

# Between a rock and a hard place: the right to self-determination versus *uti possidetis* in Africa

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## *Abstract*

The tension between the right of a people to self-determination and the right of a state to its territorial integrity has claimed many lives in Africa. The *raison d'être* of international law is the regulation of affairs pertinent to its main subjects: states. A difficulty arises when one asserts rights of individuals or peoples within a legal system that is designed for the needs of states. Generally, the international community has not had difficulty with the exercise of the right to self-determination; the problem has always been when its application resulted in secession. In post-colonial Africa, struggles have been waged under the banner of self-determination and these have been thwarted with reference to the right of a state to its territorial integrity. This paper seeks to address this tension as Africa is replete with examples of the suppression of 'a peoples' right to self-determination in favour of the territorial integrity of a state.

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## **Introduction**

International law recognises both the right to self-determination and the right of a state to its territorial integrity, and the tension between the two rights is far from being resolved. Nowhere has this tension played itself out more graphically than on the African continent. Africa has over the last half-a-century lost no less than two million lives in conflicts or wars that have been fought either in pursuit of the right to self-determination, or in defence of colonially inherited boundaries.<sup>1</sup> As Neuberger asserts:

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<sup>1</sup> See A Mazrui 'The bondage of boundaries: towards redefining Africa' *The Economist* (1993) September 11 32–36.

In Africa, more than anywhere else, we face the dilemma of having to choose between territorial integrity of a state and the self-determination of a people. The conflict between these two principles explains most of the wars, conflicts, and tensions between and within African states in post-colonial Africa.<sup>2</sup>

Katanga in the then Zaire (now Democratic Republic of Congo), Biafra in Nigeria, Eritrea, Sudan and Western Sahara are but a few examples that have brought the tension between the two principles to the fore.

The tension between the right of a people to self-determination and the right of a state to its territorial integrity, is a manifestation of a wider tension intrinsic to international law as a legal system. The *raison d'être* of international law is the regulation of affairs pertinent to its main subjects: states. A difficulty arises when one asserts rights of individuals or peoples within a legal system that is designed for the needs of states.<sup>3</sup> Be that as it may, it is an historical fact that most African states attained independence through their assertion of the right to self-determination.<sup>4</sup> Self-determination is a multi-faceted concept whose meaning can be political, cultural, economic and socio-economic. Generally, the international community has not had difficulties with the exercise of this right; the problem has always been when its application results in secession, thus interfering with the boundaries of a territorial state.

There is no right of a people to secession in international law; but at the same time secession is not prohibited.<sup>5</sup> State practice, particularly in Africa, has shown a general slant towards the protection of the territorial integrity at the cost of post independence expression of the right to self-determination. In the post-colonial Africa, struggles continue to be waged under the banner of self-determination and these have been thwarted with reference to the right of a state to its territorial integrity. It is this problem that this paper seeks to address as Africa is replete with examples of the

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<sup>2</sup> A Neuberger *National self-determination in postcolonial Africa* (1986) at 106.

<sup>3</sup> See J Kabbers & R Lefeber 'Africa: lost between self-determination and *uti possidetis*' in 1993 *Peoples and Minorities in International Law* at 36.

<sup>4</sup> OS Kamanu 'Secession and the right of self-determination: an OAU dilemma' (1974) 12/3 *The Journal of Modern African Studies* at 355.

<sup>5</sup> J Dugard 'Secession: is the case of Yugoslavia a precedent for Africa?' (1993) 5 *African Journal of International and Comparative Law* 163 at 165.

suppression of a peoples' right to self-determination in favour of territorial integrity of a state.<sup>6</sup>

The territorial delineation of a state finds its expression in its boundaries. The notion of boundaries has both political and legal ramifications. Politically they are visible demarcations of states' size and location, while legally, as Shaw points out, they 'evidence the extent of a state's sovereignty and form the limits of the operations of the domestic legal system'.<sup>7</sup> The general protection of the territorial integrity of a state in Africa has been conducted as though the principle of *uti possidetis* (which will be explained later), prescribes a territorial boundary that can never be changed, which is not the case in international law.<sup>8</sup> It is submitted that statehood remains an important coordinating principle of international relations, and that for this reason attempts should be made to maintain and respect its integrity. Conversely, there are also valid and deserving claims for secession which should not always be dismissed 'under the veil of unity'.<sup>9</sup> There may be instances where a claim to secession may be undesirable and can be dissuaded, but conversely there may also be instances where secession is inevitable and should be allowed as it was the case in Eritrea. Drawing the line between the two will require a careful and delicate balance.

The argument will be presented in three parts. Part one will present a brief overview of the discourse around Africa's colonial borders, and will include the international law attitude to territorial title. Part two will look at the evolution of the right to self-determination and its application in Africa. Part three will present the paradox between the principle of *uti possidetis* and the right to self-determination and then conclude.

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<sup>6</sup> The failed Katanga Secession (1960), the failed Biafra Secession (1967–1970) and the long struggle of the people of South Sudan against the government of Sudan (1955–1972 & 1982–2005).

<sup>7</sup> MN Shaw 'The heritage of states: the principle of *uti possidetis juris* today' (1997) 67 *British Yearbook of International Law* at 77.

<sup>8</sup> MN Shaw 'Peoples, territorialism and boundaries' (1997) 3 *European Journal of International Law* 478 at 495.

<sup>9</sup> Kabbers & Lefeber n 3 above at 45.

### **A brief overview of the discourse around Africa's colonial borders and post colonial border**

African borders are inextricably linked to the continent's colonial legacy.<sup>10</sup> At the height of colonialism, the African continent was invaded by no less than seven colonial powers.<sup>11</sup> It was these colonial powers who divided the continent at the Berlin Conference in 1884 and 1885 at which no African delegation was present or invited. The partitioning of the continent paid scant attention to the indigenous people of the continent, attempting rather to diffuse and avoid conflicts among the colonisers themselves.<sup>12</sup> The 'haphazard and arbitrary'<sup>13</sup> manner in which the borders were drawn left the inhabitants of the continent fragmented and disorientated. The arbitrarily drawn borders may have minimised the potential territorial claims between the colonial powers, but for Africans, it 'was the genesis of many present-day conflicts and virtually insoluble problems in the African continent'.<sup>14</sup> To this day, certain of these arbitrarily drawn borders continue to be 'Africa's Achilles heels'.<sup>15</sup> For instance, as Wa Mutua points out, the Masai were divided between Kenya and Tanzania, the Ewe in Togo and Ghana, while groups with a history of conflict like the Akimbo, Kikuyu and the Masai were lumped together in Kenya.<sup>16</sup>

As the 'winds of change' began to blow through the continent, it was hoped that the process of decolonisation would rid Africa of its colonial legacy. Decolonisation in the form of independence provided an opportune moment for the new crop of African leaders to make a decision

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<sup>10</sup> P Engelbrecht, S Tarango & M Carter 'Dismemberment and suffocation: a contribution to the debate on African boundaries' (2002) December *Comparative Political Studies* at 1093–1118.

<sup>11</sup> The English, Germans, Italians, Spanish, Portuguese, French and Belgians have each had a share of dominance and power on the African continent.

<sup>12</sup> See Makua wa Mutua 'Why redraw the map of Africa: a moral and legal inquiry' (1995) 16 *Michigan Journal of International Law* 16 1113 at 1127.

<sup>13</sup> J Herbst 'The creation and maintenance of national boundaries in Africa' *International Organisation* 43, 4 Autumn (1989) at 675.

<sup>14</sup> Elias as quoted in Makua wa Mutua n 12 above at 1142.

<sup>15</sup> RA Griggs 'Boundaries for an African renaissance: reshaping the continent's political geography' available on: <http://ccrweb.ccr.uct.ac.za/archive/two/3/p21.html> (accessed on 30 September 2008).

