-and-cold reaction to the process since its inception reveals that Malawi's preference is for ultimate referral to the ICJ.

Yet recourse by Malawi to the ICJ is not a foregone conclusion. Both Malawi and Tanzania are parties to the ICJ Statute by virtue of their ratification of the U.N. Charter. States are free to refer disputes to the Court without first exhausting diplomatic means of settling those disputes. But the jurisdiction of the Court—whether in terms of ordinary jurisdiction by the full bench of the Court or referral to a Chamber of the Court for arbitration—is not automatic. Under Article 36(2) of the Statute, the so-called Optional Clause, states may specifically declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court.²⁴⁰ Whereas Malawi made such a declaration on December 12, 1966,²⁴¹ Tanzania has not made one. Thus, Malawi's preferred route to judicial settlement by the ICJ would first require it to persuade Tanzania to make a special declaration accepting the compulsory jurisdiction of the Court for this matter and agree mutually to submit the dispute to the Court. This, in turn, requires precisely the kind of diplomatic suasion and pressure that Malawi is unable to exert upon Tanzania in the mediation process. It is by no means obvious that Tanzania would accede to this demand. More crucially, Malawi's declaration is accompanied by the condition that it "shall not apply to [disputes] in regard to which the parties of [sic] the dispute have agreed to have recourse to some other method of peaceful settle-

238. John Tesha was assigned to assist the mediation team in his capacity as the executive secretary of the Forum. See Aditi Lalhbahadur, *Malawi vs. Tanzania vs. SADC: Regional dispute resolution bites the dust*, S. AFR. INST. INT'L. AFF. (Aug. 13, 2013), <http://www.saiia.org.za/opinion-analysis/malawi-vs-tanzania-sadc-regional-dispute-resolution-bites-the-dust/>.

239. Such skepticism has been expressed particularly by some political analysts and commentators in the Malawian media. The view expressed by one commentator, Cedrick Ngalande, exemplifies this sentiment: "Malawi does not have much sympathy from former freedom fighters in this region because of its support for the failed RENAMO [rebels in Mozambique] and close relationship with the then apartheid South Africa. [Arbitration] by leaders in this region between Malawi and any SADC country is therefore likely to be highly skewed against us." Gwinyayi Dzinesa, *Concern over Malawi's decision on arbitration*, BUS. DAY (Apr. 11, 2013, 7:04 A.M.), <http://www.bdlive.co.za/africa/africanews/2013/04/11/concern-over-malawis-decision-on-arbitration/>.

240. Statute of the International Court of Justice art. 36(2), <http://www.icj-cij.org/documents/?p1=4&p2=2>.

241. I.C.J., *Declarations Recognizing the Jurisdiction of the Court as Compulsory: Malawi* (Dec. 12, 1966), <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>.

ment.”²⁴² Clearly, this reservation precludes the possibility of Malawi referring the matter to the ICJ while the mediation process is ongoing.

In agreeing to submit their dispute to a SADC-led mediation process, the two parties to the dispute signaled their commitment to search for a peaceful diplomatic solution. The difficulty for Malawi is that, although as of this writing (June 2016) the mediation effort had clearly stalled for over a year, neither party seems ready to break off the negotiations altogether and take responsibility for the failure, nor do the mediators appear keen to cut the Gordian knot and declare the mediation over.²⁴³ All the concerned parties are no doubt sensitive to the fact that a failed mediation would likely undermine the authority of SADC’s dispute resolution efforts in the region, with the broader implication that a region that is unable to manage its own disputes loses credibility in the eyes of the international community. This could have ramifications for SADC’s authority to address future interstate disputes among its members.²⁴⁴

Despite these pitfalls and isolated pronouncements by some political leaders on both sides proclaiming their readiness to fight in defense of their sovereignty, nobody seriously thinks that either party wishes to seek a military solution to this dispute. President Joyce Banda’s reported decision to commission patrol boats for the lake in mid-2013 was, in my view, more an empty gesture of saber-rattling aimed at impressing a domestic audience than preparation for a real military confrontation.²⁴⁵ For one

