THE ORANGE RIVER BOUNDARY DISPUTE BETWEEN NAMIBIA AND SOUTH AFRICA: TERRITORIAL AND LEGAL POSITION

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Dedication

I dedicate this work to my mother, Agnes Kamundu, who instilled in her children the value of integrity, hard work and encouraged me to pursue education as the basis for an improved life.

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I am indebted to the lecturers who introduced me to the field of law at the University of Namibia, since my enrolment in the Faculty of Law in 2007. In this regard, I wish to single out Dr Saki Akweenda, Mr Kaijata Kangueehi, Mr Sam Amoo, and Mr Francois Bangamwambo for their tutorship throughout the program.

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I express my deepest gratitude towards my fellow 2nd Year LLB full time students for 2011, who have over the years showed true companionship and support throughout our studies. May our dear Lord bestow upon you his blessings and endow you with wisdom as you proceed to apply the legal skills you have acquired during your studies at the University of Namibia.

Abstract

Akweenda states that the Orange River is a perennial river which rises on the summit of Mount aux Sources in Lesotho and its source ends in the Atlantic Ocean, its total length being about 1,200 miles, and draining an estimated area of 400,000 square miles. For about 120 years, Orange River boundary has been the subject of a dispute between South Africa and Namibia, which has led to negotiations between the two neigh bouring states. The dispute is to be traced to the Helgoland Treaty of 1890 between Britain and Germany which defined the boundary of Namibia (then *Deutsch-Südwestafrika*) and South Africa.

It is trite that the borders of most African countries were mostly fixed by colonial rulers with their own primary interests in mind, which reflects the circumstances surrounding the demarcation of the Orange River border by the Heligoland Treaty. Colonial powers were particularly interested to extent their spheres of interest to the banks of major African streams. If the course of a river, as in the case of the lower Orange, was chosen as a colonial dividing line, one question arose that demanded a precise answer from the powers negotiating in the border issue: which line in the bed of the river should form the boundary? As such, the course of a river was frequently engaged by colonial powers to define the borders of their territories, which has led to the demarcation of territorial borders without regard to cultural and demographic realities.

It is within this context that Britain and Germany demarcated the southern boundary of Namibia on the Orange River between their respective colonial territories by concluding the Helgoland Treaty, of which one of its provisions was ambiguously phrased and is the main factor for different interpretations of the treaty to exist. The different positions of the colonial powers were inherited by their successor governments, i.e. South Africa for Britain and Namibia for Germany and South Africa. The crux of the dispute currently is whether the territorial sovereignty of Namibia ends in the middle or on the Namibian side of the Orange River. This matter invariably involves conflicting issues of international law and national constitutional law.

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Chapter 1 Introduction

According to Shah, Namibia argues that the river boundary is in the middle of the Thalweg of the Orange River, while South Africa's position is that the boundary is on the Namibian bank at high-water mark, as based on the delimited boundary between Germany and Britain under the Helgoland–Zanzibar Treaty of 1890.[1]In 1991, just subsequent to the independence of Namibia, South Africa agreed to change the position of the boundary from the north bank to the Thalweg. However, disagreement existed concerning claims to minerals rights in the river, grazing in the mid-channel islands, and fishing. This resulted in South Africa backing out of its earlier commitment in 2001, stating that that 1890 agreement on the matter still controls. Namibia has, apparently, threatened to take the dispute to the International Court of Justice if South Africa does not revert to its 1991 position.[2]

As with every dispute between States, the Orange River boundary dispute entails important historical events. Therefore, Chapter 1 will highlight some of these events, as well as stating the problem question or statement of the research, the research methods and approach embarked upon, and make a brief review of the literature used herein. Moreover, the dissertation seeks to give an overview of the origin and a description of territorial boundaries, which will appear in Chapter 2.

Relevant principles concerning the demarcation of territorial boundaries will be noted in Chapter 3. Equally, this chapter will make a comment as to the interpretation of the Helgoland Treaty and what the signatories' ultimate intentions were. An account of the binding effect of colonial demarcations on independent States in light of the principles of *uti possidetis* and state succession will also be made. Chapter 4 will highlight the position of the Helgoland Treaty under Namibia's Municipal law, particularly the Constitution, especially regarding the incorporation of international agreements entered into by Namibia, or binding on it. What has to be considered is whether the Helgoland Treaty has been made binding on Namibia by virtue of Parliament having enacted a law implementing the treaty, or whether the Constitution provides for this, and whether the treaty itself is self-executing.

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[1] Shah, S. A. (2009) "*River Boundary Delimitation and The Resolution of The Sir Creek Dispute between Pakistan and India"*, p 393 available at <http://lawreview.vermontlaw.edu:>, last accessed on 04 August 2011.
[2] Ibid 394.

Chapter 5 will include a summary of the author's conclusions after the analysis, and recommendations on how the dispute could possibly be resolved with the effect of mutually benefiting both Namibia and South.

1.1 Historical Background

As stated before, Namibia's boundaries are the result of a Machiavellian political scramble by three European powers for spheres of interest in Southern Africa during the period of preclusive imperialism.[3] After 1910, Germany and Britain were not able to reach agreement on the exact location of the border, Britain insisting that the boundary should be formed by the high-water level of the northern [Namibian] bank, while Germany preferred the boundary to be located in the centre of the main river channel. An attempt to settle this dispute was aborted by the First World War, and negotiations remained in abeyance.[4] After transition to democratic government in South Africa in 1994, the boundary issue was brought to the attention of the new government, which decided that the existing Orange River boundary should be retained (i.e. the boundary based on the Helgoland Treaty). Before 1990, South Africa in fact claimed sovereignty over the whole river.[5]

Hangula notes that after the creation of a new South African democratic government in 1994, the new government showed itself to be amenable to a profile of the river which would allow communities on both sides of the river to have access to the water resources in tandem with current international law, which requires that communities of riparian states have access to common water courses; and that this would have conformed to the provisions of Article 1(4) of the Namibian Constitution.[6] However, this informal agreement suffered a setback after some South African civil servants

[3] As noted by Mukwaita Shanyengana in Hangula, L. (1993). *The International boundary of Namibia.* Windhoek: Gamsberg Macmillan, p 7.
[4] Akweenda S. (1997).*International Law and the Protection of Namibia Territorial Integrity Boundaries and Territorial Claims*, 1st edition. (International Yearbook for Legal Anthropology). The Hague: Kluwer Law International**,** p 15.
[5] Shigwedha, A. *Talks on Orange River Border Continue:* The Namibian, 11 January 2011.
[6] Hangula, L. (2010) "The constitutionality of Namibia's territorial integrity". Bosl, A, Horn, N and Du Pi Sani, A (eds*) "Constitutional Democracy in Namibia- A critical analysis after two decades"*. Windhoek: Macmillan Education Namibia, p 194.