<sup>16</sup> See Makua wa Mutua n 12 above at 1136 including fn 88. More telling of the manner in which the borders were drawn is the remark by Lord Salisbury that, '[w]e have been engaged in drawing lines upon maps where no white man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by a small impediment that we never knew exactly where the mountains and rivers and lakes were'. As quoted in Wa Mutua n 12 above at 1135.

on the question of borders. The All Africa Peoples Conference of 1958 in Accra, Ghana, had after all denounced the ‘artificial frontiers drawn by Imperialist powers to divide the peoples of Africa’. The Conference called for the ‘abolition or adjustment of such frontiers at an early date’.<sup>17</sup>

When the Organisation of African Unity (OAU)<sup>18</sup> was formed in 1963, one of the challenges the leaders faced was to pronounce on borders which they had inherited from the colonial powers. They could either re-draw the boundaries as suggested by the All African People’s Conference, or maintain the ‘status quo ante independence’.<sup>19</sup> Having just attained independence, African leaders were protective of their new gains, and were understandably very preoccupied with the integrity of the sovereignty of their new states. As Dugard writes, ‘realising that the re-drawing of the map of Africa along ethnic lines would destroy the stability of the continent, post-independence African leaders and the Organisation of African Unity invoked the principle of territorial integrity’.<sup>20</sup> The desire for territorial integrity was captured in both articles II and III of the OAU Charter (Charter). Article II enjoined member states to defend their ‘sovereignty, their territorial integrity and independence’, while in article III the leaders committed themselves to ‘respect the borders existing on their achievement of national independence’.<sup>21</sup> The effect of both articles II and III was that the arbitrarily drawn boundaries were handed ‘*voetstoots*’ (as is) to the new crop of leaders.

African leaders were once again presented with an opportunity to reconsider their position to borders when the OAU metamorphosed into the African Union (AU) in 2002. In line with the Charter of the OAU, article 4(b) of the Constitutive Act of the African Union continued to call for ‘respect of borders existing on achievement of independence’. Indeed, it has been stated that Africa is remarkable for having ‘retained essentially unchanged, the boundaries of the 1880s – a feat which international society has repeated nowhere else’.<sup>22</sup> The decisions of African political

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<sup>17</sup> As quoted in Castellino J *International law and self-determination* (2000) 140.

<sup>18</sup> One of the objectives of the OAU was to rid the continent of the remaining vestiges of colonisation and apartheid. See: [http://www.africa-union.org/root/au/AboutAu/au\\_in\\_a\\_nutshell\\_en.htm](http://www.africa-union.org/root/au/AboutAu/au_in_a_nutshell_en.htm) (accessed on 30 September 2008).

<sup>19</sup> OC Okafor *Re-defining legitimate statehood: international law and state fragmentation in Africa* (2000) 33.

<sup>20</sup> Dugard n 5 above at 163.

<sup>21</sup> As in I Brownlie *African boundaries: a legal and diplomatic encyclopaedia* (1979) 11.

<sup>22</sup> P Pam ‘Legitimacy, justice and the future of Africa’ (2005) 5 *Human Rights & Human Welfare* 28.

leaders about boundaries may have been purely political or in the interest of maintaining stability in the continent, but legally it drew from the international law principle of *uti possidetis* and it is to this that this paper now turns.

### **International law position on territorial title**

Legally, Africa's 'dogmatic devotion'<sup>23</sup> to colonial boundaries may be explained by reference to two international law principles: *uti possidetis* and intertemporal law. The history of both is well documented.<sup>24</sup> Suffice it to say that *uti possidetis* has its origins in Roman private law as a Praetorian Edict to settle property ownership.<sup>25</sup> The Edict provided provisional possession during litigation in disputes involving property ownership, by providing more rights to the possessor, hence the full text *uti possidetis, ita possidetis*, which means, 'as you possess, so may you possess'.<sup>26</sup> The reluctance of the Edict to disturb possession was aimed at promoting and maintaining order in the Roman Empire.<sup>27</sup> The possessor's rights were, however, weakened if he had obtained land in a clandestine manner or had used force.<sup>28</sup> Weakened as the position may have been, it was a general practice in Roman law that the 'status quo would be preserved; irrespective of the means by which possession had been gained'.<sup>29</sup> It is this notion of preserving the 'status quo' which inspired the principle of *uti possidetis* as it later came to be applied to territory in international law.

At the dawn of decolonisation, *uti possidetis* evolved to be a binding principle of international law protecting territorial borders of states. Malcolm Shaw encapsulates its international law ratio thus:

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<sup>23</sup> Herbst J as quoted in Ian Spears 'Debating secession and the recognition of new states in Africa' (2004) 13/2 *African Security Review* at 35.

<sup>24</sup> For *uti possidetis* see Makau wa Mutua n 12 above. Shaw n 7 above, Shaw n 8 above and E Hasani 'Uti possidetis juris: from Rome to Kosovo' (2003) 27/2 *Fletcher Forum of World Affairs* at 85. For intertemporal law, see TO Elias 'The doctrine of international law' (1980) 74/2 *American Journal of International Law* 285–30 and MN Shaw *International Law* (2003) at 429–430.

<sup>25</sup> See E Hasani n 24 above at 85.

<sup>26</sup> SR Ratner 'Drawing a better line: *uti possidetis* and the borders of new states' (1996)/90 *The American Journal of International Law* at 593.

<sup>27</sup> J Castellino n 17 at 110–111.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Id* at 111.

the principle of *uti possidetis juris* developed as an attempt to obviate territorial disputes by fixing the territorial heritage of new states at the moment of independence and converting existing lines into internationally recognised borders, and can thus be seen as a specific legal package, anchored in space and time, with crucial legitimate functions.<sup>30</sup>

Closely related to *uti possidetis* is the principle of intertemporal law.<sup>31</sup> This principle holds that in an event of a dispute or claim in international law, such a claim will be adjudicated in accordance with the conditions and rules which existed at the time when the right was created and not at the time the claim was made.<sup>32</sup> The latter principle raises the importance of what Shaw calls ‘a critical date’ on which the right was created.<sup>33</sup> The ratio of the principle was expressed in the *Island of Palmas*<sup>34</sup> arbitration where it was stated that, ‘a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.’<sup>35</sup> For both Latin America and Africa, the critical date became decolonisation.

The first application of *uti possidetis* as a principle of international law principle was during the decolonisation of Latin America at the turn of the nineteenth century. Within the Latin American context, *uti possidetis* marked an end to the concept of *terra nullius* by recognising the decolonised states as possessors of all territories presumed to have been possessed by their colonial predecessors.<sup>36</sup> Its application in Latin America avoided or minimised potential conflicts based on delineation of territory as it recognised the ‘clear identification of each border’s location based on colonial era administration lines.’<sup>37</sup> Underlying the principle of intertemporal law, is also the need for stability, so in the foregoing context, the underlying presumption is that both *uti possidetis* and intertemporal law will facilitate this – a presumption that was also applied in Africa.

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<sup>30</sup> Shaw n 7 above at 76.

<sup>31</sup> See TO Elias ‘The doctrine of international law’ (1980) 74/2 *American Journal of International Law* 285–307 for an exposé of this doctrine.

<sup>32</sup> Shaw n 24 above at 429–430.

<sup>33</sup> *Ibid.*

<sup>34</sup> <http://www.gwu.edu/~jaysmith/Island.html> (accessed on 30 September 2008).

<sup>35</sup> As quoted in Elias cited above in n 31 at 286.

<sup>36</sup> RP Hensel, ME Allison & A Khanami ‘The colonial legacy and border stability: *uti possidetis* and territorial claims in the Americas’ at:

<http://garnet.acns.fsu.edu/~phensel/Research/io05.pdf/> (accessed 30 September 2008).

<sup>37</sup> *Ibid.*

context, the underlying presumption is that both *uti possidetis* and intertemporal law will facilitate this – a presumption that was also applied in Africa.

The core principles are widely entrenched in the constitutive documents of both the OAU and the AU. Unlike Latin America, in Africa the application of *uti possidetis* was no longer about the ‘retention of colonial powers as in Spanish America’ but about ‘treaty succession to address boundaries between different colonial powers’.<sup>38</sup> Though *uti possidetis* was first applied in the decolonisation of Latin America, it was in the African dispute case of *Burkina Faso/Mali*<sup>39</sup> that its core principles and scope of application were eloquently articulated. The dispute concerned a common stretch of land between Burkina Faso and the Republic of Mali, which had for a long time been a source of conflict between the two countries. Both parties to the dispute expressly requested the chamber of the International Court of Justice to adjudicate the dispute based on the principle of the intangibility of frontiers inherited from colonisation, thus affording the chamber an opportunity to give an exposition of the doctrine of *uti possidetis*.<sup>40</sup>

As if to ratify the 1964 Cairo resolution of the African leaders retrospectively, the chamber held that:

The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.<sup>41</sup>

The Chamber went on to say that the core principle of *uti possidetis*

lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case the

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<sup>38</sup> SR Ratner n 26 above at 596.

<sup>39</sup> International Court of Justice (ICJ) Report (1986) 55. See also a commentary on the case by GN Barrie ‘*Uti possidetis* versus self-determination and modern international law: in Africa the chickens are coming home to roost’ 1988 *TSAR* 452.

<sup>40</sup> Paragraph 20.

<sup>41</sup> Paragraph 21.