242. Para. 2 of the declaration states:

Provided that this declaration shall not apply to: (i) disputes with regard to matters which are essentially within the domestic jurisdiction of the Republic of Malawi as determined by the Government of Malawi; (ii) disputes in regard to which the parties of [sic] the dispute shall agree to have recourse to some other method of peaceful settlement; or (iii) disputes concerning any question relating to or arising out of belligerent or military occupation. *Id.*

243. See Rex Chikoko, *Mutharika rules out war with Tanzania over Lake Malawi*, AFR. REV. (Aug. 13, 2014, 9:29 AM), <http://www.africareview.com/News/We-cannot-go-to-war-with-Tanzania-over-lake/-/979180/2417530/-/ohjnxqz/-/index.html>.

244. As it happens, the SADC Tribunal, the regional judicial body established in terms of Article 9 of the SADC Treaty with a mandate, *inter alia*, to resolve disputes among member states, was suspended in August 2010 by the SADC summit held in Windhoek, Namibia, following representations by Zimbabwe that the tribunal was not properly established and, as such, could not be legally recognized as an institution of SADC. The representations by Zimbabwe came after the tribunal made decisions regarding the Zimbabwe Fast-Track Land Reform Programme, which the Zimbabwean government did not agree with. The suspension was extended indefinitely by the thirty-second SADC summit in Maputo, Mozambique, on August 17, 2012. In the absence of the tribunal, there is no other regional court that could conceivably adjudicate on the matter. At the moment, neither party has mooted the idea of submitting the dispute to a formal arbitration if the mediation fails. Under these circumstances, recourse to the ICJ for a judicial settlement would be the only other option for a peaceful settlement of the dispute.

245. Aislinn Laing, *Arms firm link to charity that paid for PR costs of Malawi president’s interview*, THE TELEGRAPH (Nov. 28, 2013, 8:54 PM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/malawi/10482301/Arms-firm-link-to-charity-that-paid-PR-costs-of-Malawi-presidents-interview.html>.

thing, according to a recent assessment by a leading external intelligence agency, Malawi's military capabilities appear to be no match for Tanzania's. The agency estimated Malawi's military expenditure for 2012 at only 13.8 percent that of Tanzania, which in military terms makes Malawi undoubtedly the quantitatively weaker of the two parties.²⁴⁶ President Peter Mutharika, who replaced Joyce Banda in May 2014, has pledged to continue the search for a nonmilitary solution to the dispute while reiterating Malawi's position that its sovereignty over the lake is nonnegotiable.²⁴⁷ Yet, it is clear that Malawi continues to be a reluctant party to the mediation. Perhaps this reluctance can be explained in the context of the observation that "[the] 'voluntariness' of mediation masks the fact that mediated solutions offer imbalanced gains that generally benefit stronger parties; [and] for a weaker party, a 'voluntarily' accepted solution risks comparison to diplomatic brutalization by a powerful neighbor."²⁴⁸ For historical reasons that need not be discussed in any detail here, there can be no doubt that Tanzania enjoys superior diplomatic clout over Malawi within the SADC region because of its leadership position in the founding of the subregional body. Moreover, the fact that the three-person mediation team includes two former presidents (Joachim Chissano and Thabo Mbeki) who have historically been politically closer to Tanzania than to Malawi, because of the former's role in and support for the Mozambican and South African liberation struggles, leads the Malawian political leadership to question their ability to act as honest and impartial brokers in this mediation. This skepticism is shared by some political analysts and commentators.²⁴⁹

CONCLUSION

The examination of the historical evidence, treaties, and the applicable law undertaken in this article leads to the conclusion that Malawi has the better legal claim that would likely be vindicated by an impartial and objective judicial authority. Malawi's title rests on the provision of Article I(2) of the Anglo-German Treaty of 1890. Earlier suggestions by Tanzania that the United Kingdom had unilaterally changed the boundary from the median line to the eastern shoreline for the benefit of the Federation of Rhodesia and Nyasaland have been dismissed as factually incorrect and dubious.²⁵⁰ The argument that the 1890 Agreement must be deemed to have been impliedly amended as a result of inconsistencies in the represen-

246. Tanzania's and Malawi's military spending for 2012 was USD \$950 million and USD \$131 million, respectively. See U.S. CENTRAL INTELLIGENCE AGENCY (CIA) WORLD FACTBOOK (2012), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2034rank.html>.

