Introduction

In May 2013, African states celebrated the fiftieth anniversary of the formation of the Organization of African Unity/African Union (OAU/AU). On 21 July 2014, fifty years had passed since the renowned Cairo Resolution on African borders was adopted. Colonialism is long gone and Africa has been independent for half a century. The African state is a fully fledged subject of international law. Yet, it is not an ordinary subject. An inventory of the successes and failures of the African state in five decades immediately reveals the following.

First, the boundary alignments inherited by African states on independence are maintained all over the continent. Except for the alterations that resulted from the separation of Eritrea and South Sudan the political map of Africa has remained the same for the last fifty years. This turn of events is unexpected and rather surprising. When it is remembered that African boundaries are notoriously arbitrary, derided for paying little attention to the cohesiveness of peoples randomly fenced or divided by them, their survival becomes baffling. In contrast, boundaries of other continents that are not as disreputable underwent substantial change. Within an equivalent period, 90 per cent of the old boundary lines left in Spanish America had been redrawn. In Europe and Asia, twenty-odd states have been created in the last quarter of a century following the end of the Cold War.

Second, the only two African states created since the Cairo Resolution, Eritrea and South Sudan, had to wrest their statehood through fighting long civil wars. The processes that led to their recognition were disorderly, marred by bitter boundary disputes leading to acrimonious arbitrations, and impaired by military confrontation. Poignantly, the entire course of events was engulfed by hatred and ethnic tension. The possibility of new states peacefully springing out of old states is unthinkable in Africa. The likes of the remarkable Quebec referendum or the democratic 'yes' and 'no' campaigns of Scotland might recur anywhere on the globe but not in Africa.

Third, it was clear right from the beginning that secession was the only and inexorable outcome of the protracted civil wars of Eritrea and South Sudan. Nonetheless, secession of those two countries was opposed by the entire African continent. An early concession that would have minimized the senseless squandering of life and resources and guaranteed a soft landing for the splinter states eluded Africa until the bitter end. Other similar and dissimilar boundary-related conflicts are still raging unabated.

Fourth, in addition to the wars of secession, Africa witnessed the pitting of entire communities against one another in situations that did not necessarily involve claims to statehood. While in secession struggles the dominated group wages a war against the state, in ethnic strife it is mostly the dominating ethnicity that targets the subjugated in a bid to purge the state from its ilk. The pandemic of uneasy ethnic relations, accompanied by monopolizing of the government apparatus by one group, led to despotism, widespread human rights violations, and genocide.

Fifth, despite those tragic episodes the OAU/AU considers the territorial definition of each and every African state sacrosanct, unquestionable, and belonging first and foremost to Africa as a whole. Throughout those fifty years, the preservation of the African boundaries formed the primary responsibility of the African organization. The United Nations (UN) endorses in full this state of affairs.

Those realities question profoundly the way Africa relates to international law. While the entry of Spanish America into the international community is hailed as having radically modified the character of international law, the advent of Africa is considered to have simply widened its geographical outreach. This author cannot disagree more. Africa joined the community of nations very late and did not have an opportunity, equal to that of Spanish America 150 years before, to contribute to the moulding of international law. Inversely, the African state was itself the creation of international law. Yet, it was not too late for Africa to have an impact. To be sure, Africa managed to set the rules that govern its own territorial affairs. As soon as the rights available under the decolonization law were extinguished by setting Africa free, Africa discovered that international law has nothing more in stock. A law system predicated on the assumption that the state predates the law has no rules for a state fully dependent for its creation and bare existence on the international law regime itself. The African community of nations had to develop its own rules if it had to take account of the nonconforming circumstances of the creation of the African state, its endurance and future viability. The exclusive and robust edifice of African customary rules that was soon generated made

it possible for the OAU/AU to oversee the prescribing of inherited boundaries and the proscription of secession with the cooperation of the UN.

Part I of this book explains why and how the African territorial regime was created and articulates what makes this regime distinct. It clarifies that by accepting to respect the pre-existing frontiers without being obligated by any law principle to do so African states created new customary rules. Additionally, the Cairo Resolution generated state practice and discrete *opinio juris* enjoining African states to respect indefinitely the territorial status quo that was obtained on the achieving of independence. As a result, a special customary territorial regime that changes in many respects the way international law applies to Africa was created. Notably, the prohibition of redrawing African boundaries and the African rule against secession are of African *jus cogens*.

Part II shows that the African rule against secession mirrors the infatuated concern over hallowing the boundaries of independence concomitant with the rule of respecting the status quo. Because of this rule it is not officially permitted to advance secession claims in Africa. An ethnic group that seeks to break away is viewed to offend the central African customary rule, provoking the entire continent to side with the parent state. In order to spare this inordinate cost, African secessionists put up a pretence of abiding by the African rule by contriving arguments to excuse or disguise their real cause. It is clarified that while secession as a simple claim to territory should continue to be proscribed in accordance with the African regime, a right to egalitarian secession should be available when one ethnicity is subjected to the domination of another.