objected to the deal going through due to interests, of that country's citizens, which accrued in the River.[7]

The exact location of the border is difficult to pinpoint because the estuary is a dynamic ecosystem with sandbanks, mudflats, and small islands in the river mouth form and disappear over time.[8] The confusion about the exact location of the border has resulted in differences between the two countries over mineral rights in the river and grazing rights on the river and with both countries claiming that with no clear boundary, they are unable to prosecute fishing vessels for trespassing on the river.[9]

Akweenda states that before the delimitation of the Orange River, the territory immediately close to its banks was inhabited by the Khoi-khoi and San people. Captain Benjamin Morrell's observation on bartering for cattle, while visiting the Orange mouth in September 1828, indicates that there was a large community.[10]He reported that 'for the lucrative business of 'jerking beef there is not a more eligible situation on the whole surface of the globe, as any nuther (sic) of bullocks in the first order may be purchased at 50 cents each landed on the beach'. The north side was also inhabited by the Nama and Damara people.[11]

Akweenda notes, further, that David Christian's territory stretched from the Orange to the neighbourhood of Walvis Bay, and inland extended his residence to the east of Bethanie; and that relying on a philosophy of logic and common sense, and in view of the natural geography of the area, this work suggests that a large number of these people depended heavily on the Orange for water supply.[12] During the German colonial administration, Messrs Mostert and Visser established the 'Kytob Project', on the north bank, a few miles downstream from the Vaal Island, and irrigated a large patch of alluvial ground by means of furrows. Another scheme called the 'Aussenkehr Pumping Plant' which irrigated about 30 morgen was set up at

[7] Hangula (2010:194).
[8] Verschuuren, J. (2008). "*The Case of Transboundary Wetlands Under the Ramsar Convention: Keep the Lawyers Out!"*, p 59 available at <www.ramsar.orgp:>, last accessed on 19 October 2011.
[9] Shigwedha (2011: 1).
[10] Akweenda (1997: 69).
[11] Ibid.
[12] Ibid 70.

Aussenkehr in about 1887. Fruit and vegetable were grown at these places. The total irrigable land along the north bank is about 3,000 morgen.[13]

According to Akweenda, beyond Upington the Orange River is dotted with islands, some of these being of considerable size: near Witbank, the Orange runs through numerous channels because of the presence of islands. Krapohl and Marten Islands are the biggest, the former being about 4 miles long. About half a mile downstream from Krapohl is situated the Vaal Island. Further, about 75 miles from the sea the Orange is intersected by the Fish River which rises in the Naukluft mountains of Namibia. There are a number of important bridges across the Orange, notably Frere Bridge at Aliwal North near Hopetown, which is 1,230 feet long; and Oppenheimer Bridge near Alexander Bay near its mouth, which is 3,000 feet long.[14]

The actual mouth of the Orange River, i.e. its confluence with the Atlantic Ocean, is about two miles in width, and has been blocked by a narrow continuous sand barrier. The following islands are situated in the neighbourhood of this mouth: Krip, Long or Groot, Sand or Piet Maritz, Little or Lambe Vlei, Horse or Broe, and Modder or Camp Islands.[15]The first two islands are the biggest, highest above water and usually have large patches of thick grass and bushes. Other islands not mentioned here are very small and are not inhabited, their significance being mainly for grazing. The river's banks are highly diamondiferous, and some deposits of alluvial diamonds were brought down from upstream by the flow and distributed by in-shore currents.[16]

From the above, the geographical features of the Orange River may be summed up as follows:

a) it is shallow at some points, and its water mark is temporary;
b) it has several waterfalls, and
c) most important, its mouth is blocked by a sand-bar; that, therefore, the fundamental criterion of a navigable river is absent, namely, that of a dominant sailing channel leading to the sea; and that it is also clear that it was

[13] Akweenda (1997: 70).
[14] Ibid 67.
[15] Ibid 68.
[16] Ibid 69.

a non-navigable river during the 'critical date- namely in 1847, 1884 and 1890- when the relevant delimitation instruments came into operation.[17]

1.2 Problem Statement

The research will reveal that the Helgoland Treaty, having been entered into by a predecessor de facto administration within Namibia, though colonial, forms part of recognised principles of international law regarding treaties. In this regard, an issue to be addressed would be what the position of international law (and, thus, the Helgoland Treaty) is under Namibia's constitution and its municipal law. Is this bilateral agreement binding upon Namibia, by virtue of Article 140, simply because it was concluded by the *de facto* government of the territory called German South West Africa in 1890, or does the fact that the treaty was concluded by an illegitimate administration without due regard to the legitimate interests and expectations of the territory's citizens render it against the Namibian constitution?

The Helgoland Treaty has been interpreted to mean that the river forms part of South Africa.[18] However, Article 1(4) of the Namibian Constitution provides that the country's southern boundary shall extend up to the middle of the river, but South Africa claims that this boundary is up to the northern high-water mark of the river, basing its claim on the Helgoland Treaty.[19]It is submitted that the Namibian constitutional position presents a legal conflict with the Helgoland Treaty interpretation, as well as with the international law principle of *uti possidetis*, a principle according to which colonial boundaries, however arbitrarily drawn by the imperial powers, are to be respected. Thus, there appears to be a conflict in legal positions regarding the precise territorial boundary of Namibia in the southern part of the country.[20]

[17] Akweenda (1997: 69).
[18] Hangula (1993: 8).
[19] Verschuuren (2008: 59).
[20] The principal problem to be discussed by the research, therefore, concerns *the territorial and legally accurate position of the Orange River*.

1.3 Research Methodology

The research process largely comprised of desktop research, with an exposition of scholarly writings regarding principles of international boundary river delimitation. Such literature will be gathered from literary books, academic journals and internet research. The research approach adopted to complete the study was qualitative and comparative. This study will highlight other border disputes which were settled either by international tribunals or were the subject of negotiations on border delimitations between States.

It must be noted at the outset that this research was intended to entail an interview process to cover questions which could not be satisfactorily answered by the available literature. This specifically entailed the issue of what the positions of the respective governments of Namibia and South Africa are. However, the relevant authorities for the interview process were unwilling to shed light on this matter, both governments regarding the Orange River issue as a sensitive one.

On contacting the Namibian Ministry of Foreign Affairs, the writer was informed that that the relevant on-going negotiations “are not open for public consumption”. An official at the South African Embassy also informed the writer that the Orange River boundary issue is a sensitive subject and that no information can be divulged on it. One can thus deduce that the Orange River boundary is a rather sensitive issue. In the premise, this restricted the interpretation of available literature on the delimitation of boundaries, the succession of States to treaties concluded by colonial rulers, inter alia.