On the status of the newly created boundaries, the Yugoslav Arbitration states that 'except where otherwise agreed, the former boundaries become frontiers protected by international law'.<sup>43</sup> In Africa therefore, boundaries enjoy a political protection through the Constitutive Act of the AU and a legal one as pointed out by the Yugoslav Arbitration Commission. State practice, particularly in Africa, has been geared towards the protection of these territorial boundaries which, as Paust asserts, became the 'legally recognised curtain'<sup>44</sup> behind which serious violation of rights took place.

In the international relations arena, it must be pointed out that with the exception of Antarctica, the world does not have any territory that has not been claimed or does not fall under any state jurisdiction.<sup>45</sup> The implication of this is that for interstate territorial claims, no claim can happen without affecting the existence of another state. Within states themselves, especially in Africa with its multi-cultural and multi-ethnic populations, any claim to secession will be an affront to the much protected right of a state to its territorial integrity. In support of both *uti possidetis* and intertemporal law, proponents of these principles hold that the two assist in avoiding chaos and maintaining stability in world politics. As pointed above, Africa has been faithful in maintaining the colonially inherited borders, and yet the post-colonial era has been one characterised by instability and protracted conflicts.

The dawn of freedom in South Africa in the early 1990s marked the end of the vestiges of colonialism in Africa. To echo the International Court of Justice in the *Burkina Faso/Mali* case, Africa's 'photograph' was taken with the demise of colonisation.<sup>46</sup> Post colonial claims to secession have been constantly frustrated by political leadership preoccupied with the territorial integrity of their states. Mutua correctly notes that up until Eritrea's secession from Ethiopia, 'prevailing state ideology in Africa treated as treason any discussion about border changes, separatist movements, or ethnic self-determination within an independent state'.<sup>47</sup> Did the secession of Eritrea mark the change in state ideology in Africa, and does *uti possidetis* allow secession to take place?

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<sup>43</sup> Opinion 3 of the Yugoslav Arbitration as quoted in Shaw 8 above at 479.

<sup>44</sup> JJ Paust 'Self-determination: a definition focus' in Yonah Alexander & Robert Friedlander (eds) *Self-determination: national, regional, and global dimensions* (1980) at 7.

<sup>45</sup> See C Anyangwe 'African border disputes and their settlement by international juridical process' (2003) 28 *South African Yearbook of International Law* at 29.

<sup>46</sup> ICJ Reports 1986, 554 at 568.

<sup>47</sup> M wa Mutua n 12 above at 1119.

It is important to note that while *uti possidetis* advocates the respect of territorial borders at the moment of independence, it does not 'bar post independence changes in borders carried out by agreement'.<sup>48</sup> As an international law doctrine, *uti possidetis* has been of assistance in facilitating the process of decolonisation in both Latin America and Africa. The main difficulty, however, is with its applicability in non-colonial situations like Katanga, Biafra and Southern Sudan.<sup>49</sup> As pointed out above, Africa's first successful case of secession was in 1993 when Eritrea seceded from Ethiopia following a referendum after about thirty years of guerrilla warfare, resulting in what Ali Mazrui calls the 'taboo of officially sanctioned secession'.<sup>50</sup> It is this right to self-determination that results in secession to which this paper now turns.

### **The evolution of the right to self-determination and its application in Africa**

Scholars attribute the use of the concept of self-determination to the former American President Woodrow Wilson in the period shortly after the First World War.<sup>51</sup> There are three dimensions to Wilson's understanding of self-determination. Firstly, as Brown-John<sup>52</sup> explains there is the internal self-determination which recognises the right of people to choose their own form of government. Secondly, there is the external self-determination which recognises the freedom of the people to choose the sovereign they want to live under. Thirdly, Wilson's self-determination recognises the fact that there should be a system for the people to express their consent to the government that rules them. Common to all the three dimensions, is the right of people to choose, and this choice forms the foundation of self-determination as it has evolved over the years.

It was only in the post-1945 era that self-determination was recognised as a principle of international law. In 1952, the General Assembly of the United Nations made a recommendation that, 'state members of the United Nations shall uphold the principle of self-determination of all peoples and nations'.<sup>53</sup> The international law position has always been to

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<sup>48</sup> Ratner n 26 above at 600.

<sup>49</sup> See Castellino n 17 above 141.

<sup>50</sup> Mazrui note 1 above at 32.

<sup>51</sup> FL Kirgris 'The degrees of self-determination in the United Nations era' (1998) 88 *The American Journal of International Law* 304 at 304.

<sup>52</sup> CL Brown-John 'Self-determination and separation' (1997) September *Policy Options* at 40.

<sup>53</sup> As quoted in I Brownlie *Principles of public international law* (1990) 596.

assert the right to self-determination while at the same time affirming the territorial integrity of a sovereign state. For instance, article 1(2) of the Charter of the United Nations provides that member states shall develop friendly relations 'based on the respect for the principles of equal rights and self-determination of peoples'. Article 2(3) of the same document calls on member states to 'refrain in their international relations from the use of force against the territorial integrity or political independence of any state'.<sup>54</sup> Both articles 1(2) and 2(3) do not raise problems as they are directed towards member states in their dealings with each other.

Self-determination is a multifaceted concept which, depending on the situation, can mean independence, self-government, federalism, confederalism, unitarism or self-rule. Any of the foregoing, can be asserted by the people concerned, but must be balanced against the right of a state to its territorial integrity. The problem arises with the exercise of the right to self-determination by a group of people within a state, if that right includes a claim to secession. The exercise of the latter creates a tension between the recognition of a right to self-determination and the territorial integrity of a state. The declaration on the Occasion of the Fiftieth Anniversary of the United Nations for instance, enjoins it on its member states:

[T]o continue to reaffirm the right to self-determination of all peoples taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realise their inalienable right to self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction of any kind.<sup>55</sup>

It can therefore be inferred that the general position in international law is that a sovereign state has a right to its territorial integrity only if it represents all of its peoples. This, for Africa, has been the core of the

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<sup>54</sup> Charter of the United Nations and Statute of the International Court of Justice.

<sup>55</sup> GARes50/60 UU GAOR, 50<sup>th</sup> Sess Agenda Item 29, UN DocA/Res/50/6 (1995).

problem as most states have been tempted to repress minority groups, or even the majority as was the case in South Africa prior to 1994.

On the right to self-determination, the African Charter on Human and Peoples' Rights provides that:

All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.<sup>56</sup>

A vexing problem with regard to the right to self-determination is that international law itself does not have a satisfactory solution to the definitional problem of what constitutes a people, and Africa is no different. The Charter does not define who the 'peoples' are, a lacuna which scholars have tried to fill without notable success.<sup>57</sup> The jurisprudence of the African Commission on Human and Peoples' Rights has also not shed light on the matter.<sup>58</sup> Ouguergouz does not see the omission of a definition of the 'chameleon-like concept' of peoples as a set-back, rather he sees it as an opportunity 'to be exploited in order to explore all the possibilities it contains'.<sup>59</sup> Notwithstanding Ouguergouz's optimism, such open possibilities may, as Kiwanuka<sup>60</sup> rightly observes, create difficulties with regard to certainty in approaching this 'chameleon-like concept' and therefore opens it up for abuse.<sup>61</sup> In the midst of the uncertainty and a call for creative engagement of the concept, a context based approach seems to be the best practical option.<sup>62</sup>

Internationally, there is no prescribed formula to be followed in asserting the right to self-determination, each case is assessed on its own merits. In the event of a dispute, state practice has been to weigh the right of people to self-determination against that of a state to its territorial integrity, and the events in Africa bear testimony to this. This difficulty, which is mainly

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<sup>56</sup> Article 20.

<sup>57</sup> See S Gumedze 'The concept of "peoples" in the African Human Right System' (2005) 30 *South African Yearbook of International Law* at 157–173 and RN Kiwanuka 'The meaning of people in the African Charter on Human and Peoples' Rights' 82 *American Journal of International Law* at 82.

<sup>58</sup> *Id* at 173.

<sup>59</sup> F Ouguergouz *The African Charter on Human and Peoples' Rights: a comparative agenda for human dignity and sustainable democracy in Africa* (2003) at 205.

<sup>60</sup> Kiwanuka n 57 above at 299.

<sup>61</sup> S Gumedze n 57 above at 172.

<sup>62</sup> *Ibid*.

an international law problem, manifests itself not in international law conferences or chambers, but in international relations of states. A former US President, Mr Bill Clinton, eloquently summed the tension up, when he observed that, '[w]e have spent much of the 20th century trying to reconcile President Woodrow Wilson's belief that different nations had the right to be free – nations being people with common consciousness – had a right to be a state'.<sup>63</sup> In post-colonial Africa, this tension was noted by the Chamber of the International Court of justice in the *Burkina Faso/Mali Frontier Dispute* which noted that 'at first sight this principle [of *uti possidetis*] conflicts with another one, the right of peoples to self-determination'.<sup>64</sup> This conflict continues to be paradoxical for Africa, even more so because it comes at the cost of human lives.