Even as it is hale and hearty and enthusiastically treasured by African states, the African territorial regime was denied recognition at judicial level because of the fateful ruling in the *Frontier Dispute (Burkina Faso/Mali)*. The International Court of Justice (ICJ) missed the opportunity to establish the African territorial regime and specifically denied any possibility of 'the gradual emergence of [an African] principle of customary international law'.[1] Even worse, the ICJ Chamber posited that Africa had on independence applied *uti possidetis*. The norm-creating OAU Cairo Resolution 1964 was reduced by the Court to a declaratory instrument that merely 'defined and stressed the principle of *uti possidetis*'.[2] The ruling in the *Frontier Dispute* was accepted uncritically leading to a pervasive failure to understand how the African territorial regime functions.

[1] *Frontier Dispute (Burkina Faso/Mali)* (Judgment) [1986] ICJ Rep 554, 565.
[2] *Ibid*. 566.

African states referring their boundary disputes to the ICJ and international tribunals normally designate 'the principle of intangibility of inherited frontiers' as the applicable law rule. Yet, after the ruling in the *Frontier Dispute,* the Court and arbitration tribunals have invariably applied instead the principle of *uti possidetis.*

Part I of this book comprises five chapters. Chapter 1 argues that the ruling of the ICJ Chamber in the *Frontier Dispute* is erroneous. *Uti possidetis* is not a general principle of law applicable to Africa on independence. Nor did it, in its Spanish-American cradle, generate the concept of intangibility of frontiers. Chapter 2 examines the consistent practice of respecting the pre-existing boundaries by all African states that attained independence. It contends that this practice evinces the *opinio juris* required to give rise to the rule of intangibility of inherited frontiers as an African customary rule. Chapter 3 studies the implicit commitment made in the OAU Charter to respect the territorial status quo. It establishes that the principle of respecting the territorial integrity of states and the concept of recognizing mediation as a peaceful means of dispute settlement were put to special use by the OAU to give priority to the status quo over conflicting territorial claims. Chapter 4 demonstrates how the customary rule of respecting the territorial status quo was created. It studies the Cairo Resolution 1964, attests its immediate legal force and establishes its norm-creating character. It surveys the *usus* and *opinio juris* generated by the Cairo Resolution to give rise to the central African rule of respecting the territorial status quo. Chapter 5 shows the changes made by the African customary rules in international law. It clarifies that the prohibition of redrawing boundaries and the rule against secession, introduced by the African territorial regime, are peremptory African norms. Additionally, it examines how the African territorial regime reformulates cardinal concepts of the international law of territory with respect to Africa.

Part II, composed of three Chapters, is focused on studying the prohibition of secession in Africa. It makes a proposal for addressing the problem of secession in a post-colonial context in order to enable the African regime to survive and thrive. Chapter 6 inspects the arguments for reviving colonial self-determination, constitutional self-determination, remedial secession, and national self-determination currently advanced to justify secession in Africa. It is explained that in addition to being flawed, none of those arguments could serve as a viable exception to the African rule against secession. Chapter 7 argues normatively that domination forms a viable instance of external self-determination under Paragraph 2 of

the Declaration on Friendly Relations among States. Chapter 8 explains that Articles 19 and 20(2) of the African Charter on Human and Peoples' Rights provide for *sui generis* egalitarian rights to guarantee equality between different ethnic groups in African multi-ethnic states. It argues that Articles 19 and 20(2) of the African Charter, read together with Paragraph 2 of the Declaration on Friendly Relations, could potentially give rise to a right to secession in the event of denying one ethnicity its egalitarian rights. The egalitarian rights and the right to secession accruing on their denial constitute the right to egalitarian self-determination. This external form of the right to self-determination augments the African territorial regime and serves as an exemption to the African rule against secession.

To explain the concepts of the customary African territorial regime introduced in this study, particular terminology is used.

The simple term '*uti possidetis*' is preferred to the unnecessarily complex '*uti possidetis juris*'. The qualifier '*juris*' is of no more than vestigial content relevant to the eighteenth- and nineteenth-century concepts of occupation and possession. The accuracy of its usage was contested even in the Spanish-American context.[3] Obviously, this shibboleth is of no value in modern international law where it no longer tells '*uti possidetis*' apart from any other current law doctrine.