1.4 Literature Review

It is noted that the researcher has gathered limited scholarly writings focusing on the problem statement. A number of scholarly works deliberating on relevant topics of the problem statement concern, inter alia, Namibia’s territorial identity, the status of international law under Namibian municipal law, title to territory, and territorial disputes. Some of the principal works in this respect are noted below:

1. Huth, P.K. and Arbor, A. (1996). *Standing your ground: territorial disputes and international conflict.* Michigan: University of Michigan Press.

This book examines the origins, evolution, and termination of conflict and rivalry between states over disputed territory between 1950 and 1990, and explains why some bordering states become involved in territorial disputes, why some territorial disputes are characterised by high levels of diplomatic and military confrontation, while also defining pertinent concepts such as territorial dispute.

2. Aust, A. (2000). *Modern Treaty Law and Practice*. Cambridge University Press: Cambridge.

In this book, Aust makes exposition of relevant principles of international treaty law, and makes an examination of important provisions of the Vienna Convention on the Law of Treaties of 1969. The book also reveals various mechanisms of how a treaty may be terminated or modified, and how parties should conduct themselves when seeking the termination of any treaty.

3. Akweenda, S (1997) International Law and the Protection of Namibia Territorial Integrity Boundaries and Territorial Claims, 1st edition. (International Yearbook for Legal Anthropology).

This book examines the territorial boundaries of Namibia with a historical, economic and legal-politico perspective into the demarcation of its various border regions, i.e. Namibia-Angola, Namibia Zamibia, Namibia-Botswana, Namibia-South Africa, and the Walvis Bay issue. It describes principles of international law regulating the demarcation of boundaries.

4. Brownlie, I. (2002). Boundary Problems and the Formation of New States". Freestone, D., Subedi, S. and Davidson, S. (eds). "*Contemporary Issues in International Law: A Collection of the Josephine Onoh Memorial Lectures",* at page 185. The Hague: Kluwer Law International.

Brownlie's article discusses the contribution of boundary disputes to the formation of new States. It remarks that the concept of statehood must be taken in conjunction with the concept of title to territory, that governments have an acute sense of territorial entitlement, and that it is of no coincidence that a significant proportion of

disputes taken to the International Court of Justice or to arbitration are concerned precisely with title to territory.

5. Hangula, L (1993). *The International boundary of Namibia.* Gamsberg Macmillan: Windhoek.

In this book, Hangula highlights the territorial boundaries of Namibia with a historical, cultural and politico perspective in the demarcation of its various border regions, i.e. Namibia-Angola, Namibia-Zambia, Namibia-Botswana, Namibia-South Africa, and the Walvis Bay issue. It describes principles of international law regulating the demarcation of boundaries.

6. Hangula, L. (2010) "The constitutionality of Namibia's territorial integrity". Bosl, A, Horn, N and Du Pi Sani, A (eds*) "Constitutional Democracy in Namibia- A critical analysis after two decades"*. Windhoek: Macmillan Education Namibia

Hangula's article here makes an exposition into the state and certainty of Namibia's boundaries from a historical, geodetical, political and constitutional perspective. He makes note of the post-1994 discussions and an informal agreement between the former Presidents of Namibia and South Africa, i.e. Dr. Sam Nujoma and Mr Nelson Mandela, which acknowledged the middle of the river as the boundary.

Chapter 2 The Demarcation and Origin of Territorial Between States

2.1. An Elucidation of Concepts of Territorial Boundaries and Demarcation

There have, historically, been three ways in which river boundaries have been delimited between states:[21]

1) One option is that each state's border extends to its own river bank with the river itself being jointly owned by both states.
2) The boundary can be fixed up till the banks of one state, leaving complete sovereignty over the river to the other state. This option is often practiced when states on whose bank the boundary is fixed are disinterested in the river or have ceded territory to another, but retained sovereignty over the river.[22] This method of boundary delimitation is considered inequitable since it generally results in one state losing control and access of a river for all purposes including navigation and water usage.
3) The most commonly used method of river boundary demarcation between states today is to set the boundary at either the median line of the river or around the area most suitable for navigation under what is known as the "Thalweg principle.

In the *GabCíkovo–Nagymaros Project Dispute*[23] between Hungary and Slovakia both parties had entered into a treaty in 1977, relating to the construction of the GabCíkovo–Nagymaros dam, and the treaty was ratified, with the result that the project could adjust the course of the Danube River; it therefore had the potential to alter the international boundary of the area as determined by the Treaty of Trianon and the Treaty of Peace of 1947. With the division of Czechoslovakia into the federal republics of Czech Republic and Slovakia in 1993, the boundary concerned became one between Hungary and Slovakia. In 1992 Hungary advocated for the complete termination of the 1977 treaty citing environmental concerns, these concerns being partly based on the fear that the project would change the course of the Danube River and would result in the permanent movement of the River's Thalweg.

[21] Shah (2009: 363).
[22] This method was more frequently used in earlier centuries and has not been a preferred method of river boundary delimitation in the last two centuries, ibid 364.
[23] *GabCikovo-Nagymaros Project (Hungary/Slovakia)* 1997 I.C.J. 7.

The parties took the dispute to the International Court of Justice and it was held that the 1977 dam agreement between the state parties was valid and in force, and that Hungary's suspension and abandonment of the project was wrongful. Furthermore, Czechoslovakia/Slovakia was also held to be in violation of the treaty for unilaterally diverting the Danube River by operating and constructing the Cunovo dam upstream on its own territory. The Court indicated that the diversion of the River carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.

2.1.1. The Thalweg Principle and the Median Line [24]

Shah states that boundary determinations based on the Thalweg principle and median line are examples of considerations to achieve fairness and equality, the aim being to accord equal rights to the riparian states for the usage of the river; and refers to Grotius as stating that delimitations on the middle line doctrine were based on the "principle of sovereign equality" between states. Where international rivers are concerned, he stated that in case of doubt sovereignty extends to the middle of the stream.[25]

The Median Line can be defined as a line of equal distance from both banks at the time of a water level that is determined by mutual consent.[26] In the event that the boundary river is non-navigable, state practice suggests that the middle of the river is recognized as the international boundary in the absence of an agreement between the nations, stating otherwise.[27] This rule has also been applied in demarcations not involving rivers, for example when highways and fisheries are involved.[28] The advantages of using the median line for demarcation include the fact that the boundary is stable and it does not change in the river as under the Thalweg. It is also