#### **The *uti possidetis* and self-determination paradox**

Africa's independence was won through the assertion of the right to self-determination, and when that was done, doors were closed to 'a people' within a territorial state who wished to assert the same right, simply because the authorities wanted to maintain territorial unity. As Dugard notes,

[t]he tensions inherent in the rival claims of self-determination and territorial integrity are nowhere more apparent than in Africa. It took the lead in the assertion and implementation of the right to self-determination in its drive to rid Africa of colonial rule. But once this was achieved it retreated from the full logic of the self-determination of peoples.<sup>65</sup>

Up until the secession of Eritrea, the position in Africa had been a clear commitment to territorial integrity and outright opposition to the right to self-determination that could result in secession as was evident in the cases of Katanga and Biafra. When the Katanga secession unfolded in the early 1960s, the United Nations found itself in a situation where it had to suppress a right recognised and entrenched in its documents.<sup>66</sup>

The post OAU test on the application of the right to self-determination or the right of a state to its territorial integrity, presented itself in the form of

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<sup>63</sup> As quoted in VP Nanda 'Self-determination and secession under international law' (2003) 29/4 *Denver Journal of International Law & Policy* at 306.

<sup>64</sup> Paragraph 25 ICJ.

<sup>65</sup> Dugard n 5 above at 163.

<sup>66</sup> See R Lemarchand 'The limits of self-determination: the case of the Katanga Secession' (1962) 56/2 *The American Political Science Review* 404 at 404.

the secession attempt by Biafra from Nigeria. For three years (1967–1970), there existed an entity which functioned like a state and was recognised by a number of African states, including Tanzania, prompting David Ijalaye to ask whether Biafra was at any time a state in international law or not.<sup>67</sup> During the Biafran war, Julius Nyerere remarked that ‘it is foolish for Africans to stand by idly while millions of Africans are being killed by other Africans in the name of territorial integrity’.<sup>68</sup> Nyerere’s recognition of the sovereignty of Biafra as a state, effectively went against the African collective decision of 1964 by the OAU leadership, of which he too was a member.

The first opportunity for the African Commission on Human and Peoples’ Rights (the Commission) to give direction on the right to self-determination came in the communication of the *Katangese Peoples’ Congress v Zaire*.<sup>69</sup> Before the Commission was a communication submitted by Mr Gerard Moke, the President of the Katangese Peoples’ Congress, under article 20(1) of the Charter in which he requested the Commission to recognise the right of the Katangese people to be independent from Zaire. The reference in the communication to ‘people’ was not to the people of Zaire but to those of Katanga, and no evidence was led as to what constitutes the people of Katanga. There were two important omissions in the communication of the Katangese Peoples’ Congress. The first was the absence of an allegation of violations of human rights that may have necessitated the need to challenge the territorial integrity of the state of Zaire. The second omission related to the first in that there was no allegation that the state of Zaire had denied the Katangese people a right to participate in their government pursuant to article 13(1) of the Charter. In light of this absence, the Commission, having acknowledged that self-determination may be exercised in various ways including independence, self-government, local government, federalism, confederalism and unitarism, went on to rule that Katanga was obliged to exercise a variant of self-determination that was compatible with the sovereignty and territorial integrity of Zaire.<sup>70</sup> The Katangese communication may have not been the ideal one for advancing the jurisprudence of the Commission on the right to self-determination, but

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<sup>67</sup> DA Ijalaye ‘Was “Biafra” at any time a state in international law?’ 65/3 *The American Journal of International Law* at 551–559.

<sup>68</sup> Neuberger n 2 above at 107.

<sup>69</sup> C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) at 125–6.

<sup>70</sup> *Ibid.*

what is interesting to note was the emphasis from the Commission that it was 'obliged to uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter of Human and Peoples' Rights'.<sup>71</sup>

Pending before the Commission is the case of *the Southern Cameroons v Republique du Cameroun*<sup>72</sup> which is right at the heart of the paradox between the right to self-determination and the right of a state to its territorial integrity.<sup>73</sup> The complainants in this matter are representatives of the Southern Cameroons National Council (SCNC) and Southern Cameroons Peoples Organisation (SCAPO) acting both in their personal capacities and on behalf of the Southern Cameroons. Before the Commission is a complaint that the respondent state is guilty of violating both individual and collective rights of the peoples of Southern Cameroons. The genesis of the problem complained of dates back to 1961 when the respondent state occupied Southern Cameroons and established its colonial rule there, a claim which the respondents refute. At the core of the communication, is the complaint by the complainants that the occupation by the Respondent state violates articles 19 and 20 of the Charter, both of which deal with the right of a people to existence and to self-determination. The respondent state has conceded that the right to self-determination is an inalienable right, but argues that this right should not be 'interpreted as authorising or encouraging any measure that would partly or wholly compromise the entire territory or political unity or sovereignty and independent states'.<sup>74</sup>

When asked how the complainants reconciled their claim to self-determination with the inviolability of boundaries inherited at independence, the complainant responded by pointing out that the Southern Cameroons was at no time part of the respondent state, and therefore viewed the respondent's claim to their territory as 'expansionist, hegemonistic and colonialist'.<sup>75</sup> A further important question is whether the people of the Southern Cameroons had any ethnical connection to those of the respondent state. The complainant argues that there is no substantial ethnic connection between the two, and even if there were, that

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<sup>71</sup> *Id* at par 5 215.

<sup>72</sup> [http://www.southerncameroonsig.org/images/The%20Banjul%20Communique%CC%811\\_2.pdf](http://www.southerncameroonsig.org/images/The%20Banjul%20Communique%CC%811_2.pdf) (accessed 30 September 2008).

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

could not form a basis for the respondent state to claim territory of the Southern Cameroons. The latter question may provide an opportunity for the Commission to advance its jurisprudence on the ‘chameleon-like concept’ of peoples. In contrast to the Katangese peoples’ case above, the Southern Cameroons case has advanced good reasons for secession to be considered, but as to whether the Commission will rule against what it sees as its obligation to uphold the unity of the state, remains to be seen. Only time will tell.

A practical example of a possible acknowledgement by the AU leadership of the fact that secession might be desirable, if not inevitable, is the case of the peace agreement signed between the government of Sudan and the Sudan Peoples Liberation Movement/Army (SPLM/A) on 9 January 2005. Clause 2.5 of the peace agreement provides that:

At the end of the six (6) year interim period there shall be an internationally monitored referendum, organised jointly by the government of Sudan and the SPLM/A, for the people of Sudan to: *confirm the unity of Sudan* by voting to adopt the system of government established under the Peace Agreement, or to *vote for secession*’ (my emphasis).<sup>76</sup>

The right to self-determination of the people of South Sudan was highly contested during the peace negotiation process. What is interesting is that the Sudanese peace process was negotiated under the mediation of the Intergovernmental Authority on Development (IGAD)<sup>77</sup> with international observers from the United Kingdom, United States of America, Norway, the African Union, and the United Nations. The presence of these parties may later have a direct bearing on recognition of the new sovereign state, in the event of the people of the South opting for secession. As is always the case with self-determination and territorial integrity, clause 2.4.2 of the peace agreement provides that during the interim period, the parties shall make ‘the unity of Sudan attractive to the people of the South’.

There is relative peace between the two belligerent parties in Sudan, but the greatest test of the peace agreement will be in 2011 when the people of the South will decide on whether they want to be part of a united Sudan, or would like to secede. Should they opt for secession, Sudan’s

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<sup>76</sup> <http://www.unmis.org/English/documents/cpa-en.pdf> (accessed on 30 September 2008).

<sup>77</sup> Current member states are: Ethiopia, Sudan, Uganda, Kenya, Djibouti, Somalia and Eritrea has unilaterally suspended its membership with effect from 2007.

boundaries will have to be redrawn. Whether chaos and instability will follow as opponents of secession predict, remains to be seen, but at least the right to self-determination that results in secession would have been given a chance. Does this now mean that there is a shift in ideology in Africa? Here, too, only time will tell, but at least there is a willingness to look at the issue. But while we wait, Africa continues to be caught between a rock and a hard place.

