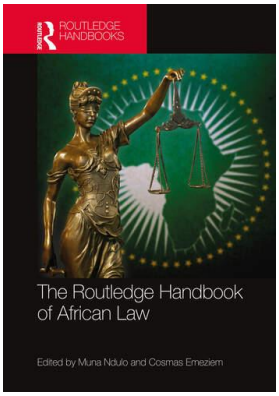

The Routledge Handbook of African Law

Muna Ndulo, Cosmas Emeziem

Beyond formalism and uti possidetis The International Court of Justice and boundary disputes in Africa

Publication details
https://www.routledgehandbooks.com/doi/10.4324/9781351142366-38
Cosmas Emeziem
Published online on: 24 Nov 2021

32

BEYOND FORMALISM AND *UTI POSSIDETIS*

The International Court of Justice and boundary disputes in Africa

Cosmas Emeziem

Introduction

Africa's encounter and engagement with the "wider world" is a subject of intense debate and broad literature. That encounter, its entanglements, and tensions are vital in understanding boundary disputes arising from the continent—especially since the early days of independence. This is also important for other aspects of international law, as it creates a critical platform from which to situate and interrogate international law. Hence, the historiography and evolution of international law, its interpretation and jurisprudence through the International Court of Justice (ICJ), and its limited integration of Africa's realities, pervades the debates that are still surrounding national boundary disputes in Africa today (see Foster 1909). This chapter argues that there is often a *formalist* focus of international law—with notions of international law from "civilized nations," propped up as *neutral* and *universal* principles to the whole world—"developing," "underdeveloped," and often colonized peoples.[1] The chapter argues for a different interpretive approach, drawing mainly from the history of international law. Namely, that a more deliberate historical analysis of the international law on boundary disputes in Africa will yield a richer jurisprudence and better equip contesting states with the policy insights direly needed for the peaceful resolution of disputes. The critique pursued here will draw greatly from the *ratio* of some of the boundary disputes settled by the ICJ between African states as of December 2017. By highlighting the often glossed over implications of the structuralist interpretations of norms, principles, agreements, parchments, and diplomatic exchanges between African potentates and their European counterparts during the era of colonization, it questions the trajectory of the ICJ based on its decisions in these cases. It urges the ICJ to bring a more incisive jurisprudential lens to the problem, so as to see the historicity of the principles and norms beyond the well-worn paths of formalism and historical linearity. By extension, international law tribunals require a refreshing circumspection in giving judicial and quasi-judicial imprimatur to international law approaches, norms, and instruments with known temporal, intertemporal, structural, and geographical power unevenness. This is especially so when considering and interpreting norms and principles forged on the anvil of colonialism.

 DOI: 10.4324/9781351142366-38

The chapter interrogates the *ratio* of some significant boundary disputes involving African states, as settled by the ICJ as of December 2017. In particular, it examines the Roman law principle of *uti possidetis* and how the Court has interpreted and applied it in these cases (see de Vattel 1758). It argues in the main that formalist ideals, which privilege the status quo of international law, have been the most influential interpretive approach adopted by the ICJ. The weakness of this approach is that the ICJ continues to put its imprimatur on the principle, without paying due attention to the historical, structural, and temporal difficulties that accompany the principle, and its impact on the communities affected by the interpretive outcomes (Ahmed 2015a).

In other words, these cases exemplify the jurisprudence of the ICJ with regard to boundary disputes—especially, in the postcolonial era. In doing so, the Court has unwittingly painted with a broad brush and applied the Roman law principle of *uti possidetis* in ways that suggests that it is beyond questioning (William 1895; Parodi 2002; Dugard 2006). The presumptive nature of the principle is ignored, while it is applied as if it is a principle with *erga omnes* character (Ragazi 1997; Zemanek 2000; ICJ 2004; Institute de Droit International 2005; Tams 2005; Fowein 2008).[2] This approach is neither justified by the provenance of the principle nor customary international law. The chapter further avers that the principle of *uti possidetis*, while clearly utilitarian in boundary disputes settlements, is not sacrosanct; it is a rebuttable principle and should be so viewed whenever it is invoked in boundary disputations involving African states.

The chapter is broadly segmented into three parts. The first part introduces and highlights the theoretical foundations to the chapter. The second dives into the debate by examining some of the critical boundary disputes involving African states, which were settled before the ICJ. That is to say: the frontier disputes between Burkina Faso/Mali 1986[3]; Benin/Niger 2005[4]; and Burkina Faso/Niger 2013.[5] These depict the interpretive disposition of the ICJ on boundary disputes in Africa. The chapter is concluded in the third part, by making recommendations about more robust interpretive approaches, which the ICJ and other experts in the field can adopt in order to move beyond the limitations of formalism, and also avoid giving unmerited weight to *uti possidetis* when settling boundary disputes involving African states. Boundary disputes are complex realities,[6] and it must be noted that this chapter is not about the larger questions of maritime and territorial disputes. Maritime and territorial disputes implicate deeper questions of sovereignty, territorial waters, and law of the sea, in general. Though some ideas and principles in these adjoining areas intersect, law of the sea disputes have specific treaty mechanisms, customs, and norms that are beyond the scope of this work.[7]

Theories and overview

Beyond formalism in international judicial interpretation

Legal interpretation is the soul of the judicial function (Breitel 1961; Macey and Miller 1992; Breen 2000).[8] In executing this function, cannons (Llewellyn 2008, 2015) and approaches of interpretation (Frank 1947; Baude and Sachs 2017) serve as guardrails, which enable the courts to achieve justice. Legal formalism is one of these broad approaches (Schlag 2009). Simply construed, legal formalism is a theory of law (Posner 1986), which considers legal principles and ideals as independent of political, economic, and social institutions (Garner and Black 2014, 1031). It privileges laws as complete in themselves, requiring neither external buffers nor interpretive resourcefulness for their application in disputes settlement (Troop 2018). The laws are perceived as having internal coherence/autonomy, and hence, their interpretation is

dependent on themselves without external influences.[9] A look beyond the law in this interpretive process, or a consideration of the political economic and social institutions implicated by such laws, is deemed an anomaly.[10] A secondary understanding of the doctrine of legal formalism (Cox 2003), as a philosophy of law (Quevedo 1985), is that legal problems can best be settled by relying completely on deductive reasoning of the accepted authorities in the field of law in question.[11] It pays little to no heed of historical contexts. As can be imagined, this position of the law and its role in society has both proponents and vigorous opponents in legal scholarship. Ernest Weinrib (1993, 583) observed, "Formalism reflects the law's most abiding aspiration …". (See, also, Weinrib [1988]; Scott [1994].)

In international law, legal formalism has also received significant attention—though, not as seen in general legal theory. In a recent work, it has been argued that, with regard to international law, "formalism not only preserves the normative character of law but also helps international scholars have a common language as to what is law, thereby preventing the international legal scholarship from becoming completely meaningless" (d'Aspremont 2011, 34).[12]

While the expressed need for preservation of normative character is good, formalism needs to be complicated a bit by giving it new tool kits, or else it will sustain some of its problematic aspects. There are two readily noticeable problematic aspects of uncensored formalism in international law on boundary disputes. First, it ignores the realities of the states confronted by boundary disputes in pursuit of "structural stability," "consistency," and "fidelity" to agreements made between previous colonial powers (Jones 2016). Second, it also fails to fulfill the objective of peaceful settlement of disputes—which I consider as the primary rationale for the existence of the ICJ, and litigations before it. It is therefore imperative that these difficulties are attenuated—if not eliminated—through legal interpretation.

It is even more necessary when one considers that international law, in general, is the pillar of the international social order—though, it is also the product of that society and the asymmetrical dynamics that shape relationships among nations. Stated another way, the politics of international law influence its development. By that analogy, international law does not escape the problems of legal interpretation, which law experiences at the national level. Hence, for coherence, predictability, and actualization of its purpose, international law needs tools of legal theory in general, to further the purpose of international law. That overarching purpose includes enhancing commerce, global peace and security, and peaceful settlement of disputes in general. Critical to the understanding of international law today is the interpretive duties of the ICJ. Legal interpretation in the international sphere is therefore of high interest, especially for states that have emerged onto the world stage since the end of the Second World War. These states not only have to abide by existing international law, but they have to pursue their national interests within the already established international legal frameworks, despite the fraught circumstances of the laws.

In performing the critical duty of legal interpretation, an unmitigated acceptance of legal formalism has the potential of representing the development of international law as a benign product of the free encounter between peoples of different cultures and traditions (Ōnuma 2017).[13] In reality, historical records on international law reveal a rather remarkable birth of international law and its transmission through a more fraught, I dare say, mostly violent encounter and experience (Anghie 2006; see, also, Nussbaum 1954; Verzijl 1968–1979; Scott 1973; Bernhardt 1984; Cassese 1986; Bederman 2001; Grewe 2000; Ōnuma 2000; Koskenniemi 2001; Cassese 2005 [Ch. 2]; Kemmerer 2008).[14] Essentially, the positive norms of international law are unable to be thoroughly disentangled from this fraught history (Gilbert 2016). In that regard, courts and tribunals have a duty to allow the currents of that history to permeate legal

interpretation—especially, when adjudicating such vexed issues as boundary disputations and delimitation.

Perhaps it is then equally important to recognize that the African context is different because the encounter with the European powers was transformative in many ways for the peoples of Africa. It expanded the scope of chattel slave trade and also culminated in colonialism (Umozurike 1979). Of course, there were many potentates within the African continent, many of whom were willing collaborators in all forms of trade, including the slave trade. However, many more were pacified for attempting to challenge and resist the powers of colonialism (Byers 2000; Marks 2003). *Punitive expeditions* were common tools of foreign policy for colonial powers (Chimni 2004). Communities that violated colonial "treaties" or instruments were sacked by European forces, without any hesitation over the human rights of the communities (Dike 1956; Vandervort 1998; Boot 2003; Zimmerer and Zeller 2008; Ratner 2015). I argue that drawing from this history will bring experts and tribunals more in tune with the current realities of international law. The experience of Africa, which is minimally highlighted here, explains some of the critique of international law seen in the continent.[15] To many, the meaning of international law has often been fraught with uncommon duplicity, if not outright cynicism.[16] The memory it evokes is long and tortuous. Particularly, the memory from the 19th century onward remains unique since it epitomized further radical changes that have since marked the trajectory of the continent. One such radical change was the division and allotment of African peoples and territories between European powers: to themselves and among themselves, and for their beneficial exploitation during the Berlin Conference of the International Law Association, 1894–1895 (Sorenson 1938; Crowe 1942; Forster, Mommsen, and Robinson 1988; Mutua 1995; Kennedy 1996; Hochschild 1998).[17] Thus, from the invasion of African homelands to their outright conquest, division, parcellation, allotment, and pacification (Keltie 1893; Fitzmaurice 1905; Keith 1919; Crowe 1942; Anstey 1962; Cookey 1968; Gavin and Betley 1973; Robinson, Gallagher, and Denny 1981; Pakenham 1991), the experience remains unique in many respects (Ewans 2002; Krisch 2005; Craven 2015).

Thus, one lasting legacy of the colonial enterprise is the boundary structures of African states—a structure hinged on international law and its interpretation since (General Act of the Berlin Conference 1885). This informs the attempt here to examine the boundary disputes and how they have been adjudged, particularly how the international laws and doctrines implicated by them have been interpreted. The present interest in looking at the international law regarding boundaries in Africa, and what interpretations are given to them, is further founded on the idea that interpretation can make significant differences in the outcome of laws. Moreover, the ICJ's pronouncements on treaties and doctrines[18] often have the capacity to put such treaties, conventions, doctrines, and principles beyond controversy (Scharf 2014). That is to say, interpretation by a foremost judicial body, as is the ICJ,[19] gives the subject matter of adjudication, and the principles of law underpinning it, an air of sacrosanctity (Ginsburg 2005, 640; Alvarez-Jiménez 2011, 685; Pellett 2011, 1076; Hernández 2014, 91; Wood 2014, 21; Talmon 2015; Choi and Gulati 2016). This seal of approval, which the Court brings to principles of law (Staton and Moore 2011; Steinberg 2004, 263–67), can be definitional by crystalizing and clarifying the international law governing the area of law or the subject matter in question.[20] This is even more important when the origins of such underlying principles and doctrines are considered controversial by a large segment of the international community (von Bogdandy and Venzke 2011, 984; ICJ Reports 1984, 392). I opine that highlighting this need for clarification and the need for a purposive interpretation is imperative in order to give proper perspective to the subsisting implications of international law forged under colonial circumstances. It is also important, for the purpose of understanding the difficult outcomes, that interpretive

approaches that are not attentive to the histories, contexts, and origins of these disputes might portend for the law and the ultimate goals of regional peace and security. Putting these in proper perspectives and contexts will enhance the capacity of African states in shaping policies around interstate boundary disputes and determining how best to resolve them.