[24] It is noted by Shah that delimitation by the median line or Thalweg has been preferred under international law when states have no prior agreement on how to delineate the river boundary, at 366.
[25] Shah (2009: 365).
[26] Demhardt, I.J. (1990). *Namibia's Orange River Boundary: origin and re-emerged effects of an inattentive colonial boundary delimitation*. Dordrecht: Kluwer, p *357.*
[27] Shah (2009: 366).
[28] Ibid 367. Shah notes, however, that a predicament is that the median line in a river shifts when the water level in a river rises or falls since the exact position of the median line varies with the width and inclination of exposed river banks; that the river's banks are not uniform but curve at different water levels; and that to avoid uncertainty in ascertaining the median line state practice, thus, determines the shoreline as the mean high water or mean low water mark, at 367.

relatively easy to fix, and both states get to share the waters equally, which is an equitable solution unless the usage of the river is primarily for navigation.[29]

The term Thalweg is a German word that translates to mean "the channel continuously used for navigation", and is a general area, not a specified line; and is used under international law to demarcate navigable rivers that are also boundary rivers.[30] It has also been defined as "'the "downway," that is, the course taken by boats going downstream, which is that of the strongest current;'" "the middle or deepest, or most navigable channel:" "the line of the greatest depth or the stream line of the fastest current;" and "the axis of the safest and most accessible channel for the largest ships.".[31] The Thalweg notion can convey three meanings:

a) the line which connects the deepest points in the river;
b) the line which connects the deepest points in a channel; and
c) the centre of the normal principal navigation channel.[32]

The primary interest protected under the Thalweg principle is the navigational freedom of riparian states: If a boundary river has numerous channels, the channel most fit for navigation is generally the one used for Thalweg determination, while the primary functions of a river should ideally determine which principle of boundary delimitation is applicable.[33] It is noted that these functions can conflict, but if navigation is the primary or predominant use of the river then demarcation based on Thalweg is generally appropriate, while if the dominant purpose of the river is for other purposes, such as fishing, or if the river is non-navigable, then a median line delimitation is preferable because it grants both states equal amounts of water if they are granted free navigation in the whole river if navigation is also important.[34]

29 Shah (2009: 367).
30 Ibid.
31 Ibid 368. According to Dermhard, *Thalweg is a* connecting line between the deepest points in the main current of the river; it is normally applied to navigable rivers only and is usually identical with the downstream navigation channel, at 55.
32 Akweenda (1997: 55). Akweenda notes herein, however, that the normal meaning of the Thalweg is 'the principal channel of navigation', at 55.
33 Shah (2009: 366).
34 Ibid.

According to Shah, where there are multiple channels of a boundary river, the Thalweg of the main channel is generally kept as the boundary. In order to determine the major branch of the channel, the length, size of the drainage area, and discharge, preferably in terms of annual volume, are to be considered. A boundary demarcation based on the Thalweg is a default rule and is pre-empted where the concerned State parties make special agreements to the contrary, which can lay out unconventional modes of delimitation.[35]The pre-emption of the Thalweg principle can also come through historical title or where one state acquiesces or renders recognition to another via practice, being subsequently estopped from raising the Thalweg doctrine.[36]

Akweenda states that where a navigable river forms the boundary, the Thalweg is taken as the imaginary boundary; if the river is non-navigable, the imaginary boundary runs through the middle of the river. If a non-navigable river dries up, the boundary continues to run along the middle of the dried bed. It is a principle of customary international law that whenever a river is declared to constitute the boundary of States, it continues to be so even if it gradually changes its position and channels from natural causes.[37] In the *State of New Jersey v. Delaware,*[38] Justice Cardoza stated that a river is navigable if 'the dominant sailing channel can be followed to the sea'. The presence of such a channel was emphasised in *Louisiana v. Mississippi*,[39] where the Court stated:

As to boundary lakes and landlocked seas where there is no necessary track of navigation, the line of demarcation is drawn in the middle and this is true of narrow straits separating the lands of two different States; but whenever there is a deepwater sailing channel therein, it is thought by the publicists that the rule of Thalweg applies.[40]

In the *Maritime Boundary Dispute (Suriname v. Guyana)*[41] case the issue concerned the Corentyne boundary river separating Suriname and Guyana. As the location of the land boundary terminus identifies the maritime boundary in the region, the

[35] Shah (2009: 369)
[36] Ibid 370.
[37] Akweenda (1997: 55).
[38] *State of New Jersey v. Delaware,* 55 S. Ct. 934 (1933)
[39] *Louisiana v. Mississippi,* 202 U.S. 1 (1906).
[40] Akweenda (1997: 59).
[41] *Maritime Boundary Dispute (Suriname v. Guyana)* available at <http://www.pca-cpa.org>.

Corentyne has been a source of dispute for purposes of delimiting the river and the maritime boundary. The source of the dispute is traced to 1936 when the British and the Dutch administrations formed a mixed commission to delimit their respective boundaries in this area. This commission determined that the whole river was under Dutch control and set the west bank of the river as the boundary, and the British acquiesced to this decision.

It so appeared that in 1962 the Dutch government proposed that the Thalweg be the boundary in the Corentyne. Inconclusiveness concerning this boundary remained following the independence of Guyana and Suriname. Suriname, a former Dutch colony, gained independence in 1975, whereas Guyana gained its independence from Great Britain in 1966. Suriname maintained that the whole river was under its sovereignty, and Guyana contended that the Thalweg was the boundary in the Corentyne. In 2007, a five-member arbitration tribunal, established under Annex VII of the Convention on the Law of the Sea of 1982 (LOS), supported Suriname's position and determined that the land boundary terminus was located on the western Guyanese side of the river bank; and that Suriname had a right of access to the whole river. It was determined that in order to accommodate Suriname's navigational access to the whole river, the maritime boundary between the two states had to be adjusted accordingly. However, the tribunal added that special circumstances that may affect a delimitation are to be assessed on a case-by-case basis, with reference to international jurisprudence and State practice.

In the *Land and Maritime Boundary Dispute*[42] between Cameroon and Niger, the International Court of Justice determined that a 1913 Anglo–German agreement effectively determined the river boundary between the two countries in the Akwayafe River as being the Thalweg in the navigable channel northeast of the Bakassi peninsula in accordance with Articles XVIII and XXI of the said agreement. The court rejected Nigeria's argument that Britain had no title to the Bakassi peninsula and hence to have no legal power to cede this territory, and accepted Cameroon's position that the Bakassi peninsula belonged to Cameroon as it lay on the German

[42] *Dispute Land and Maritime Boundary Dispute (Cameroon v. Nigeria.),* 2002 I.C.J., 303.

side of the boundary, and that Cameroon had inherited this peninsula under the principle of *uti possidetis juris*.