247. See Chikoko, *supra* note 243.

248. Lea Brilmayer, *America: The World's Mediator?*, in INTERNATIONAL DISPUTE RESOLUTION: CASES AND MATERIALS 57, 63 (Mary Ellen O'Connell ed., 2006).

249. See Dzinesa, *supra* note 239.

250. The claim was made by President Julius Nyerere in 1967. Mayall notes that the claim was linked to some apparently inconsistent information in the United Kingdom's AN-

tations of the location of the boundary on some official and unofficial maps and in textual descriptions in reports on both the British and German sides has been rejected as untenable. As successor state to the United Kingdom in the territory of the former Nyasaland protectorate, Malawi has not relinquished its title over the disputed part of the lake in favor of Tanzania. On the contrary, since their independence, both countries have confirmed their recognition of the principle of respecting boundaries inherited at independence by endorsing the OAU's Cairo resolution of 1964 and accepting the obligation enshrined in Article 4(b) of the AU Constitutive Act, to which they are both parties. Unlike the resolution, which could be characterized as lacking legally binding force, the Constitutive Act is a binding treaty.

As argued in this essay, even if one accepts, as I do, that the decision by the newly independent African states to accept the inviolability of the boundaries inherited at independence as a "tangible political reality" was a painful but necessary compromise that validated the application of questionable imperial international law and arguably illegitimate claims of title to African territories, there is now a "tangible legal reality": the sanctity of colonial boundaries is a principle reaffirmed and encoded in a binding multilateral treaty adopted by African states some four decades after independence. Political expediency is not of itself enough reason for states to withdraw from obligations voluntarily assumed under a treaty. While it is true that *uti possidetis* does not preclude states from altering their borders or creating new states, such territorial modifications can only be with the mutual consent of the parties concerned. As I have argued above, respect for the principle of *uti possidetis* need not mean the exclusion of negotiated solutions that enable the shared management of borderland resources for the mutual economic benefit of populations on both sides of the border.²⁵¹

Against the foregoing conclusion, Tanzania might argue that its presumed acceptance of *uti possidetis* has been vitiated by its contrarian conduct in depicting the boundary as following the median line, and not the shoreline, of the lake on its maps. It might thus be suggested that the current dispute differs in one significant respect from the cases discussed above in which the ICJ and other international tribunals have held that map evidence is not by itself conclusive to prove that a state has accepted the territorial claims of its neighbor. However, it is noteworthy that Tanzania's campaign to depict the boundary differently on its maps has not been consistent throughout its post-independence existence. Mention was made earlier of the categorical statements by Prime Minister Julius Nyerere, and later Prime Minister Rashid Kawawa, in the Legislative Assembly/Parliament, in the early years following Tanzania's accession to self-government and independence, confirming their acceptance of the

NUAL COLONIAL REPORTS for the period 1948–53, i.e. before the establishment of the Federation. See Mayall, *supra* note 3, at 623–24.

251. See generally the discussion in Part III *supra*: Competition Over Natural Resources as a Root Cause of Border Disputes.

shoreline boundary. Admittedly, as has been noted in this discussion, Nyerere later changed his position in 1967. A correct reading of the various cases in which the issue of map evidence has come up for consideration clearly suggests that the probative value of map evidence comes into play in situations in which the text of a boundary treaty is unclear, inconsistent, or ambiguous. In such cases, the map may be used as an additional interpretative tool, but it cannot on its own be dispositive or determinative of the dispute. In this case, Tanzania's campaign to present the boundary differently on its maps from the description in Article I(2) of the Anglo-German Treaty of 1890, a treaty that remains binding on both Malawi and Tanzania, as argued above, is nothing more than a unilateral attempt to create new "cartographic facts" on the ground to void a treaty provision. Given the trajectory of the jurisprudence of the ICJ in the many territorial disputes that it has adjudicated, it is highly doubtful that this argument would be received favorably by the Court.