The nature of boundary disputes

Boundary disputes in international law are so significant that they implicate almost every facet of public international law. They are complex and often demand complex answers. This is hardly surprising to international law scholars for several reasons. First, the concept of territory and issues surrounding it are fundamental to the more overarching concepts of statehood and sovereignty in international law.[21] Whatever affects boundaries or frontiers can be perceived as potentially disruptive of territorial integrity. More instructive is the fact that the Treaty of Westphalia,[22] the Treaty of Versailles, the founding provisions of both the League of Nations,[23] the United Nations,[24] and the Constitutive Charter of the African Union all have essential provisions about territory and territorial integrity.[25] Delimitation of boundaries is an incident inherent in the determination of the boundaries of a state. While the delimitation may not connote the certainty of territorial frontiers in all cases, it must be borne in mind that it is seen as indispensable to the concept of statehood in international law today (Taylor Sumner 2004).

Furthermore, issues of territory are, historically, also classic questions of empire, nationhood, and common identity, and thus, potentially inflammable concerns of all peoples and groups around the world.[26] In considering the principles of self-determination of groups or peoples around the world, ownership of territory is preeminent. It is a major provocative factor to warfare. Therefore, it is not uncommon that territorial annexation is a classic example of an act of aggression. The consensus as to the fact that territorial annexation constitutes an act of aggression or declaration of war is significant in international law.[27] Though the focus here is on boundaries, its complexity links it to territories. Therefore, territorial annexation is arguably the quintessential symbol of conquest (Williams, Jr. 1990; Pagden 1995; Robertson 2005; Newcomb 2008) and pacification.[28] In a sense, nothing evidences more the victory of a conquering power than the claim to territory and the subjugation of the conquered. It is even more so where there is potential of other gains—like the exploitation of mineral resources—to be made from the violently acquired territory. These same considerations affect questions of frontier disputes. It could also be about controlling a strategic trade station, or such other important territory.[29]

Following the Montevideo Declaration[30] and the expansion of international law since the 19th century, the element of territoriality, as a qualifying attribute of states, has continued to receive critical scholarly attention. Indeed, it remains a critical subject in the face of ongoing disputes about territories and territorial frontiers around the world—whether in Africa or elsewhere. Indicative of the centrality of territoriality and frontiers in defining nationhood is the many times boundary and territorial disputations have been featured on the docket of the ICJ since its inception.[31] This is not to mention a number of such cases that have been settled through other forms of alternative dispute resolution mechanisms—arbitration, mediation, and negotiation. This further explains the intense debate about sovereign territoriality, boundaries, and other allied matters. In that debate, many principles, norms, and interpretations have been established. These continue to impact international law as a tool of global peace and security.

Thus, like every other aspect of law, colonized communities have come to live with the conventions, treaties, norms, customs, principles, and practices of international law bequeathed to them as a postcolonial legacy. One may argue that these states are now free and should be able

to renegotiate many of these standards, yet a cursory observation will reveal so many factors that make that impossible. First, the states have subsisting relationships in trade, security, and general economic activities, which often constrains them from engaging in far-reaching reforms. Second, the leadership in many African states have been reticent about championing reforms and democratic transformations in ways that would have adjusted the structural dependence of the states toward their previous colonial powers. This has manifested in civil wars arising from the poor management of diversity in these communities.

Another striking problem is that of limited expertise. The time and resources required for the training of experts in international law, foreign policy, trade, and political economy in general, sometimes seem prohibitive. Because of a combination of factors including corruption, poor leadership, and other structural issues, many African states are unable to give their citizens the best possible education. This, in turn, creates a limited pool of experts, and by extension, intellectual dependence. Hence, a majority of the people can only boast of basic education, which is often not good enough in terms of providing the needed expertise that could shape a rapid transformation of the polity. A population with limited education is often a handicap to participatory democracy and an incentive to lethargic leadership.

Thus, today, the prevailing thinking and interpretation of international law is very much dependent on the norms established in colonial times, and this requires a careful interrogation to reflect the new world reality in which hitherto formerly colonized peoples are now equal players in the international arena. Such principles of law like *uti possidetis* often shape the outcomes of boundary litigations before the ICJ. These principles and doctrines are not necessarily of universal origins—though they have become entrenched in the annals of international law—hence, making it impossible to ignore them. Since, they have become inescapable in international boundary disputes settlements, it is important to understand their origins, temporalities, and crystallization. It is useful to understand that they cannot be dismissed by merely calling them "imperialist." They require resourceful usage and interrogation. This foreknowledge is critical for a better interpretation of treaties and conventions implicated in the settlement of boundary disputes that affect African states. Ignoring this will mean that courts, tribunals, and scholars will unwittingly and continually perpetuate the rigors of these doctrines and principles without adequate contextualization. Hence, they may repeatedly produce less than satisfactory outcomes, thereby defeating the interests of the states and peoples of Africa.

Uti Possidetis: Origins, distensions, and dissensions

As we have seen, international frontier disputes are often complicated situations, especially in postcolonial settings. In postcolonial settings, these disputes also affect many other concerns, from sovereign territorial integrity to right of self-determination, as well as social, economic, and sometimes, cultural interests (ICJ 1962). The disputes are also animated by questions of geopolitics, foreign relations, resources, and the balance of power. It is inadequate to study conflicts in Africa today without giving due consideration to disputes arising from boundary contestations. It should be noted that Africa has done very well in managing its frontier controversies—despite the number of countries on the continent, there have been only a few boundary disputes. In seeking to solve these boundary puzzles in judicial and quasi-judicial proceedings, the principle of *uti possidetis juris* has featured prominently. It is the centrality of this principle, in the settlement of many boundary disputes by the ICJ, that animates this work.

In looking at how this Roman law principle of *uti possidetis* has been applied in resolving African boundary disputes, it is clear that the justification most strongly associated with it is the maintenance of law and order. It is seen as indispensable toward ensuring the stability of

postcolonial states, although this need challenges the vital concept of self-determination in international law. Nevertheless, it is worth noting that in its Roman law provenance, the aim of *uti possidetis* was to impose order on claims of territorial possessions among the Empire's subjects. This was targeted at settling claims and ensuring the general integrity and stability of the Roman Empire. Similarly, subsequent European empires, like the Spanish and the British, were also interested in establishing order as to claims on territory, within the overall structures of international law. In its origins, therefore, it was a principle of allotment of territories among empire states. Though it has featured regularly in the reasoning of the ICJ over boundary disputations, the ICJ, in its *ratio*, has never categorically recognized it as a general principle of international law, or as a part of customary international law. However, through a number of *obiter dicta*, the ICJ has made an effort to mainstream it as a general principle of international law—*lex generalis*, as opposed to *lex specialis* (Koskenniemi 2006).[32]

Nevertheless, the principle of *uti possidetis* is applied extensively today in international law. The principle seeks to define the frontiers of new states, based on colonial administrative boundary lines at the time of independence (ICJ 1986). In other words, colonial administrative boundaries are deemed to remain the same, as if nothing has changed other than the administrator of the territories. It freezes the boundaries in time—notwithstanding that the supposed boundaries may not have been ever clearly delineated. It has also been viewed as a principle that administrative boundaries will become international boundaries when a political subdivision or colony achieves independence, without regard to tribes, ordinarily homogenous, finding themselves under different colonial administrations.

Furthermore, the principle of *uti possidetis* holds that claims in international law concerning territorial frontiers would be decided according to the context and rules existing at the time the dispute arose, rather than at the moment the claim was launched, establishing the critical date, with the rationale being to avoid the legitimization of forceful occupation. Thus, *uti possidetis* establishes the legitimacy of possession, while contemporary society defines the contours in accordance with a particular time, of what the possessor holds. In the case of Africa, *uti possidetis* confirms the colonial boundaries, as established in the Berlin Conference of 1884–1885, and subsequent agreements between colonial powers like the Anglo-German Treaty of 1913.[33] This principle has continued to evolve over time; primarily, from being a principle of Roman property law, it has been transformed into a principle applied in several international boundary disputes and territorial contestations with varied outcomes. The approaches to its applications have also fluctuated in different regions, like Latin America and Asia. One central element, however, in the structural situation of the principle is utility, in terms of maintaining boundaries as conceived by colonial administrations before independence. The takeaway from this varied application is that the principle raises a rebuttable presumption of fixity of boundaries. Any other interpretation misses the mark and cloaks the principle with sacrosanctity.

To further emphasize, *uti possidetis* is not *a peremptory norm* of international law[34]; it raises a presumption as to boundaries that states can derogate from by common consent. Boundaries can be renegotiated and delimited—especially, in those cases where there has never been a meaningful delimitation of the frontiers and where extreme hardship to inhabitants is highly visible. In that regard, *uti possidetis* becomes a guide.

Moreover, its original form—*uti possidetis ita possidetis* (as you possess, so you may possess)—envisaged good faith possession. An adverse possessor does not acquire absolute rights when the occupier has neither left, nor slept on his rights.[35] Thus, elements of *mala fides* (Hunter 1880; Berger 1953)—like fraud, misrepresentation, forced or violent adverse possession—would defeat any claim founded on *uti possidetis* before a Roman magistrate.[36] In its Roman origins, *uti possidetis* was also an interim preservative order, pending the outcome of proper litigation.

Yet, looking at the historical trajectory and evolution of *uti possidetis* in international law, it is revealing that the element of good faith has not received much discourse. While it is difficult to change the realities it has created, it is important to be conscious of its nature and provenance when approaching the settlement of boundary disputes.

The Cairo Declaration—First Ordinary Session of the Assembly of Heads of States and Government, July 1964

At independence, African states and the leaders of the time were confronted with the challenge of stability and nation-building. Many of these African countries had both domestic and international challenges related to boundaries and how best they could be managed vis-à-vis ongoing questions of self-determination.[37] The leaders of Africa at the time recognized the need to carefully manage the situation so as not to unleash border conflicts or threaten the territorial integrity of the newly independent but undoubtedly fragile states. A series of consultations and discussions started across Africa, at the time led by the likes of Kwame Nkrumah of Ghana, Julius Nyerere of Tanzania, Sèkou Touré of Guinea, Haile Selassie of Ethiopia, and Kenneth Kaunda of Zambia. These Pan-Africanists were conscious of not only preserving the fragile independence of African states, but also the need to create a common front for solving African problems in ways that would require cognizance of the best interests of African peoples.

These discussions gave birth to the Organisation of African Unity (OAU, 1963–1999)—now the African Union (AU), launched in 2002. The Constitutive Act of the African Union sets out the nature of the relationship between the independent states and one another. It also stipulates the approach of the Union on issues of territorial integrity. For instance, the objectives of the AU as captured in art. 3(b) of the Constitutive Act include to "defend the sovereignty, territorial integrity and independence of its member states" (AU 2000, 5). Article 4 concerns the undergirding principles of the African Union. Among the 16 principles outlined in the AU Constitutive Act, one could see what seems to be a tacit adoption of the principle of *uti possidetis juris*. There is, however, no express mention of *uti possidetis* anywhere in the Constitutive Act.[38] The relevant portions of art. 4, provides: "The Union shall function in accordance with the following principles: (a) sovereign equality and interdependence among Member States of the Union (b) respect of borders existing on achievement of independence …" (AU 2000, 6).