Article 9 of the United Nations Convention on the Law of the Sea of 1982 provides that 'if a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on low-water line of its banks'. Thus, as Akweenda asserts, the territorial sea is measured from the baseline, i.e. from the low-water line, drawn across the mouth of the river.[43]

Akweenda states that title to islands existing or arising within a river which forms an international boundary belongs to the sovereignty of the State on whose side of the Thalweg or middle line they are located; that if a 'new-born island' emerges upon the boundary line, it is divided by it into parts which accrue to the riparian State concerned, and that these rules proceeded upon the principle that the river itself was considered *communis usus* 'but the bed of it had so much land belonging to the proprietors of the banks'.[44] Grotius, relying on the law of nature observes 'that by the law of nature an island in a river and a dried out bed belongs to the one who owned the river or the part of the river, that is, to the people'; and concluded by stressing that 'an island formed in a river ought to belong to the person who has title to the river'.[45]

2.1.2. The Impact of Accretion and Avulsion on River Boundaries

Shah states that accretion can be defined as the process where one can see progress being made, but cannot recognize it while it is going on. The process involves river boundary demarcations based on geographical characteristics tending to be problematic once the river changes its original course, while river alterations raise numerous complications under international law pertaining to river boundary determinations. If left to itself, the course of a river changes very slowly due to erosion, water current or other forces of nature (like rock formation on the river bed):

[43] Akweenda (1997:58).
[44] Ibid 60.
[45] Ibid.

the river, infrequently, changes its course drastically, resulting in it to completely break away from its river bed.[46]

Shah notes that the de facto rule of international law is that the river boundary based on measures such as the median line or the Thalweg principle will shift along with the river if a river boundary changes its course slowly with accretion on one bank and denudation on the other. Accretion, thus, permanently alters river boundaries, even when the delimited boundary is a river bank which has shifted, but it will not alter the status of the river boundary if there is a treaty between the concerned states which specify differently.[47]

Akweenda states that accretion denotes the increase of territory through new formations, a process which may be natural or artificial: it is considered artificial if it is the outcome of human work, particularly when structures such as embankments, break-waters and dykes are constructed along the river or coast-line of the sea. New formation along the bank of a river may push the volume so far as to encroach upon the bank of the neighbouring riparian State.[48]

Natural formations occur through the operation of nature, which include allution, delta, new-born islands and abandoned river beds; however, when the stream detaches a portion of the soil from one bank of the river and embeds it to the other bank through a sudden act of violence, the process is known as avulsion, while a tract of land at the mouth of the river, shaped like the Greek letter Δ is known as a delta, which owes its existence to gradual deposit by the river of sand, stones and earth on one particular place of its mouth. When the banks of a river are changed by natural formation, the boundary of a navigable and non-navigable river still remains the Thalweg or middle line, respectively.[49]

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[46] Shah (2009: 371).

[47] Ibid. Such a treaty must either be explicit or should come up by necessary implication, although it has not been a general state practice to retain the original river boundary through agreement despite changes in rivers, ibid.

[48] Akweenda (1997: 61). Akweenda notes that it is a principle of international law that a State is not allowed to alter the natural conditions of a neighbouring State territory, and agreement must therefore be secured before a State constructs new formations along the river, at 61.

[49] Ibid 62.

In the *Territorial and Maritime Boundary Dispute*[50] between Nicaragua and Honduras, the International Court of Justice delimited the maritime boundary and determined the status of certain islands in the Caribbean Sea between Nicaragua and Honduras. The Court recognized the determinations made by a mixed boundary commission established in 1962, which had completed the boundary demarcation line and placement of boundary markers. Furthermore, the mixed boundary commission had confirmed the arbitral award of King Alfonso XIII of Spain awarded on December 23, 1906, under which the boundary line from the mouth of the Coco River at Cape Gracias a Dios to Portillo de Teotecacinte was drawn on the basis of the Thalweg principle.

The Court directed both states to come to an agreement over the present location of the mouth of the Coco River. Both states had agreed to the fact that the land body terminus was established properly, under the arbitral award of the King of Spain, at the mouth of the principle arm of the Coco River but that the land terminus had shifted since 1962 due to accretion of sediments and ascertaining its current location was impacting the maritime boundary between the two states (at p).

According to Shah, the process of avulsion[51] has been defined as "a lateral movement, non-continuous as regards space and instantaneous as regards time: in other words, avulsion is of a more sudden nature than accretion"; and it pre-empts the Thalweg principle of river delimitation.[52] The original middle of the channel continues to act as the river boundary but remains subject to change as a result of possible accretion; however, if the original river boundary dries up, then the boundary becomes permanent and is not changed due to soil accumulation. If the original Thalweg cannot be estimated in the dried bed then the middle of the abandoned bed will be determined as the boundary, even if this leads to land of one State to be diminished.[53]

[50] *Territorial and Maritime Dispute (Nicaragua v Honduras)* 2007 I.C.J.
[51] Akweenda describes this term as a slow and gradual process whereby the land is washed on the seashore or river-bank by water, at 62.
[52] Shah (2009: 373). An established rule of international law is that the original boundary line of the river does not change even if the center line of the original channel subsequently shifts due to avulsion.
[53] Ibid.

2.2. The Nature and Origin of Territorial Boundaries

According to Biger, international boundaries reflect the historical moments in the life of a state, when its limits were made according to its force and ability at that time; and that today's boundaries are, thus, relics from the past and might be changed in the future.[54] International boundaries can be likened to world political fault lines along which competing national aspirations are most likely to surface and come into direct contact. They mark the zones in which social, political or economic shock waves have triggered the military conflicts Britain's leading imperialist, Lord Curzon, had in mind when speaking of the "life or death to nations".[55]

Related to the above is the concept of title to territory**,** to which Brownlie remarks that a principal source of a state's title to territory is the independence of the State and its recognition as such; that title, apart from the case of islands and reefs, connotes boundaries and it is boundaries which play a major role in the public order system, a role which has three dimensions:

a) the allocation of territory and thus the implementation of the notion of entitlement;
b) the separation of jurisdictions;
c) the separation of the physical operations of police and security forces.[56]

As to the general origins of international boundaries, Judge Biebler in the *Indo-Pakistan Western Boundary (Rann of Kutch)* case[57] remarked that they

> have usually emerged by custom. They have become gradually well determined by mutual acquiescence and/or recognition by the neighbours concerned.... Mutual acquiescence and mutual recognition are therefore the most general origin of existing international boundaries. Very many of them still nowadays have no other legal foundation for their validity.