Sumner has analyzed nine territorial disputes that have been brought before the ICJ and examined the interplay and hierarchy among the most common nine justifications in the outcomes of these cases to determine which of them is dispositive or, at the minimum, determinative.²⁵² He identifies the nine justifications that have been invoked by claimants in such disputes as: treaties, geography, economy, culture, effective control, history, *uti possidetis*, elitism, and ideology.²⁵³ He concludes that the court's territorial dispute jurisprudence reveals "a tripartite, hierarchical decision rule that looks first to treaty law, then to *uti possidetis*, and finally to effective control."²⁵⁴ In his reading, although territorial disputants perennially make arguments on various justifications, only these three have operated consistently as the ICJ's decision rule, and concludes that only when a decision on any of these three grounds is impossible will the Court resort to equity in deciding a case.²⁵⁵ In my view, all three of these justifications clearly favor Malawi. While one cannot rule out the possibility that the ICJ could choose to use its authority under Article 38(2) of its Statute to decide this dispute, if brought before it on equitable grounds, Tanzania's unilateral effort to depict the boundary differently on its maps would certainly play no part in such considerations.

For the reasons explained above, Malawi appears confident that an independent and impartial application of the law would favor its position. Tanzania's position, on the other hand, hints at its confidence in a favorable outcome if the matter is resolved through diplomatic negotiations and mediation. Currently, all indications are that Tanzania would prefer to avoid submitting the matter to judicial settlement by the ICJ.

Gent and Shannon have posited that, among other factors, states are endeared by judicial settlement (adjudication and arbitration) for three

252. See Sumner, *supra* note 179, at 1780.

253. *Id.* at 1782.

254. *Id.* at 1803–04.

255. *Id.* at 1811–12.

reasons: first, it provides political cover; second, it can be more efficient; and third, it placates domestic opposition to mediated outcomes. They also argue that in a dispute over control of resources, such as this, the anticipated scale of revenue and foreign investment provides motivation for an authoritative third-party ruling for the party more confident in its legal position.²⁵⁶ Thus, the decision whether or not to proceed to judicial settlement by the ICJ as opposed to staying with the mediation through the SADC process depends on the respective parties' assessment of their chances of success or likelihood of an unfavorable outcome. The following observation summarizes the situation aptly:

Malawi, the state that holds *de facto* control over the resources, could be unwilling to risk the loss by giving up decision control. On the other hand, Tanzania could be unwilling to forfeit its opportunity to gain some of those resources by submitting to a binding process. How the parties view their respective likely outcomes, as well as their respective power comparative to one another, may instruct their enthusiasm for controlled or uncontrolled processes.²⁵⁷

This assessment is correct, and it highlights further the diplomatic challenge that Malawi faces in pursuing its preferred option of taking the dispute to the ICJ. Another factor that Malawi has to contend with is that adjudication by the ICJ is a long process that could run into a number of years. There is thus an inherent risk that the proposed oil and gas explorations, for which concessions have already been granted, and other planned economic activities could be delayed for an indeterminate time. Nevertheless, from Malawi's perspective, the threat of an ICJ decision definitively extinguishing Tanzania's legal claim over the lake incentivizes Tanzania to seek a negotiated solution that would ensure protection of the interests of the local populations and the economic benefits from participation in the exploitation of the maritime resources. Furthermore, the threat of continuing exploration and possible exploitation of these resources prior to settlement of the dispute also incentivizes Tanzania to continue with the negotiations and avoid the temptation to use its superior military power to resolve the dispute. Besides, given that Tanzania has the weaker legal case, a view supported by almost all legal commentators who have written on the matter, the best option open to it is to press on for a diplomatic or political solution through mediation or direct negotiations with Malawi.

Yet, both options—preference for recourse to the ICJ for Malawi and preference for continued mediation for Tanzania—are premised on the as-

256. Stephen E. Gent & Megan Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, 55 J. CONFLICT RESOL. 710, *passim* (2011).