Article 4(b)—"respect for borders existing on achievement of independence" (AU 2000, 6)—has been used as the basis of *uti possidetis* in cases involving boundary delimitation and disputes around Africa, especially by the ICJ. However, it is still an object of debate as to whether the African leaders intended at the time to adopt the classic *uti possidetis* principle, since there was no express mention of it in the Constitutive Act of the African Union, and subsequently, in the Cairo Declaration. In an apparent reinforcement of this position, at the First Ordinary Session of the Assembly of Heads of States and Government in July 1964, it was resolved and solemnly affirmed that all member states of the organization would respect the principles set out in art. 3 of the Charter of the Organization of African Unity (now AU). It was also solemnly declared that "all Member States pledge themselves to respect the borders existing on their achievement of national independence" (OAU 1964, para. 5).[39] This declaration, the Cairo Declaration, drew attention to the salient points about the principle, as it is to be applied in the African setting.[40]

Indeed, the Preamble to the Cairo Declaration captured quite succinctly the fact that border problems constitute a grave and permanent factor of dissension in Africa and that the borders of African states on their independence days constituted *a tangible reality*. It also recognized "the

imperious necessity of settling by peaceful means and within a strictly African framework, all disputes between African states" (OAU 1964, AHG/Res. 16(1), para. 5 of Preamble). Thus, from the outset the African states acknowledged the need to set out a clear framework/guide that should form the basis of boundary dispute resolutions in Africa. They also emphasized peaceful resolutions of these disputes through means and measures that are amenable to the larger interests of African states. *Uti possidetis* is not a principle of African law and was not adopted expressly or impliedly through the declaratory acts and statements of the Heads of States and Government. In any case, this professed African approach gave the continent a viable tool for creating stability and ensuring the sustenance of regional harmony.[41] These have been the touchstones in terms of dealing with the colonial legacy on boundary delimitations and territorial challenges across Africa.

Despite the careful avoidance of the mention of *uti possidetis* in the Cairo Declaration, the legal interpretations about the ensuing boundary disputes have often inserted *uti possidetis* in the jurisprudence when settling frontier disputes arising from Africa. It is argued that this is jurisprudentially misleading because of the controversial foundations of the principle and the decontextualized nature of the principle when it concerns Africa. Critical to this is also the temporal and intertemporal veneer of the principle of *uti possidetis*. At no time has the principle escaped the controversies surrounding it. Hence, it is left to be seen whether it has crystalized as a general principle of international law having universal application. It continues to be a principle that creates a presumption that the boundaries are fixed. In other words, contexts might change its application and interpretation in cases before the ICJ. The Cairo Declaration and AU/OAU practices did not change this.[42]

Crystallization of norms, temporality, and intertemporality in international law

The norms of international law are not a given. *Uti possidetis* and other principles of law that are useful for the settlement of disputes are also not self-evident. They have often been the product of evolution and crystallization. These principles are generally tools for justice and not all-pervading lords over disputes—especially those of boundaries in Africa, which are deeply entangled by historical attachments, effective possessions, and existence of resources in Africa. Thus, the idea of crystallization in these respects suggests emergence from a complex mix of activities—including wars, negotiations, and incorporation of ideas from the neighboring fields of law, in general, and international policy. In the light of the foregoing, the sources of international law still present a lively scholarly quest even now.[43] This is so despite the wealth of scholarship that has been devoted to it, and notwithstanding the provisions of art. 38 of the Statute of the ICJ. Thus, it is argued that the progressive development of international law—whether viewed teleologically, deontologically, or otherwise—is hinged on the fact that these norms and principles do evolve and crystalize in time. While art. 38 recognizes conventions, treaties, custom and general principles of law recognized by "civilized nations" as sources of international law, it is still a subject matter with considerable complex iterations. In a way the general nature of the provisions highlights the reality of international law, and the difficulty arising from the non-existence of a supranational legislature for international law (ICJ 2017–2020).

Nonetheless, a more interesting question, which has continued to confront the ICJ and other institutions of international law, is when does a custom or principle crystalize as an international law norm? How might any of these customs or principles be recognized and become binding on states and other operators and subjects of international law? These questions are

crucial if we recall that they must be applied effectively in solving international disputes. Their proper application may well determine the peace and security of the international community. Hence, the question of when a norm crystalizes is whether it has imbedded in it the idea of temporality and intertemporality in international law. The temporal dimension, noted here, implicates many juridical processes, and often decisions turn on how this is interpreted, linked closely with the intertemporal problem in public international law. The problem of intertemporality in international law is traceable to the need to sustain international legal order and, thus, set out the defining limits of a norm and its applicability. The animating consideration here is to maintain certainty and stability in the field, while allowing for the progressive development of international law.[44] It seeks to ensure that there is no radical shift that defeats the need for stability and pacific settlement of disputes in international law.

Elias has argued that one of the significant outcomes of the universalization of international law is the doctrine of intertemporal law:

> It is sometimes described as international intertemporal law, sometimes as theory and sometimes as a principle or doctrine of intertemporal law. Whatever name is given to it in a particular context, it seems true to say that the doctrine of intertemporal law may be regarded as a substantive rule of law in one sense, and as a rule of interpretation in another sense.
>
> *Elias 1980, 285*

The doctrine gained prominence through its application by Max Huber in the *Island of Palmas* case, wherein he expressed the opinion that "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" (UN 2006, 845).

Clearly, the facts that often implicate intertemporality are quite acute in the settlement of boundary disputes in international law. For instance, in the case of *Burkina Faso v. Mali*, the ICJ noted that *uti possidetis* applies only to the future and not retroactively.[45] Thus, intertemporal law is invaluable in understanding and applying doctrines like *uti possidetis* and *nemo dat quod non habet* to inviolability of frontiers to the settlement of boundary disputes, especially in Africa. Intertemporal law becomes even more critical when we consider that many of the boundaries now in issue were intracolonial administrative boundaries—like those within the French sphere, which have continued to be adjusted and delimited, even after the end of colonial administration. So the peculiarity of African boundary disputes is evidently more complicated by the fact of these previously intracolonial administrative boundaries—which have now become international boundaries—vis-à-vis the intercolonial administrative boundaries arising from agreements and treaties signed between one colonial power and the other, for example, the Anglo–German Treaty of 1913 through which the British ceded the Bakassi peninsula to Germany.

Thus, in applying it to the *uti possidetis* principle, it is crucial that courts and tribunals understand that its provenance and crystallization is still not a given.[46] Good faith interpretation of boundary disputes is critical, bearing in mind the circumstances of the principles implicated in these boundary disputations. Notably, art. 31 of the Vienna Convention on the Law of Treaties recognizes that treaties are to be interpreted in good faith and in accordance with the ordinary meaning of the letters of the treaty. It acknowledges that the context of the treaty should also be considered in the light of its object and purpose (VCLT 1969).

It is argued that boundary disputations are *sui generis*, because often the conflict revolves around documents made in contexts with known difficult historicity. Equally, the VCLT

privileges the existing understandings of legal positivism.[47] It centralizes structural consistency, which often limits the capacity of tribunals to consider, on a case-by-case basis, the nature of a dispute and what best provides for the peaceful settlement of the dispute. There should be a measure of circumspection, therefore, in quickly inserting the principle of *uti possidetis* into any of these boundary disputes, as that might be counterproductive for the states involved.

Some significant African boundary decisions rendered by the International Court of Justice

For scholars of public international law and international relations, the ICJ decisions on boundary disputations arising from Africa reveal a lot of difficulties and complicate the post-colonial future of the states. It has thus become imperative to ask the question: where is the ICJ going with its jurisprudence on boundary disputes emerging from Africa? The importance of this question in reviewing and understanding these decisions on boundary disputations from Africa is manifest in that the ICJ occupies a strategic position in the making, diffusion, transmission and legitimization of ideas, norms, and principles of international law. Its juridical intervention holds critical sway in the field and produces far-reaching policy ramifications. These decisions, therefore, offer a unique lens through which we can examine the international law governing the subject. In doing so, it is important to explore alternative approaches to legal interpretation that comprehend the needs of the communities that are likely to be impacted by the outcomes of these decisions. The needs of these communities are more meaningfully appreciated by paying attention to the history or histories beyond the narratives, as given by colonial administrations. Hence, the pivot to a broader historicism in improving the interpretive acuity of the ICJ and other tribunals involved in boundary disputes settlement between African states.

To this effect, the history of international law cannon often highlights the contexts of the development, evolution, and expansion of international law. Although the telling of that history has also privileged the colonial powers, recent scholarly interventions in the field have sought to hinge the historiography of international law to what has been referred to as "the road less travelled" (Amerasinghe 2001; Koskenniemi 2012; Vadi 2017). That is to say, it has been an attempt to complicate the history of international law in ways that show more openness to the voices coming from different parts of the world, including the former colonized peoples.[48] This is needed not only because of the insights that it generates for international law operators, but also for the reasonable measure of healthy skepticism that it engenders about formalist approaches to international law. It is argued that this has great epistemic value, because it interrogates the sources of international law, the crystallization of norms, and the temporality of these sources of international law and norms.

Furthermore, the newer scholarship spotlights the entangled history of international law, imperial powers, and colonialism. This triadic entanglement is critical to understanding the temporal and intertemporal nature of principles and norms of law. For emphasis, any application of these norms and principles without due attention to the triangle of forces that shaped international law—especially as it relates to colonized peoples—will be deficient in several respects. It will be pointing at a stump while missing the entire living forest of ideas and activities that guarantee the development of international law. For instance, when Captain H. L. Gallwey, British Vice Consul, in 1892, visited the Oba of Benin, Oba Ovonramwem Nogbaisi, he had one mission in mind—to bring the kingdom under the jurisdiction of the Queen.[49] He had with him a perfectly crafted parchment. The parchment was a "standard form" treaty from Her Royal Majesty, the Queen of Great Britain and Northern Ireland and Empress of India.

The parchment, which had only nine articles, would subsequently prove pivotal to the survival of the kingdom and subsequent conquest and colonization by British authorities.[50]

Of the nine articles of the Gallwey Treaty 1892, arts. I and II were critical and did not, in any way, pretend to be an agreement between two equal sovereigns, who enjoyed freedom of contract and autonomy of destiny.

Article I provided thus: "Her Majesty the Queen of Great Britain and Ireland, Empress of India, in compliance with the request of the King of Benin, hereby extends to him and the territory under his authority and jurisdiction, Her gracious favor and protection" (Ayeni 2017, 39).[51]

On dispute settlement, the Treaty stated in art. II:

> [Any dispute between] the King of Benin and other chiefs and British or foreign traders or between the aforesaid king and neighboring tribes which cannot be settled amicably between the two parties, shall be submitted to the British consular or other officers appointed by Her Britannic Majesty to exercise jurisdiction in the Benin territories for arbitration and decision or for arrangement.
>
> *Ayeni 2017, 39–40*

As these forms of treaties spread across the continent, the British and other European powers were able to establish their respective *spheres of influence*.[52] Any form of resistance by Indigenous tribes or kingdoms was met with firm military expeditions, dethronement, and exile of the Indigenous or aboriginal potentates. In the same vein, these "treaties" formed the foundation of the parcellation of Africa between European powers at the Berlin Africa Conference of 1894–1895.[53]

In recent years, several boundary disputations arising from Africa have been litigated before the International Court of Justice. These contentious cases continue to spotlight the significance of the ICJ's application of the principle of *uti possidetis* when settling African boundary disputes. They have also underscored the value of the declaration for respect of territorial integrity and frontiers at the time of independence—the AU Constitutive Act and the Cairo Declaration. Three of these cases speak to the entirety of the disputations about the evolution, temporality, and extent of applicability of the Roman law principle of *uti possidetis* in international law, especially in the settlement of frontier disputes in Africa.[54] What is lacking, however, is a more nuanced interpretation and application of the principle with respect to different regions of the world—especially in the light of the distinctive features, historical foundations, and iterations of the principle in these regions. The Court puts too much undeserved strength to the principle, despite its controversial origins. In this segment, these cases are used to illustrate how the principle has been applied by the International Court of Justice, the implications it has for legal development in the region, the lessons deducible, and the policy relevance of it all.

Frontier Dispute (Burkina Faso/Republic of Mali), *ICJ Reports 1986*

The two countries, Burkina Faso[55] and the Republic of Mali,[56] were former French colonies and they gained their independence in 1960.[57] The case between them arose in the 1980s. Both countries decided to approach the ICJ to settle the frontier dispute between them. In a rather remarkable framing of the operative parts of the agreement submitting the dispute for adjudication before the ICJ, it was the expressed desire of the parties, "to achieve as rapidly as possible a settlement of the frontier between them, based on respect for the principle of the intangibility

of frontiers inherited from colonization, and to effect the definitive delimitation and demarcation of their common frontier" (ICJ 1986, 557).