Shaw notes that the vast majority of African borders were laid down not as a result of prescription over a period of time, but by European treaties. The question of the validity and determination of such boundaries is, therefore, connected with the status

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[54] Biger, G (1995). *The Encyclopedia of International Boundaries*. Jerusalem: The Jerusalem Publishing House Ltd, p 10.
[55] Biger ibid.
[56] Brownlie, I. (2002) 'Boundary Problems and the Formation of New States'. Freestone, D., Subedi, S. and Davidson, S. (eds). *Contemporary Issues in International Law: A Collection of the Josephine Onoh Memorial Lectures,* The Hague: Kluwer Law International, p 185.
[57] *Indo-Pakistan Western Boundary (Rann of Kutch).* Reports of International Arbitral Awards 1968, 6.

in law of the particular treaties specifying such boundaries, which has raised two particular questions:

1) Whether it could be argued that the demise of colonialism and the establishment of the principle of self-determination have resulted in a fundamental change in circumstances as regards particular boundary treaties, thus terminating the treaty or enabling a party or a successor to a party to the treaty to terminate it, and
2) Whether, in view of the 'clean slate' principle governing new States and State succession to the treaties of its predecessor, such boundary treaties lapse upon independence.[58]

According to Akweenda, the clean slate principle means that a successor State is not under an obligation to take over the treaties of its predecessor: it must select the obligations into which it wishes to enter.[59]The principle was developed in an attempt to discredit the old theories of state succession which advocated continuity of rights and obligations of the predecessor State to the successor State.[60]

Taking into account the implications of the principles of the United Nations Charter, in particular self-determination, in the modern law concerning succession in respect of treaties, the International Law Commission found in its twenty-fourth session that it could not endorse the view by some jurists that the modern law does, or ought to, make the presumption that a "newly independent State" consents to be bound by any treaties previously in force internationally with respect to its territory, unless within a reasonable time it declares a contrary intention.[61]

However, such a presumption touches on a fundamental point of principle affecting the general approach to the formulation of the law relating to the succession of a newly independent State. In the opinion of the Commission, the traditional principle that a new State begins its treaty relations with a clean slate, if properly understood

[58] Shaw, M. (1986). *Title to territory in Africa: International legal Issues.* Oxford: Oxford University Press, p 230.
[59] Akweenda (1997:43).
[60]Makonnen, Y. (1983) '*International Law and the New States of Africa*'. New York: Library of Congress Catalogue, p 132.
[61] *Report of the International Law Commission To The United Nations General Assembly on the work of its twenty-fourth session*, Supplement No.10, 2 May - 7 July 1972, p 227.

and limited, was more consistent with the principle of self-determination; and that the latter principle was, equally, well-designed to meet the situation of newly independent States which emerge from former dependent territories. Consequently, the Commission was of the view that the main implication of the principle of self-determination in the law concerning succession in respect of treaties was precisely to confirm, as the underlying norm for cases of newly independent States, the traditional clean slate principle derived from the treaty practice relating to cases of secession.[62]

Furthermore, the Commission emphasized that the "clean slate" metaphor is merely a convenient and succinct way of referring to the newly independent State's general freedom from obligation in respect of its predecessor's treaties, and that this principle, as it operates in the modern law of succession of States, is very far from normally bringing about a total rupture in the treaty relations of a territory which emerges as a newly independent State. While leaving the newly independent State free under the clean slate principle to determine its own treaty relations, modern law holds out to itself the means of achieving the maximum continuity in those relations consistent with the interests of itself and of other States parties to its predecessor's treaties. In addition, the clean slate principle does not relieve a newly independent State of the obligation to respect a boundary settlement and certain other situations of a territorial character established by treaty.[63]

Klabbers notes that the operation of the applicable rules primarily means that treaties must be complied with in good faith, following the ancient adage *pacta sunt servanda*;[64] and also that, in principle, agreements may only be terminated or their operation suspended in accordance with the law of treaties.[65]The *pacta sunt servanda* rule does not only apply to the performance of treaties once concluded, but it also governs the process of their conclusion as well: the two are, in fact, inseparable. The rule *pacta sunt servanda* is a power-conferring rule: its exact

[62] International Law Commission Report To The United Nations General Assembly on the work of its twenty-fourth (1972: 227).
[63] Ibid.
[64] The rule *pacta sunt pervanda* is stated by Article 26 of the Vienna Convention on the Law of Treaties to mean that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”.
[65] Klabbers, J. (1996) *‘The Concept of Treaty in International Law’*. The Hague: Kluwer Law International, p 38.

purport is not to lay down a norm of conduct, but to empower states to create, by concluding treaties, obligations binding on themselves.[66]Furthermore, the possibility to make reservations, amendments, or modifications, must also follow the requirements set forth by the law of treaties. Agreements may as well not contain norms which would conflict with peremptory norms of international law, and they ought to be interpreted in accordance with established canons of treaty interpretation.[67]

Klabbers, when raising the question of what is meant by saying that 'a certain agreement is legally binding', notes that such a phrase means that the agreement must in one way or another have been subjected to a certain legal system.[68] This would, furthermore, provoke questions such as what it means to be governed by international law mean; and in this respect, to say that an agreement is governed by international law indicate that the agreement is subject to the operation of applicable international legal rules, which are, predominantly, but not exclusively, the rules which make up the body of rules known as the law of treaties.[69] In this regard, it is submitted, this would mean that the treaty agreement at issue, i.e. the Helgoland treaty, is governed by international law, as opposed to it being governed by, say, Namibian law, or South African law, or the law of some other domestic legal system such as Britain or German. This has the effect of removing the agreement from the jurisdiction of the law (and the Constitution) of Namibia but would be governed by the rules of the law of treaties.

[66] Klabbers (1996: 39). Klabbers adds that a distinguishing feature of power conferring rules is not so much that they can be observed or breached, but rather that they are "susceptible of being or not being applied", which implies that there is no obligation on states to invoke the *pacta sunt servanda* rule. States are free to apply or not to apply the *pacta sunt servanda* norm, and it is only when they do that agreements can be deemed binding.
[67] Ibid.
[68] Ibid 38.
[69] Ibid.