The author agrees with Schachter that the two terms 'rule' and 'principle' are not synonymous.[4] Legal rules dictate specific results whereas legal principles, even as they have the dimension of weight when they are found relevant, are open-textured and of potential vagueness. Because *uti possidetis* is characterized by a laissez-faire approach, while the 'intangibility of inherited frontiers' is a strict edict that offers itself to rigorous implementation, in this book '*uti possidetis*' is referred to as a principle, while the 'intangibility of inherited frontiers' is referred to, as far as

[3] Moore states: 'Apart from the usual and reasonable interpretation above defined, the phrase "*uti possidetis juris*" is meaningless and self-contradictory. To say that the word "juris" excludes altogether the consideration of possession de facto, is to make the words self-destructive. The judgment of "*uti possidetis*" cannot be predicated of a situation from which the thought of continued physical possession is wholly excluded. Such a use of terms would be purely fanciful.' John Bassett Moore, *Costa Rica-Panama Arbitration 1911: Memorandum on Uti Possidetis* (The Commonwealth Company 1913) 35; G. Pope Atkins, *Encyclopaedia of the Inter-American System* (Greenwood 1997) 41.

[4] Oscar Schachter, *International Law in Theory and Practice* (Kluwer 1991) 20–1; R. Dworkin, *Taking Rights Seriously* (Duckworth 1977) 22–45; also see R. Dworkin, *The Philosophy of Law* (Oxford University Press 1977) 47.

possible, as a rule.[5] For the same reasons, 'the territorial status quo rule' and 'the rule against secession' are styled as such.

Even as the terms 'intangibility of inherited frontiers' and 'territorial status quo' are commonplace, they are used in this book in reference to specific customary rules with the particular normative content recognized for them in this study. The term 'African territorial regime' denotes the legal construction of customary international law obtained as the result of the interplay between those two customary rules.

The term 'vertical territory transfer' is used to indicate the sovereign territory transfer that took place on the day of decolonization. A vertical claim is a claim aiming to establish the boundary line left by an outgoing colonial power on the critical date. Disputes over where the inherited boundary line runs are typical vertical disputes. Vertical territory transfers, claims or disputes are governed by the rule of intangibility of inherited frontiers.

Conversely, the term 'horizontal territory transfer' refers to a territorial claim incongruent with the inherited boundary, denying the existence of such boundary, or challenging it substantially. A claim to revive a pre-colonial boundary is a typical horizontal claim. Secession claims, by virtue of their vying to create a boundary of no colonial origin or to confer international status on a frontier that was not of such status on decolonization, are horizontal claims. Horizontal claims offend the territorial status quo rule and are as such proscribed in Africa.[6]

The rights that accrue to sub-national groups in multi-ethnic states under Article 19 of the African Charter are referred to as 'egalitarian rights'. The term 'egalitarian secession' denotes a right of external self-determination argued to be normatively feasible under Article 20(2)

[5] However, this does not apply to some instances, particularly in Chapter 1, in which reference was made to 'the *principle* of intangibility of inherited frontiers', which is the term used in the Special Agreement in the *Frontier Dispute*. Sometimes it is also referred to as the *concept* of intangibility of inherited frontiers in general terms rather than to the African customary rule.

[6] This distinction between vertical and horizontal transfers does not replicate the division made in the 1920s between 'delimitation disputes' and 'disputes as to attribution of territory', which has since largely fallen into disfavour. The conventional categorization is based on whether the land in dispute forms a geographically autonomous portion or not. When this point is determined no particular conclusion applies, because in either case a line would fall to eventually be drawn, see *Frontier Dispute* 563–4, Memorial of Burkina Faso 65–6. Conversely, the applied significance of the categorization made in this study is that whereas a vertical claim is allowed, a claim betraying horizontal inklings should be thrown out by a court of law applying the customary rule of respecting the territorial status quo.

of the African Charter read together with Paragraph 2 of the Declaration on Friendly Relations among States.

Due care has been taken to make sure that this study reflects the law and African state practice as at 31 March 2015.

PART I

The African territorial regime

> [W]hile the pre-colonial African states have indulged in … land worship in relation to both agriculture and the burial of ancestors, the post-colonial state indulged in the worship of territory in relation to power and sovereignty. The dichotomy between the land worship of old and territorial worship in post-colonial states has not yet been resolved. All we know is that the last legacy of the colonial order to be decolonised is likely to be the territorial boundary between one African country and another … The ghosts of ancestors and land worship have been overshadowed by the imperative of sovereignty and territorial possessiveness, inherited from the Treaties of Westphalia.
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> Ali Mazrui*

* Ali Mazrui, *The Africans: A Triple Heritage* (Little, Brown & Co 1986) 272. The author expresses his profound gratitude and appreciation to the family of the late Professor Ali Mazrui, notably his widow, Pauline Uti Mazrui, and the Co-Executors of the Mazrui Estate, Professor Alamin Muhammad Mazrui and Professor Kim Abubakar Ali Forde-Mazrui, for their approval to use the above quote as an epigraph. My thanks also go to the BBC and Little, Brown & Co for granting their respective copyright permissions.