The task, therefore, before the ICJ was to help the parties settle their differences by indicating the boundary line between Burkina Faso and the Republic of Mali, for the disputed areas defined in the special agreement of the parties submitting to the court's jurisdiction. In the proceedings, the Court observed that to ascertain the rules applicable to the case, it was important to be mindful that both states derived their existence from the process of decolonization. Thus, Burkina Faso is the same as the Colony of Upper Volta, and the Republic of Mali, the former French Sudan. More significantly to our discussion is the exposition of the principle of *uti possidetis* by the Court. Though it acknowledged that *uti possidetis juris* was not a central issue in the litigation process, the Court still espoused it in its deliberations and judgment in a way that has continued to resonate in the literature and stimulate the interest of scholars.

Specifically, at para. 20 of the ICJ judgment, the Court noted that, since the parties have urged the Court to settle the dispute based on "the principle of the intangibility of frontiers inherited from colonization, the Chamber cannot disregard the principle of *uti possidetis juris* …" (ICJ 1986, 565). It viewed *uti possidetis* as a direct and inexorable outcome of decolonization and respect for intangible frontiers at independence. In the specific words of the Court:

> Although there is no need, for the purposes of the present case, to show that this is a firmly established principle of international law where decolonization is concerned, the Chamber nonetheless wishes to emphasize its general scope, in view of its exceptional importance for the African continent and for the two Parties. In this connection it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless, the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.
>
> *ICJ 1986, para. 20, 565*[58]

The view expressed by the majority of the ICJ is blemished in many regards. Indeed, it is interesting to imagine why the ICJ engaged in this overreaching exercise of incorporating the doctrine of *uti possidetis*, despite acknowledging that it did not form part of the central questions before it.

Moreover, the fact that the parties, in their agreement submitting to the jurisdiction of the Court, expressly stated their commitment to the doctrine of "intangibility of frontiers" heightens the curiosity about why the ICJ would readily pivot to the principle of *uti possidetis*. In these respects, a number of points can be suggested. First, the ICJ, in its majority opinion, was consciously seeking to influence the crystallization of the principle of *uti possidetis* as a general principle of international law, applicable to all colonial peoples and boundary disputations. In doing so, it was also seeking to formalize the law, and as much as possible, to achieve uniformity of application across the different regions of the world. More interesting, while acknowledging the challenge the doctrine poses to self-determination, the Court still insisted that the fact that African states at independence decided to respect the colonial boundaries meant that this was an application in Africa of a rule of international law, which has a universal

scope. It is argued that the attitude of states, both within the African Union and elsewhere, does not suggest a uniformity of practice that has resulted in the emergence of a generally applicable principle of international law. It is a bit capricious for the ICJ to have set for itself this task of sanctifying and consolidating the principle of *uti possidetis*, despite the fact that it was not germane to the settlement of the dispute before it. A bystander may be quick to argue that this was a frantic effort to regularize the principle as a generally accepted principle of international law. This perception was totally avoidable. The ICJ could have insulated itself from this self-induced censure.

It is argued that the mere convenient recognition of the administrative boundaries handed down at independence does not mean, by that fact alone, an acceptance of the principle of *uti possidetis*. It must also be made clear that the approach adopted by the African heads of states and government did not mean that *uti possidetis* was no longer of any value. It only meant that *uti possidetis* has to be considered as one of the relevant tools of boundary disputes settlement and not a sacred and dispositive principle in all cases and at all times. Suzanne Lalonde has critiqued the broad interpretation of the doctrine of *uti possidetis* by the ICJ, because it is not the same as the doctrine of *intangibility of boundaries* as expressed by the parties in this case (Lalonde 2002; Ahmed 2015).[59] This is especially so in the light of the Cairo Declaration, which remains, at best, a policy of keeping stability within the newly independent states in Africa and not an affirmation of the establishment of the principle of *uti possidetis*. In effect, that fact is only a strand of evidence among other pieces of evidence that may be applied in proof of boundaries of postcolonial African states.

More in tune with the practice of African states, as illustrated by the Cairo Declaration, is the opinion of Judge Abie Saab, which is that the principle of *uti possidetis* cannot be applied as an absolute principle of general international law, because doing so can fly in the face of reality within the postcolonial states.[60] In other words, the principle must always be interpreted in the light of the internal realities of the states at issue. The Cairo Declaration of 1964 merely establishes a policy direction about national frontiers and that explains the approach adopted in settling many boundary disputes, such as that between Kenya and Uganda, and Egypt and Sudan after independence.

Frontier Dispute (Benin/Niger), Judgment, *ICJ Reports 2005*

In the same manner as in the Burkina Faso/Mali case discussed previously, the ICJ was confronted with another frontier dispute between Benin and Niger. The parties had, by a special agreement, also set out their interest in having their dispute settled, as concerned the definitive delimitation of the entire boundary between them, by the ICJ. Article 2 of the agreement submitting the dispute to the ICJ stipulated that subject and requested that the Court:

(a) determine the course of the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector;
(b) specify which state owns each of the islands in the said river, and in particular Lété Island;
(c) determine the course of the boundary between the two states in the River Mekrou sector.

ICJ 2005, art. 2, 95

The parties presciently also stipulated that the principles of applicable law to the settlement of their dispute shall be "those set out in Article 38, paragraph 1, of the Statute of the International Court of Justice, including the principle of state succession to the boundaries inherited from

colonization, that is to say, the intangibility of those boundaries" (ICJ 2005, art. 6, 96).[61] As in the previous case, the ICJ majority Chamber, in para. 23 of its majority judgment, stated:

> Under Article 6 of the Special Agreement ("Applicable Law"), the rules and principles of international law applicable to the present dispute include 'the principle of State succession to the boundaries inherited from colonization, that is to say, the intangibility of those boundaries'. It follows from the wording of this provision and from the arguments of the Parties that they are in agreement on the relevance of the principle of *uti possidetis juris* for the purposes of determining their common border.
>
> *ICJ 2005, 108*

Respectfully, the ICJ misstated the purport of the agreement of the parties and the law behind the principle of intangibility and *uti possidetis juris*. The principle of intangibility of frontiers and *uti possidetis* are not the same—neither in origins, nor applications.[62]

Frontier Dispute (Burkina Faso/Niger), *ICJ Reports 2013*

In the case of the *Frontier Dispute (Burkina Faso/Niger)* 2013, the ICJ adopted the same approach, citing its interpretation and application of the principle of *uti possidetis*, as if it was one and the same with the *principle of intangibility* of frontiers, as contemplated by the AU Charter and the Cairo Declaration. In seeking to correct this mistaken impression, Judge Yusuf, in a separate opinion, has argued that the principle of respect for intangibility of territorial frontiers inherited at independence, as expressed by the OAU/AU Constitutive Act and the Cairo Resolution, are not interchangeable with *uti possidetis juris*. They are neither identical nor equivalent. His argument stands on three solid grounds. First, the *travaux préparatoires* of the Addis Ababa Conference, and even less by the heads of state in their inaugural speeches, did not refer to *uti possidetis juris.* If the heads of states had so intended it, they would have expressly stated that *uti possidetis* would be the applicable principle of law. This is even more important in the light of the long practice in Latin America of the principle of *uti possidetis* before the independence of African states. Second, there are clear differences between the principles espoused by the AU resolution vis-à-vis *uti possidetis juris* in terms of their origin, purpose, legal scope, content, and nature. For instance, *uti possidetis*, by its nature, had the primary purpose of ensuring that there was no *terra nullius* open to occupation by foreign powers in Spanish America. Its purposes in Spanish America were therefore clear and specific to the region. There was nothing of that sort in the African context to necessitate its transplant haphazardly into the domain of African international law—especially, in the settlement of boundary disputes. It is therefore a principle with limited provenance and application (ICJ 2013, 134–8).

Furthermore, *uti possidetis* is essentially retrospective in nature, as it invests upon international boundaries the administrative limits intended originally for quite different purposes. Many of the divisions, as can be seen in French West Africa, were for administrative convenience. There were no *terra nullus* or unexplored territories in Africa.[63] Indeed, there were countries, like Ethiopia and Liberia, that were foundation members of the AU and never colonized. So, if the OAU/AU Charter was intended to fully adopt the principle of *uti possidetis* with all its fraught colonial imprint from Spanish America, what of these states that were never colonized? There were also the trust territories under the Trusteeship Council of the United Nations. Judge Yusuf averred that this diversity of the boundary regimes, existing at the time of independence, and the aversion of the newly independent African states to the legitimization of colonial law led the AU to construct its own principle (ICJ 2013, 138–9).

The meaningful reading from this opinion is that the declaration and charter provisions were not about *uti possidetis*, as that would have been too narrow to meet the juridical and political needs of post-independent Africa. The opinion canvased by Judge Yusuf is plausible in that the express position of the AU, which remained silent on the principle of *uti possidetis*, is an indication that there was no intention to just transplant the principle from its Roman and Latin American origins into the radically different political, economic, social, and cultural landscape of the emergent Africa in the 1960s. One important lesson in this African approach is that it is critical that in seeking answers to frontier disputes in different regions of the world, care must be taken to avoid an uncritical transplant of legal ideas, doctrines, and principles. Such uncritical transplant, in essence, will also mean importing the conflicts, problems, and challenges associated with the transplanted doctrine from wherever it originated. The ICJ, for its part, need not coerce the crystallization of the principle of *uti possidetis* as a general principle of international law applicable to all states—especially in those states like African states that have made deliberate choices to avoid it.

Looking forward

The significance of legal of interpretation in the evolution of international law is beyond question. Interpretation gives life to the law and contextualizes its application. Beyond the Vienna Convention on Law of Treaties, which has become canonical in terms of treaty interpretation, the ICJ often finds itself confronted by the need to interpret doctrines, principles, norms and practices. The provisions of art. 38(1) of the Statute of the ICJ sets out the sources from which the ICJ may derive legal rules applicable to any controversy and dispute before it. In the sphere of frontier and territorial disputations—which are very significant in Africa and in the Balkans post-1990—the norms can sometimes be anachronistic, unclear, and laden with colonial baggage. Interestingly, these principles are often applied with a view that seems to suggest that the principles are beyond question. The doctrine of *uti possidetis* has enjoyed uncommon reverence and generous application by the ICJ, notwithstanding its provenance. The ICJ's imprimatur on the principle does not resonate properly with the objectives of self-determination or the doctrine of intangibility of frontiers privileged by Africa at the time of independence.

The overwhelming reliance that the ICJ has placed on the principle limits the jurisprudential objectivity of the ICJ since it is perceived to be attaching too much weight on a principle, with no proof of uniform application. This leaves a question as to what the path is of legal development on boundary disputes settlement that the ICJ is pursuing. It would seem that boundary disputes in Africa have become the Appian way through which the ICJ disseminates and solders principles like *uti possidetis* on the framework of international law. This approach, which ignores the provenance and historical inconsistency of the principles, is quite a judicial stretch. The ICJ needs to reappraise its interpretive approaches with respect to the context of these principles, so as to avoid leaving scholars and practitioners wondering what the ICJ seeks to achieve. Indeed, principles like *uti possidetis* have their value within the framework of international law; however, applying them, without careful interrogation as to their applicability to particular situations, may lead to unjust results. This may in turn delay their crystallization.

Conclusion

Territorial and boundary disputations in Africa are clear and present problems. This was well-known from the moment of independence in the 1960s. The leaders at the time

responded through the instrumentality of the OAU/AU and adopted the Cairo Declaration in 1964, which recognized and respected the territorial integrity of states at independence. This is a deliberate choice and is pragmatic but not slavish about colonial ordinances. This has been the underpinning policy informing the settlement of frontier disputes in Africa. It shares some policy semblance with the doctrine of *uti possidetis*, but it is not the same as *uti possidetis*. This is why some of the disputes have undergone settlement through joint boundary commissions, good offices negotiations, deliberations, arbitrations, and sometimes litigations.

The ICJ appears, in a number of cases, to overstretch the meaning and essence of the Cairo Declaration and African Approach, to respect the frontiers existing at the time of independence. In the *Frontier Dispute Concerning Burkina Faso/Mali*, the Court went as far as pronouncing that *uti possidetis* is a general principle of customary international law applicable to all states. There is no congruence between this interpretation given by the ICJ in that case and the practice of states, or the opinion of publicists. *Uti possidetis* is, therefore, a rebuttable principle of law. Its utility need not be universal but applied on a case-by-case basis, considering the peculiarities of regions like Africa, which are different from that of Latin American states. Another reason for viewing *uti possidetis* with a great deal of circumspection is that boundary markers and colonial cartographers had little or no empirical facts upon which they planted the markers or drew the lines. Most of the territories were not properly explored. *Uti possidetis* also suffered interpretational challenges, even in Latin America where the Spanish introduced it. Brazil and its Spanish-speaking neighbors have different interpretational dispositions with respect to *uti possidetis*. It is worthy of note that despite the attempt by some scholars and tribunals to overstate the purport of *uti possidetis* in international law, it is still debatable as to whether it is anything more than a guiding principle.