Chapter 3 Nature of Boundary Disputes and The Helgoland Treaty

3.1. The Nature of Boundary Disputes

According to Huth and Arbor, a boundary dispute indicates a disagreement on point of law or fact as to the precise course of the lines marking the limits of territorial sovereignty, which is usually governed by delimitation and demarcation treaties. A territorial dispute, on the other hand, involves either a disagreement between states over where their common homeland or colonial borders should be fixed, or, more fundamentally, the dispute entails one country contesting the right of another country even to exercise sovereignty over some or all of its homeland or colonial territory.[70] It specifically exists between two states in any of the following situations:[71]

a) At least one government does not accept the definition of where the boundary line of its border with another country is currently located, whereas the neighbouring government takes the position that the existing boundary line is the legal border between the two countries based on the previously signed treaty or document. The scope of disagreement over the boundary line can range from a small section of territory to the entire length of the border;[72]
b) There is no treaty or set of historical documents clearly establishing a boundary line, and, as a result, bordering countries present opposing definitions of where the boundary line should be drawn;
c) One country occupies the national territory of another and refuses to relinquish control over the territory despite demands by that country to withdraw;
d) One government does not recognise the sovereignty of another country over some portion of territory within the borders of that country. The government may often be hesitant to openly and clearly issue its own irredentist claim to that portion of territory but, instead, may support separatist groups who claim that the disputed territory should form the basis of an independent and sovereign state;

[70] Huth, P.K. and Arbor, A. (1996). *Standing your ground: territorial disputes and international conflict.* Michigan: University of Michigan Press, p 19.
[71] Ibid.
[72] It is submitted that the Orange River boundary dispute can be described as reflecting this state of affairs.

e) One government does not recognize the independence and sovereignty of another country (or colonial territory) and seeks to annex some or all of the territory of that country.

3.2. The Helgoland Treaty[73]

3.2.1. Interpretation of the treaty

It is noted that an important material for the interpretation of the agreement which is the basis of the respective claims of both Namibia and South Africa, i.e. the Helgoland Treaty, is the Vienna Convention on the Law of Treaties of 1969. Section 4 of this Convention provides that the Convention applies only to treaties which are concluded by States after the entry into force of the Convention with regard to such States, without prejudicing the application of any rules set forth in the Convention to which treaties would be subject under international law, independent of the Convention; thus rendering the convention to, generally, have no retrospective effect.[74]

Furthermore, it is observed that although the above Convention has no retrospective effect, and would presumably not apply to treaties concluded before it entered into force, it was applied in the *Kasikili/Sedudu Island*[75] case between Botswana and Namibia; with the International Court of Justice noting, as regards the interpretation of the Helgoland Treaty, that although neither Botswana or Namibia were parties to the Vienna Convention on the Law of Treaties, both parties to the dispute had considered Article 31 of this Convention as applicable in as much as it reflects customary international law. Sub-article (1) of this Article provides that a treaty shall be interpreted in good faith in. accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[76]

[73] A treaty is defined by Article 2 of the Vienna Convention on Law of Treaties of 1969 as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".
[74] Aust, A. (2002). *Modern Treaty Law and Practice*. Cambridge: Cambridge University Press, p 8.
[75] *Kasikili/Sedudu Island (Botswana v Namibia.),* 1999 I.C.J. 1045.
[76] Aust notes, in addition, that the Vienna Convention on the Law of Treaties of 1969 can be applied to bilateral treaties, at 8.

Those rules of the Convention which reflect customary international law, thus, apply to the Helgoland treaty, although it was concluded before the entry into force of the Convention.[77] Various provisions in the Convention and its preamble confirm that the rules of customary international law continue to govern questions not regulated by the Convention. In this regard, treaties and custom are regarded as the main sources of international law, customary law being made up of two elements:

1) a general convergence in the practice of states from which one can extract a norm (standard of conduct), and
2) *opinio juris* – the belief by states that the norm is legally binding on them.[78]

It is, furthermore, noted that the view has been expressed that custom, being autonomous and even when codified, retains its separate existence; and that, though not reflecting the approach to legal problems taken by foreign ministry legal advisers, new customary rules which emerge from economic changes or dissatisfaction with a treaty rule can result in a modification in the operation of the treaty rule.[79]

According to Aust, whether a particular rule in the Convention represents customary international law is likely to be an issue only if the matter is litigated, and the court or tribunal will even then, take the Convention as the starting and finishing point.[80] In the *Gabcikovo* case,[81] in which the principal treaties at issue, i.e. the Treaty of Trianon and the Treaty of Peace of 1947, predated the entry into force of the Convention for the parties to the case, the International Court of Justice passed by the question of the possible non-applicability of the Convention's rules to questions of termination and suspension of treaties, and applied Articles 60-62 as reflecting customary law, even though they had been considered rather controversial.[82]

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[77] Aust (2002: 8).
[78] Ibid 9.
[79] Ibid 12.
[80] Ibid 11.
[81] *GabCikovo-Nagymaros Project (Hungary/Slovakia)* 1997 I.C.J. 7, 38.
[82] Aust assert that, given previous similar verdicts by the Court, it is reasonable to assume that the Court will take the same approach in respect of all of the substantive provisions of the Convention; and for most practical purposes treaty questions are resolved by applying the rules of the Convention: to attempt to determine whether a particular provision of the Convention represents customary international law is usually a rather futile task, at 11.

3.2.2. Tracing the Intention of the Parties

According to Klabbers the element of intent appeared to be the most useful element, although it was not directly mentioned in the 1969 and 1986 Vienna Conventions' definitions, and that it turned out to be, within certain bounds, useful in the determination of whether or not an agreement is to be considered binding (whether under international law or some other legal system).[83] However, the intention to be bound is, for various reasons, an awkward notion: not only is it difficult to identify, but it also imbues those who conclude agreements with a psychological state they may never really have had.[84]

Klabbers opines that the relative weight of intent vis-a-vis other factors contributing to law-making needs to be established; that it is one thing to claim that intent is of vital importance, but even casual acquaintance with international law demonstrates that other factors (e.g. good faith, reliance, estoppels) may be of importance as well; and that the recognition of the vital importance of intent gives little guidance on how intent is to be identified or recognised. In other words, how can the intent to be bound be ascertained or demonstrated and can it be so demonstrated or ascertained at all?[85]

Furthermore, even if it were possible to know with certainty the intentions of one person, in order to meaningfully analyze the intent underlying agreements, one must at least be able to know with certainty the intentions of two persons; and the problem becomes even more complicated when international agreements are involved.[86] Although reference to a state's intentions may often be useful as legal shorthand, such a reference should not hide the fact that the state is but an abstract entity, composed of individuals and entities whose intentions need not always coincide.[87]

Klabbers remarks that useful in the context of intent is the view expressed in the old English maxim that "not even the devil knows what is inside a man's head", meaning that the starting point of any investigation into the intention(s) of legal subjects must

[83] Klabbers (1996: 65).
[84] Ibid.
[85] Ibid 64.
[86] Ibid 69.
[87] Ibid.

be their intentions as they manifest themselves to the outside world: we are, therefore, not looking for 'subjective' intentions, but for 'manifest' intentions.[88] This reliance on manifest intent also follows from the point sometimes made that what one should be looking for is the common intention of the parties to an agreement; discerning this 'common intention' can, normally, only mean discerning that which the parties agreed to do. It can, generally, not refer to the underlying motives and reasons, because these may well be radically different from one party to another.[89]

As an example, the original member states of the European Union are noted to all have had their own reasons for participating. While an important reason for West Germany was its desire to be part of the Western partnership, the small Benelux States saw the establishment of European integration as a means to be protected against their bigger neighbours. Hence, their common intent related to means rather than ends: they agreed that their own motives were best served by European institutions. There may, however, have been fairly little common intent as far as those motives themselves were concerned.[90]

Akweenda, further, remarks that the Helgoland Treaty, expressed in English and German, contains no provision indicating which of the two texts is to be regarded as authoritative: thus, in the absence of such a provision, none of the texts is superior to the other- both possess equal authority.[91] Moreover, the phrase 'at the mouth' is not defined by the Agreement. However, the golden rule of interpretation posits that these terms must be given their natural meanings, and that as the mouth of the Orange has a considerable width, the first task would be the identification of the precise commencing spot.[92]

[88] Klabbers (1996: 69).
[89] Ibid 70.
[90] Ibid.
[91] Ibid 90.
[92] Akweenda (1997: 90).