### **Conclusion**

In international law, the right to self-determination of a people and the right of a state to its territorial integrity are recognised and entrenched in most of the international instruments to which most states are signatories. With the demise of colonisation, the new indigenous African leaders committed themselves to respecting colonial boundaries no matter how arbitrarily drawn. It has been argued in this paper that there is nothing in international law that proscribes the re-drawing of borders as long as this is based on an agreement or treaty. The paper has presented an evolution of the principle of *uti possidetis* over time and argued that even under *uti possidetis*, borders can still be redrawn. It has been argued further that recent developments in Africa, like the secession of Eritrea from Ethiopia and the Comprehensive Peace Agreement between the people of South Sudan and those of the North, may be an indication that Africa is beginning to adopt a change in its approach to the colonially inherited borders, which may be another indication that the winds of change are once again blowing through the continent. A delicate balance needs to be maintained between the two competing rights in assessing situations where secession may be desirable and when it may be inevitable.

In Africa, more than anywhere else, we face the dilemma of having to choose between territorial integrity of a state and the self-determination of a people. The conflict between these two principles explains most of the wars, conflicts, and tensions between and within African states in post-colonial Africa.<sup>2</sup>

Katanga in the then Zaire (now Democratic Republic of Congo), Biafra in Nigeria, Eritrea, Sudan and Western Sahara are but a few examples that have brought the tension between the two principles to the fore.

The tension between the right of a people to self-determination and the right of a state to its territorial integrity, is a manifestation of a wider tension intrinsic to international law as a legal system. The *raison d'être* of international law is the regulation of affairs pertinent to its main subjects: states. A difficulty arises when one asserts rights of individuals or peoples within a legal system that is designed for the needs of states.<sup>3</sup> Be that as it may, it is an historical fact that most African states attained independence through their assertion of the right to self-determination.<sup>4</sup> Self-determination is a multi-faceted concept whose meaning can be political, cultural, economic and socio-economic. Generally, the international community has not had difficulties with the exercise of this right; the problem has always been when its application results in secession, thus interfering with the boundaries of a territorial state.

There is no right of a people to secession in international law; but at the same time secession is not prohibited.<sup>5</sup> State practice, particularly in Africa, has shown a general slant towards the protection of the territorial integrity at the cost of post independence expression of the right to self-determination. In the post-colonial Africa, struggles continue to be waged under the banner of self-determination and these have been thwarted with reference to the right of a state to its territorial integrity. It is this problem that this paper seeks to address as Africa is replete with examples of the

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<sup>2</sup> A Neuberger *National self-determination in postcolonial Africa* (1986) at 106.

<sup>3</sup> See J Kabbers & R Lefeber 'Africa: lost between self-determination and *uti possidetis*' in 1993 *Peoples and Minorities in International Law* at 36.

<sup>4</sup> OS Kamanu 'Secession and the right of self-determination: an OAU dilemma' (1974) 12/3 *The Journal of Modern African Studies* at 355.

<sup>5</sup> J Dugard 'Secession: is the case of Yugoslavia a precedent for Africa?' (1993) 5 *African Journal of International and Comparative Law* 163 at 165.

suppression of a peoples' right to self-determination in favour of territorial integrity of a state.<sup>6</sup>

The territorial delineation of a state finds its expression in its boundaries. The notion of boundaries has both political and legal ramifications. Politically they are visible demarcations of states' size and location, while legally, as Shaw points out, they 'evidence the extent of a state's sovereignty and form the limits of the operations of the domestic legal system'.<sup>7</sup> The general protection of the territorial integrity of a state in Africa has been conducted as though the principle of *uti possidetis* (which will be explained later), prescribes a territorial boundary that can never be changed, which is not the case in international law.<sup>8</sup> It is submitted that statehood remains an important coordinating principle of international relations, and that for this reason attempts should be made to maintain and respect its integrity. Conversely, there are also valid and deserving claims for secession which should not always be dismissed 'under the veil of unity'.<sup>9</sup> There may be instances where a claim to secession may be undesirable and can be dissuaded, but conversely there may also be instances where secession is inevitable and should be allowed as it was the case in Eritrea. Drawing the line between the two will require a careful and delicate balance.

The argument will be presented in three parts. Part one will present a brief overview of the discourse around Africa's colonial borders, and will include the international law attitude to territorial title. Part two will look at the evolution of the right to self-determination and its application in Africa. Part three will present the paradox between the principle of *uti possidetis* and the right to self-determination and then conclude.

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<sup>6</sup> The failed Katanga Secession (1960), the failed Biafra Secession (1967–1970) and the long struggle of the people of South Sudan against the government of Sudan (1955–1972 & 1982–2005).

<sup>7</sup> MN Shaw 'The heritage of states: the principle of *uti possidetis juris* today' (1997) 67 *British Yearbook of International Law* at 77.

<sup>8</sup> MN Shaw 'Peoples, territorialism and boundaries' (1997) 3 *European Journal of International Law* 478 at 495.

<sup>9</sup> Kabbers & Lefeber n 3 above at 45.

### **A brief overview of the discourse around Africa's colonial borders and post colonial border**

African borders are inextricably linked to the continent's colonial legacy.<sup>10</sup> At the height of colonialism, the African continent was invaded by no less than seven colonial powers.<sup>11</sup> It was these colonial powers who divided the continent at the Berlin Conference in 1884 and 1885 at which no African delegation was present or invited. The partitioning of the continent paid scant attention to the indigenous people of the continent, attempting rather to diffuse and avoid conflicts among the colonisers themselves.<sup>12</sup> The 'haphazard and arbitrary'<sup>13</sup> manner in which the borders were drawn left the inhabitants of the continent fragmented and disorientated. The arbitrarily drawn borders may have minimised the potential territorial claims between the colonial powers, but for Africans, it 'was the genesis of many present-day conflicts and virtually insoluble problems in the African continent'.<sup>14</sup> To this day, certain of these arbitrarily drawn borders continue to be 'Africa's Achilles heels'.<sup>15</sup> For instance, as Wa Mutua points out, the Masai were divided between Kenya and Tanzania, the Ewe in Togo and Ghana, while groups with a history of conflict like the Akimbo, Kikuyu and the Masai were lumped together in Kenya.<sup>16</sup>

As the 'winds of change' began to blow through the continent, it was hoped that the process of decolonisation would rid Africa of its colonial legacy. Decolonisation in the form of independence provided an opportune moment for the new crop of African leaders to make a decision

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<sup>10</sup> P Engelbrecht, S Tarango & M Carter 'Dismemberment and suffocation: a contribution to the debate on African boundaries' (2002) December *Comparative Political Studies* at 1093–1118.

<sup>11</sup> The English, Germans, Italians, Spanish, Portuguese, French and Belgians have each had a share of dominance and power on the African continent.

<sup>12</sup> See Makua wa Mutua 'Why redraw the map of Africa: a moral and legal inquiry' (1995) 16 *Michigan Journal of International Law* 16 1113 at 1127.

<sup>13</sup> J Herbst 'The creation and maintenance of national boundaries in Africa' *International Organisation* 43, 4 Autumn (1989) at 675.

<sup>14</sup> Elias as quoted in Makua wa Mutua n 12 above at 1142.

<sup>15</sup> RA Griggs 'Boundaries for an African renaissance: reshaping the continent's political geography' available on: <http://ccrweb.ccr.uct.ac.za/archive/two/3/p21.html> (accessed on 30 September 2008).

<sup>16</sup> See Makua wa Mutua n 12 above at 1136 including fn 88. More telling of the manner in which the borders were drawn is the remark by Lord Salisbury that, '[w]e have been engaged in drawing lines upon maps where no white man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by a small impediment that we never knew exactly where the mountains and rivers and lakes were'. As quoted in Wa Mutua n 12 above at 1135.

on the question of borders. The All Africa Peoples Conference of 1958 in Accra, Ghana, had after all denounced the ‘artificial frontiers drawn by Imperialist powers to divide the peoples of Africa’. The Conference called for the ‘abolition or adjustment of such frontiers at an early date’.<sup>17</sup>

When the Organisation of African Unity (OAU)<sup>18</sup> was formed in 1963, one of the challenges the leaders faced was to pronounce on borders which they had inherited from the colonial powers. They could either re-draw the boundaries as suggested by the All African People’s Conference, or maintain the ‘status quo ante independence’.<sup>19</sup> Having just attained independence, African leaders were protective of their new gains, and were understandably very preoccupied with the integrity of the sovereignty of their new states. As Dugard writes, ‘realising that the re-drawing of the map of Africa along ethnic lines would destroy the stability of the continent, post-independence African leaders and the Organisation of African Unity invoked the principle of territorial integrity’.<sup>20</sup> The desire for territorial integrity was captured in both articles II and III of the OAU Charter (Charter). Article II enjoined member states to defend their ‘sovereignty, their territorial integrity and independence’, while in article III the leaders committed themselves to ‘respect the borders existing on their achievement of national independence’.<sup>21</sup> The effect of both articles II and III was that the arbitrarily drawn boundaries were handed ‘*voetstoots*’ (as is) to the new crop of leaders.