For African states and policymakers, it is plausible, therefore, to seek beneficial settlement of boundary disputes through peaceful measures, paying attention to the best interests of the inhabitants caught in the web of the irregular and often hazy colonial boundary lines. While there is need to respect colonial boundaries, it is important that states be deliberate in the application of principles like *uti possidetis*. Joint boundary commissions, joint industrial clusters, joint exclusive economic zones, or joint oil and mineral resources ventures can be set up to take advantage of the resources in some of the contested boundary areas for collective benefits. It is often the uncompromising and lack of conciliatory approaches to frontier disputes by African leaders—even in the face of heavy humanitarian consequences—that leads to a cycle of violence over borders. Leaders must also be quick to condemn claims to new frontiers arising from recent discoveries of resources like oil and gas. Adjudication before the ICJ may help streamline the claims, but it may sometimes not provide lasting solutions to the underlying socio-economic, cultural, environmental, and historical issues implicated by these boundary disputes. Policymakers must always bear this in mind.

Notes

1 Article 38 (1)(c) of the Statute of the ICJ still recognizes as a source of international law, "the general principles of law recognized by civilized nations"; see www.icj-cij.org/en/statute; Đorđeska(2020).
2 Principles with *erga omnes* character are those that create obligations owed by a state to the international community as a whole, as opposed to obligations owed either to a particular state or an institution. See Gaja (1981).
3 Case concerning *Frontier Burkina Faso/Mali ICJ Reports 1986.*
4 Case concerning *Frontier Dispute (Benin/Niger)*, Judgment, ICJ Reports 2005.
5 Case concerning *Frontier Dispute (Burkina Faso/Niger)*, Judgment, ICJ Reports 2013.

6 The complex nature of boundary disputes is shown in many places around the world. Sometimes, these disputes can lead to wars and conflicts and other adverse impacts on inhabitants. See Mahmud (2010).

7 For instance, the United Nations Convention on the Law of the Sea (UNCLOS), 1982 has several significant provisions on maritime boundary disputations. It often intermingles with territoriality and sovereign ownership of territories appurtenant to the sea and right of free navigation. This whole area of international law does not come within the scope of this work. See *The South China Sea Arbitration (The Republic of The Philippines v. The People's Republic of China*), The Hague, July 12, 2016. https://docs.pca-cpa.org/2016/07/PH-CN-20160712-Award.pdf.

8 Because of the centrality of legal interpretation in understanding the rights and privileges of parties—especially, in settling disputes, legal interpretation is a vibrantly debated in topic in jurisprudence. Many cannons have been developed about it. International tribunals are duty bound to assimilate these cannons and be open to different approaches, especially when dealing with such subject matters and boundary disputations.

9 Raz highlights the question of coherence in law and how it is rather a remarkable debate in the field. See Raz (1992).

10 An alternative thinking about law can be found in the critical legal school (CLS)/critical legal thought (CLT). This school or movement in law perceives law as indeterminate, and therefore, capable of different outcomes. Thus, it has advocated for a more radical look at law that does not default to formalism. See Hutchinson and Monahan (1984); Hunt (1986); Unger (1986); Krygier (1987); Purvis (1991); Tushnet (1991); Kennedy (1999); Joerges, Trubek, and Zumbansen (2011); Unger (2015).

11 See, generally, Leiter (2010, 1), who notes particularly, "[f]ormalist theories claim that (1) the law is 'rationally' determinate, … and (2) adjudication is thus 'autonomous' from other kinds of reasoning, that is, the judge can reach the required decision without recourse to non-legal normative considerations of morality or political philosophy."

12 D'Aspremont continued in that line of thought by noting that, although formal standards help in ascertaining international legal rules, it does not completely remove indeterminacy in rules. The further advantage, he noted, is that formalism preserves debates about international law and forestalls the potentiality of scholars speaking over each other's head—a babel of sorts, instead of engaging in a rewarding debate. This, he considered, is the limited value of formalism since it focuses on a few formal indicators for ascertaining international law.

13 Ōnuma highlights the need for more careful, complex, and informed approaches to international law. The need for this is illustrated by the cross-cultural application of international law. The peoples of the world can no longer be allotted based on the spheres of influence of empire states. As seen in the United Nations, they are of diverse peoples, cultures, languages, civilizations, and thoughts, and this is yet to meaningfully be reflected in the central cannons of international law, as we know it.

14 Africa's encounter with other cultures, especially with the Arabs and other Middle Eastern cultures, is also a big subject matter, which is not the focus of this work. The focus on the European encounter is privileged in this work because this is what has shaped the present focus of international law and also the jurisprudence of the ICJ since its establishment after the Second World War.

15 First, international law served the purpose of empire, expanding suzerainty and appropriating resources of the colonized. In other words, international law was used to justify, legitimize, and buffer the *civilizational mission* of the European states to Africa—*pacification*, *colonization*, *extraction, exploitation*, and *transfer* of the resources of colonized peoples. Second, it gave the colonizers a mantle with which to muffle their conscience and placate voices of dissent in the day, regarding the gross violations of the human rights of Indigenous communities, not only in Africa, but in South America, Asia, and other parts of the world outside Europe. In the face of this justification and conscience pacification—which international law offered to empire states—it became easy to operate the machinery of colonial invasion, slavery, domination, and expropriation of African and other colonized peoples.

16 There is an emergent scholarship that tracks the earlier works of African scholars like T. O. Elias, who pioneered the contribution of African scholars to international law. See, for example, Gathii (2008), who argues that, in a way, Elias was too accommodating of international law, as produced from the colonial enterprise. In essence, Elias sought to show how Africa was an equal contributor to the development of international law without shifting the structures, especially, with respect to international economic law. Thus:

> Elias's view of international law as a cultural achievement did not focus on its role in gaining and perpetuating positions of power for Europe and the attendant disadvantage to Africa this

> engendered … Elias's revisionist historiography easily showed that blacks were not inferior to whites, but perhaps fell short of exposing the various ways in which colonialism had established its hegemony over non-European peoples.
>
> *Gathii 2008, 338*

See, also, Okafor (2005).

17 See "The Berlin Conference of the International Law Association" (1906). No pretense was made by the European powers about consulting the peoples of Africa. Indeed, it was recorded that, for many of the European powers, they had no idea of where the territories allotted to them were located, except to say the locations had been hinted to them by a map.

18 *Corfu Channel (U.K. v. Albania)*, Judgment of April 9, 1949, ICJ Reports (1949) 4; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment of December 17, 2002, ICJ Reports (2002) 625, para. 37; *Avena and Other Mexican Nationals (Mexico v. U.S.)*, Judgment of March 31, 2004, ICJ Reports (2004) 12, para. 83; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Judgment of December 15, 2004, ICJ Reports (2004) 279, para. 100; *Legal Consequences of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, July 9, 2004, ICJ Reports (2004) 136, para. 94; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)*, Judgment of February 26, 2007, ICJ Reports (2007) 43, para. 160; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of June 4, 2008, ICJ Reports (2008). These judicial pronouncements often resonate hard in the formation of norms and principles of customary international law beyond the particular cases in question. This shows the preeminence of the ICJ in the making of international law through interpretation and judicial pronouncements.

19 See Petersen (2017). This paper examines, generally, the emergence of norms through the ICJ, and how it is sometimes shadowed by politics.

20 "Judicial decisions and writings may serve as subsidiary means for the identification of rules of customary international law." See the International Law Commission Report 2015, A/70/10, Identification of Customary International Law, Draft conclusion 14 [Judicial decisions and writings]. https://legal.un.org/ilc/reports/2015/english/chp6.pdf.

21 The Montevideo Convention on the Rights and Duties of States 1933 (in force 1934) recognizes a permanent population, a defined territory, government, and capacity to enter into relations with other states, as qualifying attributes of states. See art. 1 of the Montevideo Convention on the Rights and Duties of State (see www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf).

22 The Treaty of Westphalia, which was made in 1648, highlighted, among other things, the structural foundations of the modern state system and the concept of territorial sovereignty. See, generally, Croxton (1999); Caporaso (2000).

23 In art. 10 of the Covenant of the League of Nations, members undertook "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled." See https://avalon.law.yale.edu/20th_century/leagcov.asp.

24 Article 2(4) of the UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (see www.un.org/en/sections/un-charter/chapter-i/index.html).

25 See, also, the Charter of the Organization of American States of April 30, 1948, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife of February 20, 1928.

26 For instance, when African and Indigenous territories elsewhere were framed as *terra nullus*, it was not a neutral framing. It meant a lot in terms of imperial powers and what they could do to those lands. See Fisch (1988).

27 For instance, when the Iraqi Government, led by the then dictator Saddam Hussein, invaded Kuwait in 1990 and annexed its territory, it was viewed by the United Nations as striking at the foundations of the UN Charter and post-Second World War international legal order. See Greenwood (1992).

28 For Indigenous peoples in Africa and elsewhere, this has been quite a nightmare. See Miller (2006, 9–24); Miller and Ruru (2009, 852–7); Miller et al. (2010).

29 Also, it is an emotive issue because of the memories that societies usually attach to their ancestral homelands—attachments often permeating their ways of life, identity, and ultimate quest. Sometimes, the attachment is motivated by such factors as the existence of places of worship and other venerated

grounds, temples, sacred groves, shrines, and graveyards. Article 12 of the UNESCO Declaration of the Rights of Indigenous Peoples recognizes that:

> Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
>
> *UN 2008, art. 12*

This further shows the reason why communities may be more attached to their ancestral homelands and removing them from these lands becomes a highly difficult experience (UN 2008).

30 The Montevideo Convention is central to state formation and the politics of international law. This has been the subject of many scholarly engagements. See, generally, Koskenniemi (2007, 2009).

31 Frontier and territorial disputes have been the most frequent matters on the docket of the ICJ. Some of them include: *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, p. 95 (the *Chagos* case is quite interesting, because it dealt also with the larger questions of decolonization and the right to self-determination); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136; *Western Sahara,* Advisory Opinion, ICJ. Reports 1975; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970); *North Sea Continental Shelf Case*, Judgement ICJ Reports 1969.

32 This work of the International Law Commission explored the doctrine of *lex specialis* and *lex generalis* within the contemplation of self-contained disputes settlements systems in international law.

33 The Anglo-German Treaty of 1913 between Great Britain and Germany was to settle the frontier between Nigeria and Cameroon—from Yola to the sea, and regulate navigation on the Cross River. This treaty was signed in London on March 11, 1913. Nothing better epitomizes how these treaties were produced than this example. Just like other previous efforts, the treaty was made between two empire states, with no representation of any of the colonized peoples. Moreover, it adopted previous maps signed by British and German delegates on October 6, 1909, thus incorporating these maps as an enforceable part of the treaty.

34 A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of states, as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law (*jus cogens*) having the same character. See UN 2005 (art. 53 and art. 64); see, also, Alexidze 1981; Hannikainen 1988; Charlesworth and Chinkin 1993; Cassese 2012; Knuchel 2015; Weatherall 2015; Kadelbach 2016; Vargas 2016; Costelloe 2017.

35 In most cases, the colonial communities challenged the effort to expropriate their territories or delineate them, leading to the use of force in most cases by the colonizing authorities to subdue and impose their will on the colonial peoples.

36 I cite Roman magistracy principally because the principle of *uti possidetis* derives originally from the Roman legal tradition.

37 It is evident in the literature that there was some expressed dissatisfaction with the nature of the colonial frontiers. For instance, Ghana and Togo were already contemplating what would be the fates of tribes, like the Ewe people, who were living on both sides of the frontier. The administration of the two parts by different colonial powers and the desire for a separate identity and self-determination on each side of the border did not make this easy for ethnic groups separated by a territorial border. Kwame Nkrumah pressed for the integration of the Trust Territory of British Togoland with an independent Ghana. See Austin (1963).