257. CHRIS MAHONY ET AL., N.Z. CTR. FOR HUMAN RIGHTS LAW, POLICY AND PRACTICE WHERE POLITICS BORDERS LAW: THE MALAWI-TANZANIA BOUNDARY DISPUTE 10 (2014); New Zealand Centre for Human Rights Law, Policy and Practice, Africa Working Paper Series No. 21.

sumption that the best outcome is one that satisfies the absolutist position of either party. It is not impossible to imagine a solution, whether a judicial settlement or a negotiated outcome, that would both reaffirm Malawi's territorial integrity and the sanctity of its international boundaries *and* require both states to cooperate with each other on the joint management and exploitation of the resources in the disputed area of the lake. This requires a shift from an approach that focuses on the imaginary line that delineates the boundary between the two neighbors and the singular and exclusive interests of the states to one that widens its gaze across borderlands and the broader interests and livelihoods of the ordinary communities on both sides of the lake: a solution that turns the border from a barrier into a bridge between the two communities. A recent informal statement by a member of the mediation team seems to hint at some thinking in this direction, at least on the part of the particular mediator.²⁵⁸ The best outcome for both Malawi and Tanzania is one that ensures that the oil and gas resources under the troubled waters of Lake Malawi, if they exist, should be a benefit, not a curse, for the peoples of both countries.²⁵⁹ Of course, given the history of the relations between the two countries, it is also conceivable that if the mediation fails and neither party

258. During a visit by to Malawi Mr. Joachim Chissano and Mr. Festus Mogae on November 20, 2014 to brief President Mutharika on the status of the stalled mediation, Mr. Mogae warned Malawi during a media conference that taking the matter to the ICJ is costly and time-consuming. He shared Botswana's experience of its own river boundary dispute with Namibia which was adjudicated by the Court in 1996 (the *Kasikili/Sedudu Island* case). He noted that although Botswana won the case, the Court ordered it to continue allowing Namibians to carry out navigation, fishing, and tourism activities in the waters under its sovereignty, which he said they had already been doing before they took the matter to the ICJ and spent a lot of money on the litigation. The irony that it was under his presidency that Botswana submitted the case to the Court after a failed mediation could not have been lost on his audience. On his part, Mr. Chissano admitted that the mediation had stalled because Malawi was going into its (May 2013) presidential and general elections, and that he could not confirm when the process would resume. If this was indeed the reason for the stalling, then it could take much longer before the mediation talks restart, given that Tanzania has its own presidential and general elections coming up in late 2015. Meanwhile, President Mutharika is reported to have reaffirmed his commitment to seeking a peaceful solution while insisting that Malawi will not negotiate on its ownership of the lake. Frank Namangale, *Mediation Team Urges Patience from Malawi, Tanzania*, THE NATION (Nov. 21, 2014), <http://mwnation.com/mediation-team-urges-patience-malawi-tanzania/>.

259. On November 19, 2014, Malawi's Ministry of Natural Resources, Energy and Mining directed that "[all] companies involved in oil and gas exploration in Malawi immediately cease all operations in relation to the granted oil and gas exploration licenses until the review that is currently under way, regarding the manner and the procedures that were followed, is finalized." Hudson Mphande, *Malawi Stops Oil, Gas Exploration; RakGas Gets Support*, NYASA TIMES (Nov. 20, 2014), <http://www.nyasatimes.com/2014/11/20/malawi-stops-oil-gas-exploration-rakgas-gets-support/>. The government has pointed out that this does not signal any move to abandon oil and gas exploration on the lake, but simply to verify that all exploration concessions were granted in accordance with proper procedures and to ensure transparency. At the time of this writing (June 2016), the suspension has not yet been lifted, and all indications are that it will remain in place for a while longer. In the meantime, unconfirmed reports suggest that one or more of the concessions may be revoked for apparent irregularities in the awarding process.

takes the matter to the ICJ for judicial settlement, the boundary dispute will be allowed to fester indefinitely, or at least for the foreseeable future, without resolution. While this may not be the most desirable outcome, consigning the dispute to the state of legal limbo in which it has been for the better part of the last fifty years may be the most politically convenient “solution” for both parties, until domestic pressures once again dictate otherwise.