African leaders were once again presented with an opportunity to reconsider their position to borders when the OAU metamorphosed into the African Union (AU) in 2002. In line with the Charter of the OAU, article 4(b) of the Constitutive Act of the African Union continued to call for ‘respect of borders existing on achievement of independence’. Indeed, it has been stated that Africa is remarkable for having ‘retained essentially unchanged, the boundaries of the 1880s – a feat which international society has repeated nowhere else’.<sup>22</sup> The decisions of African political

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<sup>17</sup> As quoted in Castellino J *International law and self-determination* (2000) 140.

<sup>18</sup> One of the objectives of the OAU was to rid the continent of the remaining vestiges of colonisation and apartheid. See: [http://www.africa-union.org/root/au/AboutAu/au\\_in\\_a\\_nutshell\\_en.htm](http://www.africa-union.org/root/au/AboutAu/au_in_a_nutshell_en.htm) (accessed on 30 September 2008).

<sup>19</sup> OC Okafor *Re-defining legitimate statehood: international law and state fragmentation in Africa* (2000) 33.

<sup>20</sup> Dugard n 5 above at 163.

<sup>21</sup> As in I Brownlie *African boundaries: a legal and diplomatic encyclopaedia* (1979) 11.

<sup>22</sup> P Pam ‘Legitimacy, justice and the future of Africa’ (2005) 5 *Human Rights & Human Welfare* 28.

leaders about boundaries may have been purely political or in the interest of maintaining stability in the continent, but legally it drew from the international law principle of *uti possidetis* and it is to this that this paper now turns.

### **International law position on territorial title**

Legally, Africa's 'dogmatic devotion'<sup>23</sup> to colonial boundaries may be explained by reference to two international law principles: *uti possidetis* and intertemporal law. The history of both is well documented.<sup>24</sup> Suffice it to say that *uti possidetis* has its origins in Roman private law as a Praetorian Edict to settle property ownership.<sup>25</sup> The Edict provided provisional possession during litigation in disputes involving property ownership, by providing more rights to the possessor, hence the full text *uti possidetis, ita possidetis*, which means, 'as you possess, so may you possess'.<sup>26</sup> The reluctance of the Edict to disturb possession was aimed at promoting and maintaining order in the Roman Empire.<sup>27</sup> The possessor's rights were, however, weakened if he had obtained land in a clandestine manner or had used force.<sup>28</sup> Weakened as the position may have been, it was a general practice in Roman law that the 'status quo would be preserved; irrespective of the means by which possession had been gained'.<sup>29</sup> It is this notion of preserving the 'status quo' which inspired the principle of *uti possidetis* as it later came to be applied to territory in international law.

At the dawn of decolonisation, *uti possidetis* evolved to be a binding principle of international law protecting territorial borders of states. Malcolm Shaw encapsulates its international law ratio thus:

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<sup>23</sup> Herbst J as quoted in Ian Spears 'Debating secession and the recognition of new states in Africa' (2004) 13/2 *African Security Review* at 35.

<sup>24</sup> For *uti possidetis* see Makau wa Mutua n 12 above. Shaw n 7 above, Shaw n 8 above and E Hasani 'Uti possidetis juris: from Rome to Kosovo' (2003) 27/2 *Fletcher Forum of World Affairs* at 85. For intertemporal law, see TO Elias 'The doctrine of international law' (1980) 74/2 *American Journal of International Law* 285–30 and MN Shaw *International Law* (2003) at 429–430.

<sup>25</sup> See E Hasani n 24 above at 85.

<sup>26</sup> SR Ratner 'Drawing a better line: *uti possidetis* and the borders of new states' (1996)/90 *The American Journal of International Law* at 593.

<sup>27</sup> J Castellino n 17 at 110–111.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Id* at 111.

the principle of *uti possidetis juris* developed as an attempt to obviate territorial disputes by fixing the territorial heritage of new states at the moment of independence and converting existing lines into internationally recognised borders, and can thus be seen as a specific legal package, anchored in space and time, with crucial legitimate functions.<sup>30</sup>

Closely related to *uti possidetis* is the principle of intertemporal law.<sup>31</sup> This principle holds that in an event of a dispute or claim in international law, such a claim will be adjudicated in accordance with the conditions and rules which existed at the time when the right was created and not at the time the claim was made.<sup>32</sup> The latter principle raises the importance of what Shaw calls ‘a critical date’ on which the right was created.<sup>33</sup> The ratio of the principle was expressed in the *Island of Palmas*<sup>34</sup> arbitration where it was stated that, ‘a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.’<sup>35</sup> For both Latin America and Africa, the critical date became decolonisation.

The first application of *uti possidetis* as a principle of international law principle was during the decolonisation of Latin America at the turn of the nineteenth century. Within the Latin American context, *uti possidetis* marked an end to the concept of *terra nullius* by recognising the decolonised states as possessors of all territories presumed to have been possessed by their colonial predecessors.<sup>36</sup> Its application in Latin America avoided or minimised potential conflicts based on delineation of territory as it recognised the ‘clear identification of each border’s location based on colonial era administration lines.’<sup>37</sup> Underlying the principle of intertemporal law, is also the need for stability, so in the foregoing context, the underlying presumption is that both *uti possidetis* and intertemporal law will facilitate this – a presumption that was also applied in Africa.

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<sup>30</sup> Shaw n 7 above at 76.

<sup>31</sup> See TO Elias ‘The doctrine of international law’ (1980) 74/2 *American Journal of International Law* 285–307 for an exposé of this doctrine.

<sup>32</sup> Shaw n 24 above at 429–430.

<sup>33</sup> *Ibid.*

<sup>34</sup> <http://www.gwu.edu/~jaysmith/Island.html> (accessed on 30 September 2008).

<sup>35</sup> As quoted in Elias cited above in n 31 at 286.

<sup>36</sup> RP Hensel, ME Allison & A Khanami ‘The colonial legacy and border stability: *uti possidetis* and territorial claims in the Americas’ at:

<http://garnet.acns.fsu.edu/~phensel/Research/io05.pdf/> (accessed 30 September 2008).

<sup>37</sup> *Ibid.*

The core principles are widely entrenched in the constitutive documents of both the OAU and the AU. Unlike Latin America, in Africa the application of *uti possidetis* was no longer about the ‘retention of colonial powers as in Spanish America’ but about ‘treaty succession to address boundaries between different colonial powers’.<sup>38</sup> Though *uti possidetis* was first applied in the decolonisation of Latin America, it was in the African dispute case of *Burkina Faso/Mali*<sup>39</sup> that its core principles and scope of application were eloquently articulated. The dispute concerned a common stretch of land between Burkina Faso and the Republic of Mali, which had for a long time been a source of conflict between the two countries. Both parties to the dispute expressly requested the chamber of the International Court of Justice to adjudicate the dispute based on the principle of the intangibility of frontiers inherited from colonisation, thus affording the chamber an opportunity to give an exposition of the doctrine of *uti possidetis*.<sup>40</sup>

As if to ratify the 1964 Cairo resolution of the African leaders retrospectively, the chamber held that:

The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.<sup>41</sup>

The Chamber went on to say that the core principle of *uti possidetis*

lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.<sup>42</sup>

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<sup>38</sup> SR Ratner n 26 above at 596.

<sup>39</sup> International Court of Justice (ICJ) Report (1986) 55. See also a commentary on the case by GN Barrie ‘*Uti possidetis* versus self-determination and modern international law: in Africa the chickens are coming home to roost’ 1988 *TSAR* 452.

<sup>40</sup> Paragraph 20.

<sup>41</sup> Paragraph 21.

<sup>42</sup> Paragraph 23.

On the status of the newly created boundaries, the Yugoslav Arbitration states that 'except where otherwise agreed, the former boundaries become frontiers protected by international law'.<sup>43</sup> In Africa therefore, boundaries enjoy a political protection through the Constitutive Act of the AU and a legal one as pointed out by the Yugoslav Arbitration Commission. State practice, particularly in Africa, has been geared towards the protection of these territorial boundaries which, as Paust asserts, became the 'legally recognised curtain'<sup>44</sup> behind which serious violation of rights took place.