38 It may be argued that the omission of *uti possidetis* does not detract from the outlook of the Cairo Declaration 1964. However, that argument ignores the fact that the travel preparatory of the Declaration also did not mention it, thereby showing that it did not feature in the legislative history of the Declaration of *uti possidetis*. Legal interpretation often relies on legislative history, as a way of gaining valuable insights into principles and laws applicable to any particular dispute. In essence, interpretations provide a guide as to the intention of the lawmaker or norm maker.

39 This is the famous Cairo declaration, which could be treated as a declaration of state practice in Africa regarding application of the *uti possidetis* principle.

40 The text of the Cairo Resolution entitled "Border Disputes among African States" reads:

Considering that border problems constitute a grave and permanent factor of dissension;
Conscious of the existence of extra-African maneuvers aimed at dividing African States;
Considering further that the borders of African States, on the day of their independence, constitute a tangible reality;
Recalling the establishment in the course of the Second Ordinary Session of the Council of the Committee of Eleven charged with studying further measures for strengthening African Unity;
Recognising the imperious necessity of settling, by peaceful means and within a strictly African framework, all disputes between African States;
Recalling further that all Member States have pledged, under Article IV of the Charter of African Unity, to respect scrupulously all principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;

1. SOLEMNLY REAFFIRMS the strict respect by all Member States of the Organization for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;
2. SOLEMNLY DECLARES that all Member States pledge themselves to respect the borders existing on their achievement of national independence

OAU 1964, AHG/Res. 16(1)

Article 4(b) of the Constitutive Act of the AU lists as one of the Principles of the Union "respect of borders existing on achievement of independence" (AU 2000, 6).

41 It is also instructive that, during the Cairo First Ordinary Session of the Assembly of Heads of States and Government in 1964, with respect to the ongoing border disputation between Ghana and Upper Volta, the Assembly recommended that heads of state of Ghana and the Republic of Upper Volta (now Burkina Faso) should hold direct discussions, with a view to finding a mutually acceptable solution to their border dispute.

42 Judge Yusuf has argued, and I agree with him, that "*uti possidetis juris* and the OAU/AU principle on respect of borders are neither identical nor equivalent" and that the Cairo Resolution and founding instruments of the OAU and AU do not refer to *utis possidetis juris.* Equally, "the two principles must be distinguished in light of their different origins, purposes, legal scope and nature." See ICJ (2013) Frontier Dispute (Burkina Faso/Niger) and particularly, the separate opinion of Judge Yusuf (ICJ 2013, 94–108).

43 In the year 2012, the International Law Commission (ILC) did appoint a special rapporteur to study the "Formation and Evidence of Customary International Law." See UN (2015).

44 In his report to the *Justitia et Pace*, *Institute De Droit International*, Session of Wiesbaden, 1975, Max Sorensen (Eleventh Commission, Rapporteur) proposed a resolution on the doctrine thus: "… the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it" (IIL 1975, 1). For the purposes of application of this principle, Sorensen stated further that:

a) any rule which relates to a single fact shall apply to facts that occur while the rule is in force;
b) any rule which relates to the repetition or succession of identical facts shall apply even though only one or some of such facts should occur after the entry into force of the rule;
c) any rule which relates to an actual situation shall apply to situations existing while the rule is in force, even if these situations have been created previously;
d) any rule which relates to a certain period of time, or to the existence of a situation during a defined period, shall apply only to periods the initial and terminal dates of which lie within the time when the rule is in force;
e) any rule which relates to the end of a period shall apply to any case where the period has come to an end at a time when the rule is in force;

… States and other subjects of international law shall, however, have the power to determine by common consent the temporal sphere of application of norms, …

IIL 1975, 1–2

45 By becoming independent, a new state acquires sovereignty with the territorial base and boundaries left to it by the colonial power. This is part of the ordinary operation of the machinery of state succession. International law—and consequently, the principle of *uti possidetis*—applies to the new

state (as a state) not with retroactive effect, but immediately and from that moment onward. It applies to the state as it is, that is, to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does riot unfreeze the hands?

46 In the past, some scholars have expressly argued that the principle of *uti possidetis* should be discarded, because it has been so discredited. See Lapradelle (1928, 86); Ayala (1931).

47 Even with the existence of the Vienna Convention on the Law of Treaties, which was aimed at codifying state practices and norms about treaty interpretation, as per its arts. 31, 32, and 33, legal interpretation in international law remains a live subject. It is, therefore, interesting to see that principles like *uti possidetis* would be treated with so much grace in the light of its origins and imprecision.

48 For more on the different histories of international law and increasing participation of voices from different parts of the world, see Obregón (2019). The author highlighted the newness of peripheral international law histories.

49 It did not matter that the renowned kingdom, which is part of present-day southern Nigeria, had for centuries resisted the efforts of Europeans, including the British, to control the trade routes in the lower Niger and the territorial and sovereign integrity of the kingdom.

50 Part of the justification of the British Punitive Expedition to Benin in 1897 was an alleged breach of the treaty and the continuance of slave trade by the local authorities in Benin.

51 See, also, Papers Relative to King Jaja of Opobo, and the Opening of West African Markets to British Trade, Parliamentary Papers, Vol. 74, April 1888; *Benin Empire and the World* (The Gallway, Treaty 1892), Heritage Encyclopedia, Project Gutenberg; Oba Akenzua, II, "Historical facts, being a review of the Benin Community, Intelligence Report, May 12th 1938 (unpublished typescript at the S.D.A's Office, Benin City; Egharevba 1960; Igbafe 1970; Larr 2016.

52 From *British and Foreign State Papers* (1893–1894): Regulations respecting Customs, Duties and Licenses. British Central Africa. Zomba, 1st February, 1894; Uganda. Treaty. British Protection. Kampala, 27th August, 1894; Treaty between Great Britain and Benin and Jekeri. British Protection, Trade, &c. Benin, 2nd August, 1894; Regulations. Navigation of Niger. 19th April, 1894; Convention, Great Britain and Congo. Spheres of Influence. Brussels, 12th May, 1894; Convention, France and Germany. French Congo and Cameroon. Spheres. Lake Chad. Berlin, 15th March, 1894. See https://babel.hathitrust.org/cgi/pt?id=hvd.hj13at&view=1up&seq=5.

53 The European parcellation of Africa is often considered not only a violent act against the peoples of Africa but also a humiliating experience. The memory it evokes and the political realities it implicates in the present offers a rich literature in the field. Even for scholars from Europe, it was quite absurd. As Lord Salisbury, the British Prime Minister, remarked in 1890, following the conclusion of the Anglo-French Convention through which the respective spheres of influence of both colonial states were established in West Africa, "[we] 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 the small impediment that we never knew exactly where the mountains and rivers and lakes were." See Ndulo (2003, Note 97).

54 *Frontier Dispute (Benin/Niger)* 2005; *Guinea–Bissau v. Senegal* 1991; *Frontier Dispute Burkina Faso/Niger)* 2013; *Frontier Dispute (Burkina Faso/Republic of Mali)* 1986.

55 Burkina Faso—formerly known as the Republic of Upper Volta—gained independence from France on August 5, 1960. Both Mali and Burkina Faso states were members of the French community.

56 Mali gained independence from the French on June 20, 1960.

57 Both Mali and Burkina Faso states were members of the French community. Burkina Faso, formerly known as the Republic of Upper Volta, gained independence from France on August 5, 1960. Mali gained independence from the French on June 20, 1960.

58 The Court also noted that the elements of *uti possidetis juris* were embedded and "latent" in many of the resolutions and declarations under the auspices of the OAU/AU. It therefore concluded that the solemn affirmations of the OAU/AU did not consecrate a new principle of frontier delimitation in international law but a mere acknowledgement of a principle already in existence, as part of the general principles of international law regarding state succession. The justification for this sweeping application of the *uti possidetis* principle on the fabric of international boundary disputation, especially as it applies to African States, is that it will "prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power" (ICJ 1986, 565).

59 Lalonde argues rather forcefully that nothing justifies the overriding importance now attributed to the principle of *uti possidetis* by the ICJ. She drew a critical contrast between the principle of *uti possidetis*

and the intangibility principle in the sense that the doctrine of intangibility is limited to the judicial consequences flowing from a situation already in existence. Indeed, the idea of *uti possidetis*, as a general principle of international law, suggests a one-size-fits-all approach to the settlement of international boundary disputes, and this is at best a legal illusion (Lalonde 2002, 152).

60 He opines that the principle of *uti possidetis*:

> … like any other, is not to be conceived in the absolute; it has always to be interpreted in the light of its function within the international legal order … the principle of *uti possidetis* was formulated to serve a dual purpose: first, a defensive purpose towards the rest of the world …; secondly, a preventive purpose: to avoid or at least minimize conflict occurring in relationships among the successors, by freezing the carved-up territory in the format it exhibited at independence.
>
> *ICJ 1986, 661–2*

61 The same disposition was expressed by the parties in the Case Concerning Burkina Faso/Niger ICJ Report 2013—to wit: "The rules and principles of international law applicable to the dispute are those referred to in Article 38, paragraph 1, of the Statute of the International Court of Justice, including: the principle of intangibility of boundaries inherited from colonization and the Agreement of 28 March 1987" (ICJ 2013, art. 7, 51). See, generally, Mendelson 1996; Monaco 1996; Shahabuddeen (1996); Ōnuma (2002); Pellet (2012); Thirlway (2014); Yee (2016).

62 There is yet no consistency in the practice of states with regard to *uti possidetis*. Thus, it is not a general principle of customary international law by any measure. This has been ably investigated in a recent work, and it was found that even classical international law has not considered it as general principle of international law applicable to all states. Hence, it is left to be seen why the ICJ keeps pushing this pattern of opinion, thereby exposing its jurisprudence to scathing scholarly strictures (Lalonde 2002).

63 *Terra nullius* is a Latin expression that means "land belonging to no man." See Jennings (1963); Lindley (1991); Slattery (1991). The colonial argument was always that *terra nullius* (empty, vacant, or insufficiently occupied or used land) is available for settlement by anybody—usually European settler communities. It ignored the idea of *terra communis*—land ownership by Indigenous communities. See, further, Smith (1977); Hendlin (2014).

References

Ahmed, Dirdeiry M. 2015a. "The Frontier Dispute Case and Applying *Uti Possidetis* to Africa." In *Boundaries and Secession in Africa and International Law: Challenging* Uti Possidetis, 11–46. Cambridge, UK: Cambridge University Press.

Ahmed, Dirdeiry M. 2015b. "The Rule of Intangibility of Inherited Frontiers." In *Boundaries and Secession in Africa and International Law: Challenging* Uti Possidetis, 47–74. Cambridge, UK: Cambridge University Press.

Alexidze, Levan. 1981. "Legal Nature of Jus Cogens in Contemporary International Law" (vol. 172). In *Collected Courses of the Hague Academy of International Law*. Leiden: Brill.

Alvarez-Jiménez, Alberto. 2011. "Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009." *International & Comparative Law Quarterly* 60 (3): 681–712.

Amerasinghe, C. F. 2001. "The Historical Development of International Law—Universal Aspects." *Archiv des Völkerrechts* 39 (4): 367–93.

Anghie, Antony. 2006. "The Evolution of International Law: Colonial and Postcolonial Realities." *Third World Quarterly* 27 (5): 739–53.

Anstey, Roger. 1962. *Britain and the Congo in the Nineteenth Century*. Oxford: Clarendon Press.

Ayala, Eusebio. 1931. "Le principe de l'*uti Possidetis* et le règlement des questions territoriales en Amérique." *Revue de droit international* 8 (4): 441–56.

AU (African Union). 2000. "Constitutive Act of the African Union." https://au.int/en/treaties/constitutive-act-african-union.

Austin, Dennis. 1963. "The Uncertain Frontier: Ghana-Togo." *Journal of Modern African Studies* 1 (2): 139–5.

Ayeni, Sylvanus A. 2017. *Rescue Thyself: Change in Sub-Saharan Africa Must Come from Within*. New York: Hamilton Books.

Baude, William, and Stephen E. Sachs. 2017. "The Law of Interpretation." *Harvard Law Review* 130 (4): 1079–147.