In the international relations arena, it must be pointed out that with the exception of Antarctica, the world does not have any territory that has not been claimed or does not fall under any state jurisdiction.<sup>45</sup> The implication of this is that for interstate territorial claims, no claim can happen without affecting the existence of another state. Within states themselves, especially in Africa with its multi-cultural and multi-ethnic populations, any claim to secession will be an affront to the much protected right of a state to its territorial integrity. In support of both *uti possidetis* and intertemporal law, proponents of these principles hold that the two assist in avoiding chaos and maintaining stability in world politics. As pointed above, Africa has been faithful in maintaining the colonially inherited borders, and yet the post-colonial era has been one characterised by instability and protracted conflicts.

The dawn of freedom in South Africa in the early 1990s marked the end of the vestiges of colonialism in Africa. To echo the International Court of Justice in the *Burkina Faso/Mali* case, Africa's 'photograph' was taken with the demise of colonisation.<sup>46</sup> Post colonial claims to secession have been constantly frustrated by political leadership preoccupied with the territorial integrity of their states. Mutua correctly notes that up until Eritrea's secession from Ethiopia, 'prevailing state ideology in Africa treated as treason any discussion about border changes, separatist movements, or ethnic self-determination within an independent state'.<sup>47</sup> Did the secession of Eritrea mark the change in state ideology in Africa, and does *uti possidetis* allow secession to take place?

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<sup>43</sup> Opinion 3 of the Yugoslav Arbitration as quoted in Shaw 8 above at 479.

<sup>44</sup> JJ Paust 'Self-determination: a definition focus' in Yonah Alexander & Robert Friedlander (eds) *Self-determination: national, regional, and global dimensions* (1980) at 7.

<sup>45</sup> See C Anyangwe 'African border disputes and their settlement by international juridical process' (2003) 28 *South African Yearbook of International Law* at 29.

<sup>46</sup> ICJ Reports 1986, 554 at 568.

<sup>47</sup> M wa Mutua n 12 above at 1119.

It is important to note that while *uti possidetis* advocates the respect of territorial borders at the moment of independence, it does not 'bar post independence changes in borders carried out by agreement'.<sup>48</sup> As an international law doctrine, *uti possidetis* has been of assistance in facilitating the process of decolonisation in both Latin America and Africa. The main difficulty, however, is with its applicability in non-colonial situations like Katanga, Biafra and Southern Sudan.<sup>49</sup> As pointed out above, Africa's first successful case of secession was in 1993 when Eritrea seceded from Ethiopia following a referendum after about thirty years of guerrilla warfare, resulting in what Ali Mazrui calls the 'taboo of officially sanctioned secession'.<sup>50</sup> It is this right to self-determination that results in secession to which this paper now turns.

### **The evolution of the right to self-determination and its application in Africa**

Scholars attribute the use of the concept of self-determination to the former American President Woodrow Wilson in the period shortly after the First World War.<sup>51</sup> There are three dimensions to Wilson's understanding of self-determination. Firstly, as Brown-John<sup>52</sup> explains there is the internal self-determination which recognises the right of people to choose their own form of government. Secondly, there is the external self-determination which recognises the freedom of the people to choose the sovereign they want to live under. Thirdly, Wilson's self-determination recognises the fact that there should be a system for the people to express their consent to the government that rules them. Common to all the three dimensions, is the right of people to choose, and this choice forms the foundation of self-determination as it has evolved over the years.

It was only in the post-1945 era that self-determination was recognised as a principle of international law. In 1952, the General Assembly of the United Nations made a recommendation that, 'state members of the United Nations shall uphold the principle of self-determination of all peoples and nations'.<sup>53</sup> The international law position has always been to

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<sup>48</sup> Ratner n 26 above at 600.

<sup>49</sup> See Castellino n 17 above 141.

<sup>50</sup> Mazrui note 1 above at 32.

<sup>51</sup> FL Kirgris 'The degrees of self-determination in the United Nations era' (1998) 88 *The American Journal of International Law* 304 at 304.

<sup>52</sup> CL Brown-John 'Self-determination and separation' (1997) September *Policy Options* at 40.

<sup>53</sup> As quoted in I Brownlie *Principles of public international law* (1990) 596.

assert the right to self-determination while at the same time affirming the territorial integrity of a sovereign state. For instance, article 1(2) of the Charter of the United Nations provides that member states shall develop friendly relations 'based on the respect for the principles of equal rights and self-determination of peoples'. Article 2(3) of the same document calls on member states to 'refrain in their international relations from the use of force against the territorial integrity or political independence of any state'.<sup>54</sup> Both articles 1(2) and 2(3) do not raise problems as they are directed towards member states in their dealings with each other.

Self-determination is a multifaceted concept which, depending on the situation, can mean independence, self-government, federalism, confederalism, unitarism or self-rule. Any of the foregoing, can be asserted by the people concerned, but must be balanced against the right of a state to its territorial integrity. The problem arises with the exercise of the right to self-determination by a group of people within a state, if that right includes a claim to secession. The exercise of the latter creates a tension between the recognition of a right to self-determination and the territorial integrity of a state. The declaration on the Occasion of the Fiftieth Anniversary of the United Nations for instance, enjoins it on its member states:

[T]o continue to reaffirm the right to self-determination of all peoples taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realise their inalienable right to self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction of any kind.<sup>55</sup>

It can therefore be inferred that the general position in international law is that a sovereign state has a right to its territorial integrity only if it represents all of its peoples. This, for Africa, has been the core of the

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<sup>54</sup> Charter of the United Nations and Statute of the International Court of Justice.

<sup>55</sup> GARes50/60 UU GAOR, 50<sup>th</sup> Sess Agenda Item 29, UN DocA/Res/50/6 (1995).

problem as most states have been tempted to repress minority groups, or even the majority as was the case in South Africa prior to 1994.

On the right to self-determination, the African Charter on Human and Peoples' Rights provides that:

All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.<sup>56</sup>

A vexing problem with regard to the right to self-determination is that international law itself does not have a satisfactory solution to the definitional problem of what constitutes a people, and Africa is no different. The Charter does not define who the 'peoples' are, a lacuna which scholars have tried to fill without notable success.<sup>57</sup> The jurisprudence of the African Commission on Human and Peoples' Rights has also not shed light on the matter.<sup>58</sup> Ouguergouz does not see the omission of a definition of the 'chameleon-like concept' of peoples as a set-back, rather he sees it as an opportunity 'to be exploited in order to explore all the possibilities it contains'.<sup>59</sup> Notwithstanding Ouguergouz's optimism, such open possibilities may, as Kiwanuka<sup>60</sup> rightly observes, create difficulties with regard to certainty in approaching this 'chameleon-like concept' and therefore opens it up for abuse.<sup>61</sup> In the midst of the uncertainty and a call for creative engagement of the concept, a context based approach seems to be the best practical option.<sup>62</sup>

Internationally, there is no prescribed formula to be followed in asserting the right to self-determination, each case is assessed on its own merits. In the event of a dispute, state practice has been to weigh the right of people to self-determination against that of a state to its territorial integrity, and the events in Africa bear testimony to this. This difficulty, which is mainly

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<sup>56</sup> Article 20.

<sup>57</sup> See S Gumedze 'The concept of "peoples" in the African Human Right System' (2005) 30 *South African Yearbook of International Law* at 157–173 and RN Kiwanuka 'The meaning of people in the African Charter on Human and Peoples' Rights' 82 *American Journal of International Law* at 82.

<sup>58</sup> *Id* at 173.

<sup>59</sup> F Ouguergouz *The African Charter on Human and Peoples' Rights: a comparative agenda for human dignity and sustainable democracy in Africa* (2003) at 205.

<sup>60</sup> Kiwanuka n 57 above at 299.

<sup>61</sup> S Gumedze n 57 above at 172.

<sup>62</sup> *Ibid*.

an international law problem, manifests itself not in international law conferences or chambers, but in international relations of states. A former US President, Mr Bill Clinton, eloquently summed the tension up, when he observed that, '[w]e have spent much of the 20th century trying to reconcile President Woodrow Wilson's belief that different nations had the right to be free – nations being people with common consciousness – had a right to be a state'.<sup>63</sup> In post-colonial Africa, this tension was noted by the Chamber of the International Court of justice in the *Burkina Faso/Mali Frontier Dispute* which noted that 'at first sight this principle [of *uti possidetis*] conflicts with another one, the right of peoples to self-determination'.<sup>64</sup> This conflict continues to be paradoxical for Africa, even more so because it comes at the cost of human lives.