Bederman, D. J. 2001. *International Law in Antiquity*. Cambridge, UK: Cambridge University Press.
Berger, Adolf. 1953. *Enclyopedic Dictionary of Roman Law*. Philadelphia: American Philosophical Society. Reprinted 1991.
"The Berlin Conference of the International Law Association." 1906. *The Advocate of Peace (1894-1920)* 68 (10): 2010–12 www.jstor.org/stable/25752778.
Bernhardt, R., ed. 1984. *Encyclopedia of Public International Law*, vol. VII. Amsterdam: North-Holland.
Boot, Max. 2003. *The Savage Wars of Peace: Small Wars and the Rise of American Power*. New York: Basic Books.
Breen, John M. 2000. "Statutory Interpretation and the Lessons of Llewellyn." *Loyola of Los Angeles Law Review* 33 (2): 263–448.
Breitel, Charles D. 1961. "Review: *The Common Law Tradition—Deciding Appeals* by Karl N. Llewellyn." *Columbia Law Review* 61 (5): 931–40.
Byers, Michael. 2000. *Custom, Power and the Power of Rules: International Relations and Customary International Law*. Cambridge, UK, Cambridge University Press.
Caporaso, James A. 2000. "Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty." *International Studies Review* 2 (2): 1–28.
Cassese, Antonio. 1986. *International Law in a Divided World*. Oxford: Clarendon Press.
Cassese, Antonio. 2005. *International Law*, 2nd edn. Oxford: Oxford University Press.
Cassese, Antonio. 2012. "For an Enhanced Role of Jus Cogens." In *Realizing Utopia: The Future of International Law*, edited by Antonio Cassese, 158–71. Oxford: Oxford University Press.
Charlesworth, Hilary, and Christine Chinkin. 1993. "The Gender of *Jus Cogens*." *Human Rights Quarterly* 15 (1): 63–76.
Chimni, B. S. 2004. "An Outline of a Marxist Course on Public International Law." *Leiden Journal of International Law* 17: 1–30.
Choi, Stephen J. and Mitu Gulati. 2016. "Customary International Law: How Do Courts Do It?" In *Custom's Future: International Law in a Changing World*, edited by Curtis A. Bradley, 117–47. New York: Cambridge University Press.
Cookey, S. J. S. 1968. *Britain and the Congo Question 1885–1913*. London: Longmans.
Costelloe, Daniel. 2017. *Legal Consequences of Peremptory Norms in International Law*. Cambridge, UK: Cambridge University Press.
Cox, Paul N. 2003. "An Interpretation and (Partial) Defense of Legal Formalism." *Indiana Law Review* 36 (1): 57–100.
Craven, Matthew. 2015. "Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade." *London Review of International Law* 3 (1): 31–59.
Crowe, S. E. 1942. *The Berlin West African Conference 1884–1885*. London: Longmans & Green.
Croxton, Derek. 1999. "The Peace of Westphalia of 1648 and the Origins of Sovereignty." *The International History Review* 21 (3): 569–91.
d'Aspremont, Jean. 2011. *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*. Oxford: Oxford University Press.
de Vattel, Emer. 1758. *The Law of Nations*.
Dike, K. Onwuka. 1956. *Trade and Politics in the Niger Delta, 1830–1885*. Oxford: Oxford University Press.
Đorđeska, Marija. 2020. *General Principles of Law Recognized by Civilized Nations (1922–2018)*. Leiden, The Netherlands: Brill Nijhoff.
Dugard, John. 2006. *International Law: A South African Perspective*, 3rd edn. Johannesburg: Jute.
Egharevba, Jacob. 1960. *A Short History of Benin*. Ibadan: Ibadan University Press.
Elias, T. O. 1980. "The Doctrine of Intertemporal Law." *American Journal of International Law* 74 (2): 285–307.
Ewans, Martin. 2002. *European Atrocity, African Catastrophe: Leopold II, the Congo Free State and Its Aftermath*. London: Routledge.
Fisch, Jörg. 1988. "Africa as *terra nullius*: The Berlin Conference and International Law." In *Bismarck, Europe and Africa: The Berlin Conference 1884–1885 and the Onset of Partition*, edited by Stig Forster, Wolfgang J. Mommsen, and Ronald Robinson, 347–75. Oxford: Oxford University Press.
Fitzmaurice, Edmund. 1905. *The Life of Granville George Leveson Gower, Second Earl Granville, 1815–1891*, vol. 2. London: Longmans, Green.
Forster, Stig, Wolfgang J. Mommsen, and Ronald Robinson, eds. 1988. *Bismarck, Europe and Africa: The Berlin Conference 1884–1885 and the Onset of Partition*. Oxford: Oxford University Press.
Foster, John W. 1909. "The Evolution of International Law." *Yale Law Journal* 18 (3): 149–64.

Fowein, Jochen A. 2008. "Obligations Erga Omnes." In Max Planck Encyclopedias of International Law. Oxford Public International Law. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1400.

Frank, Jerome. 1947. "Words and Music: Some Remarks on Statutory Interpretation." *Columbia Law Review* 47 (8): 1259–78.

Gaja, Giorgio. 1981. "Jus Cogens Beyond the Vienna Convention (vol. 172)." In *Collected Courses of the Hague Academy of International Law*. http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789024727780_03.

Garner, Bryan A., and Henry Campbell Black, eds. 2014. *Black's Law Dictionary*, 10th ed. St. Paul, MN: Thomson Reuters.

Gathii, James Thuo. 2008. "A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias." *Leiden Journal of International Law* 21 (2): 317–49.

Gavin, Rosemarie J., and J. A. Betley. 1973. *The Scramble for Africa: Documents on the Berlin West African Conference and Related Subjects 1884/1885*. Ibadan: Ibadan University Press.

General Act of the Berlin Conference on West Africa. February 26, 1885. https://loveman.sdsu.edu/docs/1885GeneralActBerlinConference.pdf.

Gilbert, Jérémie. 2016. *Indigenous People's Land Rights Under International Law: From Victims to Actors*, 2nd rev. edn. Leiden: Brill Nijhoff.

Ginsburg, Tom. 2005. "Bounded Discretion in International Judicial Lawmaking." *Virginia Journal of International Law* 45 (3): 631–73.

Greenwood, Christopher. 1992. "New World Order or Old? The Invasion of Kuwait and the Rule of Law." *Modern Law Review* 55 (2): 153–78.

Grewe, Wilhem G. 2000. *The Epochs of International Law* (trans. and rev. by M. Byers). Boston: De Guyter.

Hall, Edward William. 1895. *A Treatise on International* Law, 4th edn. Oxford: Clarendon Press.

Hannikainen, Lauri A. 1988. *Peremptory Norm (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*. Helsinki: Finnish Lawyers' Publishing Company.

Hendlin, Yogi Hale. 2014. "From *Terra Nullius* to *Terra Communis*: Reconsidering Wild Land in an Era of Conservation and Indigenous Rights." *Environmental Philosophy* 11 (2): 141–74.

Hernández, Gleider I. 2014. *The International Court of Justice and the Judicial Function*. Oxford: Oxford University Press.

Hochschild, Adam. 1998. *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa.* New York: Houghton Mifflin.

Hunt, Alan. 1986. "The Theory of Critical Legal Studies." *Oxford Journal of Legal Studies* 6 (1): 1–45.

Hunter, William Alexander. 1880. *Introduction to Roman Law*. London: W. Maxwell & Son.

Hutchinson, Allan C., and Patrick J. Monahan. 1984. "Law, Politics, and the Critical Legal Scholars." *Stanford Law Review* 36 (1/2): 199–245.

ICJ (International Court of Justice). 1962. "Case Concerning the *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of June 1962." *ICJ Reports*, p. 6. www.icj-cij.org/files/case-related/45/045-19620615-JUD-01-00-EN.pdf.

ICJ (International Court of Justice). 1984. "Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. U.S.*)." Jurisdiction and Admissibility, ICJ Reports, p. 392, November 26. www.icj-cij.org/en/case/70/judgments.

ICJ (International Court of Justice). 1986. ICJ (International Court of Justice). 1986. "Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), Judgment of 22 December 1986." *ICJ Reports*, p. 554, and Separate Opinion of Judge Abi-Saab, p. 659. www.icj-cij.org/files/case-related/69/069-19861222-JUD-01-00-EN.pdf and www.icj-cij.org/files/case-related/69/069-19861222-JUD-01-02-EN.pdf.

ICJ (International Court of Justice). 2004. Advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. www.un.org/unispal/document/auto-insert-178825/.

ICJ (International Court of Justice). 2005. "Frontier Dispute (Benin/Niger), Judgment, *ICR Reports* 2005, p. 90. www.icj-cij.org/files/case-related/125/125-20050712-JUD-01-00-EN.pdf.

ICJ (International Court of Justice). 2013. "Frontier Dispute (Burkina Faso/Niger), Judgment of 16 April 2013." *ICJ Reports*, p. 44, and Separate Opinion of Judge Yusuf, p. 134. www.icj-cij.org/files/case-related/149/149-20130416-JUD-01-00-EN.pdf and www.icj-cij.org/files/case-related/149/149-20130416-JUD-01-03-EN.pdf.

ICJ (International Court of Justice). 2017–2020. "Statute of the International Court of Justice." ICJ, The Hague. www.icj-cij.org/en/statute.

Igbafe, Philip A. 1970. "The Fall of Benin: A Reassessment." *Journal of African History* 11 (3): 385–400.

IIL (Institute of International Law). 1975. "The Intertemporal Problem in Public International Law." Eleventh Commission, Rapporteur, Max Sorensen. Session of Wiesbaden. www.idi-iil.org/app/uploads/2017/06/1975_wies_01_en.pdf.

Institut de Droit International. 2005. Fifth Commission: Obligations and rights *erga omnes* in international law. Rapporteur: M. Giorgio Gaja, Krakow Session. www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf.

Jennings, Robert Y. 1963. *The Acquisition of Territory in International Law*. Manchester, UK: Manchester University Press.

Joerges, Christian, David M. Trubek, and Peer C. Zumbansen. 2011. "The Legacy of Critical Legal Thought and Transatlantic Endeavours" Osgoode CLPE Research Report No. 6/2011, Comparative Research in Law & Political Economy 7 (3). https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1044&context=clpe.

Jones, Henry. 2016. "The Radical Use of History in the Study of International Law." In *The Finnish Yearbook of International Law*, vol. 23, 2012–2013, edited by Jarna Petman, 309–50. Oxford: Hart Publishing.

Kadelbach, Stefan. 2016. "Genesis, Function and Identification of Jus Cogens Norms." In *Netherlands Yearbook of International Law 2015*, vol. 46, edited by Maarten den Heijer and Harmen van der Wilt, 147–72. The Hague: T.M.C. Asser Press.

Keith, Arthur B. 1919. *The Belgian Congo and the Berlin Act*. Oxford: Clarendon Press.

Keltie, John S. 1893. *The Partition of Africa*. London: Edward Stanford.

Kemmerer, A. 2008. "The Turning Aside: On International Law and its History." In *Progress in International Organisation,* edited by Rebecca M. Bratspies and Russell A. Miller, 71–93. Leiden: Martinus Nijhoff Publishers.

Kennedy, David. 1996. "International Law and the Nineteenth Century: History of an Illusion." *Nordic Journal of International Law* 65 (3–4): 385–420.

Kennedy, David. 1999. "The Disciplines of International Law and Policy." *Leiden Journal of International Law* 12 (1): 9–133.

Knuchel, Sévrine. 2015. *Jus Cogens: Identification and Enforcement of Peremptory Norms*. Zurich: Schulthess.

Koskenniemi, Martii. 2001. *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960*. Cambridge, UK: Cambridge.

Koskenniemi, Martti. 2006. "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law." Report of the Study Group of the International Law Commission A/CN.4/L.682, 46–222. 58th Session, Geneva, May 1–June 9 and July 3–August 11. https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdfv

Koskenniemi, Martti. 2007. "The Fate of Public International Law: Between Technique and Politics." 70 (1): 1–30.

Koskenniemi, Martti. 2009. "The Politics of International Law—20 Years Later." *European Journal of International Law* 20 (1): 7–19.

Koskenniemi, Martti. 2012. "A History of International Law Histories." In *The Oxford Handbook of the History of International Law*, edited by Fassbender, Bardo, Anne Peters, Simone Peter, and Daniel Högger, 943–71. Oxford: Oxford University Press.

Krisch, Nico. 2005. "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order." *European Journal of International Law* 16 (3): 369–408.

Krygier, Martin. 1987. "Critical Legal Studies and Social Theory—A Response to Alan Hunt." *Oxford Journal of Legal Studies* 7 (1): 26–39.

Lalonde, Suzanne N. 2002. *Determining Boundaries in a Conflicted World: The Role of* Uti Possidetis. Montreal: McGill-Queens Press.

Lapradelle, Paul de. 1928. *La Frontière: Étude de Droit International*. Paris: La Éditions Internationales.

Larr, Frisky. 2016. *Lost in Democracy: An Analytical Inquest Into Africa's Difficulties with Democracy and the Prospects of Finding Alternatives of Government that May Work Without Hitches*. Bloomington, IN: AuthorHouse UK.

Leiter, Brian. 2010. "Legal Formalism and Legal Realism: What Is the Issue?" Public Legal & Legal Theory Working Papers No. 320, University of Chicago Law School. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1178&context=public_law_and_legal_theory.

Lindley, Mark Frank 1969. *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion*. New York: Negro Universities Press.

Llewellyn, Karl N. 2008. *The Bramble Bush: The Classic Lectures on the Law and Law School*. Oxford: Oxford University Press.

Llewellyn, Karl N. 2015. *The Common Law Tradition: Deciding Appeals*. New Orleans, LA: Quid Pro Books.

Macey, Jonathan R., and Geoffrey P. Miller. 1992. "The Canons of Statutory Construction and Judicial Preferences." *Vanderbilt Law Review* 45 (3): 647–72.

Mahmud, Tayyub. 2010. "Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier." *Brooklyn Journal of International Law* 36 (1). https://brooklynworks.brooklaw.edu/bjil/vol36/iss1/1/.

Marks, Susan. 2003. "Empire's Law (The Earl A. Snyder Lecture in International Law).", *Indiana Journal of Global Legal Studies* 10 (1): 449–66.

Mendelson, Maurice. 1996. "The International Court of Justice and the Sources of International Law." In *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, edited by Vaughan Lowe and Malgosia Fitzmaurice, 63–89. Cambridge, UK: Cambridge University Press.

Miller, Robert J. 2006. *Native America, Discovered And Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny*. Westport, CT: Praeger.

Miller, Robert J., and Jacinta Ruru. 2009. "An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand." *West Virginia Law Review* 111 (3): 849–918.

Miller, Robert J., Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg. 2010. *Discovering Indigenous Lands: The Doctrine of Discovery in The English Colonies*. Oxford: Oxford University Press.

Monaco, R. 1996. "Reflexions sur la theorie des sources du droit international." In *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, edited by Jerzy Makarczyk, 517–29. The Hague: Kluwer Law International.

Mutua, Makau wa. 1995. "Why Redraw the Map of Africa: A Moral and Legal Inquiry." *Michigan Journal of International Law* 16 (4): 1113–76.

Ndulo, Muna. 2003. "The Democratization Process and Structural Adjustment in Africa." *Indiana Journal of Global Legal Studies* 10 (1): Article 12. www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1258&context=ijgls.

Newcomb, Steven T. 2008. *Pagans in The Promised Land: Decoding the Doctrine of Christian Discovery*. Golden, CO: Fulcrum Publishing.

Nussbaum, Arthur. 1954. *A Concise History of the Law of Nations*, rev. edn. New York: Macmillan.

OAU (Organization of African Unity). 1964. "Resolutions Adopted by the First Ordinary Session of the Assembly of Heads of State and Government Held in Cairo, UAR, From 17 to 21 July 1964." OAU, Addis Ababa. https://au.int/sites/default/files/decisions/9514-1964_ahg_res_1-24_i_e.pdf.

Obregón, Liliana 2019. "Peripheral Histories of International Law." *Annual Review of Law and Social Science* 15: 437–51.

Okafor, Obiora C. 2005. "Newness, Imperialism and International Legal Reform in Our Time: A Twail Perspective." *Osgoode Hall Law Journal* 43 (1/2): 171–91.

Ōnuma, Yasuaki. 2000. "When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilisational Perspective." *Journal of the History of International Law* 2 (1): 1–66.

Ōnuma, Yasuaki. 2002. "The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law." In *Liber Amicorum Judge Shigeru Oda*, edited by Shigeru Oda, Nisuke Ando, Edward McWhinney, and Rüdiger Wolfrum, 191–212. The Hague: Kluwer Law International.

Ōnuma, Yasuaki. 2017. *International Law in a Transcivilizational World*. Cambridge, UK: Cambridge University Press.

Pagden, Anthony. 1995. *Lords of All the World: Ideologies of Empire in Spain, Britain and France c.1500–c.1800*. New Haven, CT: Yale University Press.

Pakenham, Thomas. 1991. *The Scramble for Africa: 1876–1912*. London: Weidenfeld & Nicolson.

Parodi, Carlos A. 2002. *Politics of South American Boundaries*. Westport, CT: Greenwood.

Pellet, Alain. 2011. "Shaping the Future of International Law: The Role of the World Court in Law Making." In *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, edited by Mahnoush H. Arsanjani, Jacob Cogan, Robert Sloane, and Siegfried Wiessner, 1065–83. Leiden: Martinus Nijhoff Publishers.

Pellet, Alain. 2012. "Article 38." In *The Statute of the International Court of Justice: A Commentary*, 2nd edn. Edited by Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, and Christian J. Tams, 731–870. Oxford: Oxford University Press.

Petersen, Niels. 2017. "The International Court of Justice and the Judicial Politics of Identifying Customary International Law." *European Journal of International Law* 28 (2): 357–85.

Posner, Richard A. 1986. "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution." *Case Western Reserve Law Review* 37 (2): 179–217.

Purvis, Nigel. 1991. "Critical Legal Studies in Public International Law." *Harvard International Law Journal* 32 (1): 81–128.

Quevedo, Steven M. 1985. "Formalist and Instrumentalist Legal Reasoning and Legal Theory." *California Law Review* 73 (1): 119–57.

Ragazi, M. 1997. *The Concept of International Obligations Erga Omnes*. Oxford: Clarendon Press.

Ratner, Steven R. 2015. *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations*. Oxford: Oxford University Press.

Raz, Joseph. 1992. "The Relevance of Coherence." *Boston University Law Review* 72 (2): 273–321.

Robertson, Lindsay G. 2005. *Conquest by Law: How The Discovery of America Dispossessed Indigenous Peoples of Their Lands*. Oxford: Oxford University Press.

Robinson, Ronald, John A. Gallagher, and Alice Denny. 1991. *Africa and the Victorians: The Official Mind of Imperialism*, 2nd edn. London: Macmillan.

Scharf, Michael P. 2014. "Accelerated Formation of Customary International Law." *ILSA Journal of International & Comparative Law* 20 (2): 305–42.

Schlag, Pierre. 2009. "Formalism and Realism in Ruins (Mapping the Logics of Collapse)." *Iowa Law Review* 95: 195–244.

Scott, George. 1973. *The Rise and Fall of the League of Nations*. London: Hutchinson.

Scott, Shirley V. 1994. "International Law as Ideology: Theorizing the Relationship between International Law and International Politics." *European Journal of International Law* 5: 313–25. www.ejil.org/pdfs/5/1/1245.pdf.

Shahabuddeen, Mohamed. 1996. *Precedent in the World Court*. Cambridge, UK: Cambridge University Press.

Slattery, Brian. 1991. "Aboriginal Sovereignty and Imperial Claims." *Osgoode Hall Law Journal* 29 (4): 681–703.

Smith, Mark A. A. 1977. "Sovereignty Over Unoccupied Territories—The Western Sahara Decision." *Case Western Reserve Journal of International Law* 9 (1): 135–59.

Sorensen, M. 1938. "The Modification of Collective Treaties without the Consent of all the Contracting Parties." *Nord TIR* 9: 150.

Staton, Jeffrey K., and Will H. Moore. 2011. "Judicial Power in Domestic and International Politics." *International Organization* 65 (3): 553–87.

Steinberg, Richard H. 2004. "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints." *American Journal of International Law* 98 (2): 247–75.

Talmon, Stefan. 2015. "Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion." *European Journal of International Law* 26 (2): 417–43.

Tams, C. J. 2005. *Enforcing Obligations Erga Omnes in International Law*. Cambridge, UK: Cambridge University Press.

Taylor Sumner, Brian. 2004. "Territorial Disputes at the International Court of Justice." *Duke Law Journal* 53 (6): 1779–812.

Thirlway, Hugh. 2014. *The Sources of International Law*. Oxford: Oxford University Press.

Troop, Paul. 2018. "Why Legal Formalism Is Not a Stupid Thing, Ratio Juris." 31 (4): 428–43.

Tushnet, Mark. 1991. "Critical Legal Studies: A Political History." *Yale Law Journal* 100: 1515–44.

Umozurike, U. Oji. 1979. *International Law and Colonialism in Africa*. Enugu, Nigeria: Nwamife Publishers.

UN (United Nations). 2005. "Vienna Convention on the Law of Treaties 1969." Done at Vienna on May 23. Entered into force on January 27, 1980. UN Nations Treaty Series, vol. 1155, p. 331. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

UN (United Nations). 2006. "Reports of International Arbitral Awards: Island of Palmas Case (Netherlands, USA), April 4, 1928, vol. II, pp. 829–71. https://legal.un.org/riaa/cases/vol_II/829-871.pdf.

UN (United Nations). 2008. "Declaration on the Rights of Indigenous Peoples." www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

UN (United Nations). 2015. "Third Report on Identification of Customary International Law by Michael Wood, Special Rapporteur." A/CN.4/682, UN General Assembly, March 27, 2015; International

Law Commission, Sixty-seventh session, Geneva, May 4–June 5 and July 6–August 7, 2015. https://undocs.org/A/CN.4/682.

Unger, Roberto Mangabeira. 1986. *The Critical Legal Studies Movement*. Cambridge, MA: Harvard University Press.

Unger, Roberto Mangabeira. 2015. *The Critical Legal Studies Movement: Another Time, a Greater Task*. London: Verso.

Vadi, Valentina. 2017. "International Law and Its Histories: Methodological Risks and Opportunities." *Harvard International Law Journal* 58 (2): 311–52.

Vandervort, Bruce. 1998. *Wars of Imperial Conquest in Africa 1830–1914*. Bloomington, IN: University of Indiana Press.

Vargas, Elizabeth Santalla. 2016. "In Quest of the Practical Value of Jus Cogens Norm." In *Netherlands Yearbook of International Law 2015*, vol. 46, edited by Maarten den Heijer and Harmen van der Wilt, 211–39. The Hague: T.M.C. Asser Press.

VCLT. 1969. Vienna Convention on the Law of Treaties. Done at Vienna May 23, 1969. Entered into force on January 27, 1980. United Nations, Treaty Series, vol. 1155, p. 331. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

Verzijl, J. W. 1968–1979. *International Law in Historical Perspective* (10 volumes). Leiden: A. W. Sijthoff.

von Bogdandy, Armin, and Ingo Venzke. 2011. "Beyond Dispute: International Judicial Institutions as Lawmakers." *German Law Journal* 12 (5): 979–1003.

Weatherall, Thomas. 2015. *Jus Cogens: International Law and Social Contract*. Cambridge, UK: Cambridge University Press.

Weinrib, Ernest. 1988. "Legal Formalism: On the Immanent Rationality of Law." *Yale Law Journal* 97 (6): 949–1016.

Weinrib, Ernest. 1993. "Jurisprudence of Legal Formalism." *Harvard Journal of Law and Public Policy* 16 (3): 583–96.

Williams, Jr., Robert A. 1990. *The American Indian in Western Legal Thought: The Discourses of Conquest*. New York: Oxford University Press.

Wood, Michael. 2014. Special Rapporteur: Second Report on Identification of Customary International Law, International Law Commission, Sixty-sixth session, A/CN.4/672, May 5–June 6 and July 7–August 8, Geneva. https://legal.un.org/ilc/documentation/english/a_cn4_672.pdf.

Yee, Sienho. 2016. "Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases." *Journal of International Dispute Settlement* 7 (2): 472–98.

Zemanek, Karl. 2000. "New Trends in the Enforcement of *Erga Omnes* Obligations." In *Max Planck Yearbook of United Nations Law Online* 4 (1): 1–52. https://brill.com/view/journals/mpyo/4/1/article-p1_2.xml?language=en.

Zimmerer, Jürgen, and Joachim Zeller, eds. 2008. *Genocide in German South-West Africa: The Colonial War of 1904–1908 and Its Aftermath*. Translated by E. J. Neather. Monmouth, Wales: Merlin Press.