### **The *uti possidetis* and self-determination paradox**

Africa's independence was won through the assertion of the right to self-determination, and when that was done, doors were closed to 'a people' within a territorial state who wished to assert the same right, simply because the authorities wanted to maintain territorial unity. As Dugard notes,

[t]he tensions inherent in the rival claims of self-determination and territorial integrity are nowhere more apparent than in Africa. It took the lead in the assertion and implementation of the right to self-determination in its drive to rid Africa of colonial rule. But once this was achieved it retreated from the full logic of the self-determination of peoples.<sup>65</sup>

Up until the secession of Eritrea, the position in Africa had been a clear commitment to territorial integrity and outright opposition to the right to self-determination that could result in secession as was evident in the cases of Katanga and Biafra. When the Katanga secession unfolded in the early 1960s, the United Nations found itself in a situation where it had to suppress a right recognised and entrenched in its documents.<sup>66</sup>

The post OAU test on the application of the right to self-determination or the right of a state to its territorial integrity, presented itself in the form of

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<sup>63</sup> As quoted in VP Nanda 'Self-determination and secession under international law' (2003) 29/4 *Denver Journal of International Law & Policy* at 306.

<sup>64</sup> Paragraph 25 ICJ.

<sup>65</sup> Dugard n 5 above at 163.

<sup>66</sup> See R Lemarchand 'The limits of self-determination: the case of the Katanga Secession' (1962) 56/2 *The American Political Science Review* 404 at 404.

the secession attempt by Biafra from Nigeria. For three years (1967–1970), there existed an entity which functioned like a state and was recognised by a number of African states, including Tanzania, prompting David Ijalaye to ask whether Biafra was at any time a state in international law or not.<sup>67</sup> During the Biafran war, Julius Nyerere remarked that ‘it is foolish for Africans to stand by idly while millions of Africans are being killed by other Africans in the name of territorial integrity’.<sup>68</sup> Nyerere’s recognition of the sovereignty of Biafra as a state, effectively went against the African collective decision of 1964 by the OAU leadership, of which he too was a member.

The first opportunity for the African Commission on Human and Peoples’ Rights (the Commission) to give direction on the right to self-determination came in the communication of the *Katangese Peoples’ Congress v Zaire*.<sup>69</sup> Before the Commission was a communication submitted by Mr Gerard Moke, the President of the Katangese Peoples’ Congress, under article 20(1) of the Charter in which he requested the Commission to recognise the right of the Katangese people to be independent from Zaire. The reference in the communication to ‘people’ was not to the people of Zaire but to those of Katanga, and no evidence was led as to what constitutes the people of Katanga. There were two important omissions in the communication of the Katangese Peoples’ Congress. The first was the absence of an allegation of violations of human rights that may have necessitated the need to challenge the territorial integrity of the state of Zaire. The second omission related to the first in that there was no allegation that the state of Zaire had denied the Katangese people a right to participate in their government pursuant to article 13(1) of the Charter. In light of this absence, the Commission, having acknowledged that self-determination may be exercised in various ways including independence, self-government, local government, federalism, confederalism and unitarism, went on to rule that Katanga was obliged to exercise a variant of self-determination that was compatible with the sovereignty and territorial integrity of Zaire.<sup>70</sup> The Katangese communication may have not been the ideal one for advancing the jurisprudence of the Commission on the right to self-determination, but

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<sup>67</sup> DA Ijalaye ‘Was “Biafra” at any time a state in international law?’ 65/3 *The American Journal of International Law* at 551–559.

<sup>68</sup> Neuberger n 2 above at 107.

<sup>69</sup> C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) at 125–6.

<sup>70</sup> *Ibid.*

what is interesting to note was the emphasis from the Commission that it was 'obliged to uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter of Human and Peoples' Rights'.<sup>71</sup>

Pending before the Commission is the case of *the Southern Cameroons v Republique du Cameroun*<sup>72</sup> which is right at the heart of the paradox between the right to self-determination and the right of a state to its territorial integrity.<sup>73</sup> The complainants in this matter are representatives of the Southern Cameroons National Council (SCNC) and Southern Cameroons Peoples Organisation (SCAPO) acting both in their personal capacities and on behalf of the Southern Cameroons. Before the Commission is a complaint that the respondent state is guilty of violating both individual and collective rights of the peoples of Southern Cameroons. The genesis of the problem complained of dates back to 1961 when the respondent state occupied Southern Cameroons and established its colonial rule there, a claim which the respondents refute. At the core of the communication, is the complaint by the complainants that the occupation by the Respondent state violates articles 19 and 20 of the Charter, both of which deal with the right of a people to existence and to self-determination. The respondent state has conceded that the right to self-determination is an inalienable right, but argues that this right should not be 'interpreted as authorising or encouraging any measure that would partly or wholly compromise the entire territory or political unity or sovereignty and independent states'.<sup>74</sup>

When asked how the complainants reconciled their claim to self-determination with the inviolability of boundaries inherited at independence, the complainant responded by pointing out that the Southern Cameroons was at no time part of the respondent state, and therefore viewed the respondent's claim to their territory as 'expansionist, hegemonistic and colonialist'.<sup>75</sup> A further important question is whether the people of the Southern Cameroons had any ethnical connection to those of the respondent state. The complainant argues that there is no substantial ethnic connection between the two, and even if there were, that

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<sup>71</sup> *Id* at par 5 215.

<sup>72</sup> [http://www.southerncameroonsig.org/images/The%20Banjul%20Communique%CC%811\\_2.pdf](http://www.southerncameroonsig.org/images/The%20Banjul%20Communique%CC%811_2.pdf) (accessed 30 September 2008).

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

could not form a basis for the respondent state to claim territory of the Southern Cameroons. The latter question may provide an opportunity for the Commission to advance its jurisprudence on the ‘chameleon-like concept’ of peoples. In contrast to the Katangese peoples’ case above, the Southern Cameroons case has advanced good reasons for secession to be considered, but as to whether the Commission will rule against what it sees as its obligation to uphold the unity of the state, remains to be seen. Only time will tell.

A practical example of a possible acknowledgement by the AU leadership of the fact that secession might be desirable, if not inevitable, is the case of the peace agreement signed between the government of Sudan and the Sudan Peoples Liberation Movement/Army (SPLM/A) on 9 January 2005. Clause 2.5 of the peace agreement provides that:

At the end of the six (6) year interim period there shall be an internationally monitored referendum, organised jointly by the government of Sudan and the SPLM/A, for the people of Sudan to: *confirm the unity of Sudan* by voting to adopt the system of government established under the Peace Agreement, or to *vote for secession*’ (my emphasis).<sup>76</sup>

The right to self-determination of the people of South Sudan was highly contested during the peace negotiation process. What is interesting is that the Sudanese peace process was negotiated under the mediation of the Intergovernmental Authority on Development (IGAD)<sup>77</sup> with international observers from the United Kingdom, United States of America, Norway, the African Union, and the United Nations. The presence of these parties may later have a direct bearing on recognition of the new sovereign state, in the event of the people of the South opting for secession. As is always the case with self-determination and territorial integrity, clause 2.4.2 of the peace agreement provides that during the interim period, the parties shall make ‘the unity of Sudan attractive to the people of the South’.

There is relative peace between the two belligerent parties in Sudan, but the greatest test of the peace agreement will be in 2011 when the people of the South will decide on whether they want to be part of a united Sudan, or would like to secede. Should they opt for secession, Sudan’s

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<sup>76</sup> <http://www.unmis.org/English/documents/cpa-en.pdf> (accessed on 30 September 2008).

<sup>77</sup> Current member states are: Ethiopia, Sudan, Uganda, Kenya, Djibouti, Somalia and Eritrea has unilaterally suspended its membership with effect from 2007.

boundaries will have to be redrawn. Whether chaos and instability will follow as opponents of secession predict, remains to be seen, but at least the right to self-determination that results in secession would have been given a chance. Does this now mean that there is a shift in ideology in Africa? Here, too, only time will tell, but at least there is a willingness to look at the issue. But while we wait, Africa continues to be caught between a rock and a hard place.

### **Conclusion**

In international law, the right to self-determination of a people and the right of a state to its territorial integrity are recognised and entrenched in most of the international instruments to which most states are signatories. With the demise of colonisation, the new indigenous African leaders committed themselves to respecting colonial boundaries no matter how arbitrarily drawn. It has been argued in this paper that there is nothing in international law that proscribes the re-drawing of borders as long as this is based on an agreement or treaty. The paper has presented an evolution of the principle of *uti possidetis* over time and argued that even under *uti possidetis*, borders can still be redrawn. It has been argued further that recent developments in Africa, like the secession of Eritrea from Ethiopia and the Comprehensive Peace Agreement between the people of South Sudan and those of the North, may be an indication that Africa is beginning to adopt a change in its approach to the colonially inherited borders, which may be another indication that the winds of change are once again blowing through the continent. A delicate balance needs to be maintained between the two competing rights in assessing situations where secession may be desirable and when it may be inevitable.