Having in mind several theses which would illustrate possible 'commencing' points for the boundary of river, the following conclusions are made by Akweenda:

1) Article III(1) of the Agreement does not define the alignment with precision;
2) the precise 'commencing' point at the mouth of the Orange and the spot from where the line should 'ascend' to the 'north bank' had not been identified; and
3) the Article appears to constitute a restatement of the line established by a Proclamation of 17 December 1847.[93]

3.3. The Termination or Revision of a Treaty

3.3.1. The *rebus sic stantibus* rule

According to Shaw**,** the rule *rebus sic stantibus* states that a party to a treaty may unilaterally invoke as a ground for terminating or suspending the operation of the treaty the fact that there has been a fundamental change of circumstances from those which existed at the time of the conclusion of the treaty.[94] In this respect, customary law is viewed as forming part of the general circumstances in light of which treaties are concluded and, if it changes, an assumption (or custom)[95] on the basis of which the agreement was made is regarded as having been altered because had the parties known how the law would evolve, they would probably not have concluded the same treaty.[96] Although attractive in theory and possibly necessary in practice within limits, the rule could prove dangerous and could reduce the concept of *pacta sunt servanda* to a mere form of words.[97]

The International Law Commission commentary on the Draft articles on the Law of Treaties is referred to as having noted that some members of the commission had suggested that the total exclusion of treaties establishing boundaries might be going too far and inconsistent with the principle of self-determination, recognised in the United Nations Charter.[98] The Commission concluded, however, that treaties establishing a boundary should be accepted as an exception to the rule, because

[93] Akweenda (1997: 97).
[94] Shaw (1985: 230)
[95] *My emphasis*.
[96] Kontou, N. (1994). *The Termination and Revision of Treaties in the Light of New Customary International Law*. Oxford: Oxford University Press, p 149.
[97] Shaw ibid.
[98] Ibid 231.

otherwise, the rule instead of being an instrument of peaceful change might become a source of dangerous friction.[99] Moreover, Article 62(2) of the Vienna Convention on the Law of Treaties of 1969 provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the treaty establishes a boundary.

With regard to self-determination, the Commission was of the view that this principle, as envisaged in the United Nations Charter, was an independent one, which might lead to confusion if in the context of the law of treaties it were presented as an application of the rule regarding *rebus sic stantibus,*[100]and that to have permitted the revision of nineteenth-century territorial arrangements, or those of any other era, on the grounds of the post-1945 principle of self determination would have had the effect not only of ignoring inter-temporal law but also of opening the door to a large number of territorial claims, particularly in Africa.[101]

3.3.2. Succession of treaty rules by new customary rules

According to Kontou, the termination of one rule by another and priority of one rule over the other in the context of their application to a concrete case are two possible ways in which supervening custom may affect prior treaties, these two possibilities being theoretically distinct: either the treaty rule is considered to have ceased to exist as a result of the formation of new custom, in which case no real conflict arises, because only the customary rule remains in force, or both rules are considered to be in force and it must be decided as to which of the two will apply.[102]

In addition, Kontou notes, the possibility of treaty termination by new custom is accepted by writers who consider that customary law is based on the tacit agreement of States. Under this view, conventional and customary rules have the same normative basis, because they are basically different ways of expressing a

[99] Shaw (1985: 231).
[100] Ibid.
[101] Ibid 232.
[102] Kontou (1994: 22).

State's consent to be legally bound. As a result, one legal situation may be substituted for another, if the will of States has changed accordingly.[103]

It is observed by the writer that the Namibian government might base its position with regard to the Orange river boundary dispute on the view that new customary law have superseded certain provisions of the Helgoland treaty which are inconsistent with such customary norms as expressed by resolutions of both the United Nations General Assembly and the Security Council, norms which have subsequently been adopted and accepted by the international community as jus cogens.

In this regard, a new customary law may terminate or modify a prior treaty rule, because custom and treaties are sources of international law of equal value, and normative equivalence is one of the criteria used in literature for the solution of conflicts between a treaty rule and a more recent customary rule, both regarded to be in force and in operation.[104] It is noted that a good example of a new customary law/rule can be the right to self-determination of the Namibian people to demarcate the territorial boundaries of their country in accordance with their needs and aspirations.

Kontou opines that the inter-changeability of treaties and customary law, however, is not necessarily premised on the theory that custom constitutes a tacit agreement between States;[105] that in this respect, substitution can take place between rules deriving either from the same or from different sources of international law, and that on the basis that the relationship between treaty and custom is not hierarchical, it is accepted that treaty and customary rules have the same legal value, because they both emanate from States.[106] As the international legal order is largely decentralised and there is no international legislator imposing its will on individual States, such entities are free to regulate their relations as they see fit, and to change them, if they so wish, by replacing an existing treaty rule by new customary law or *vice versa*.[107]

Therefore, a new customary rule or practice, such as the self-determination of the inhabitants of the territory of the then German South-West Africa, might possibly be

[103] Kontou (1994: 22).
[104] Ibid.
[105] Treaty termination or modification leads to the older provision to be viewed as having been abandoned, as it no longer reflects the will of States, ibid 23.
[106] Ibid.
[107] Ibid.

used as a ground to modify any provision, inconsistent with such new customary norm, ascertained in the Helgoland Treaty demarcation of the territory's boundary on the Orange River in 1890. The parties to a prior treaty may themselves also agree that it is incompatible with the new custom and needs to be revised accordingly.[108]

According to Kontou, the revision of a treaty will in some cases be the most appropriate way of adapting treaties to supervening custom, and the procedure to be followed in such instances is the same as it applies in cases of termination. One party may ask for the revision of the treaty and have recourse to a settlement procedure wherever available, if its claim is disputed.[109] On the other hand, such a party cannot unilaterally introduce the required amendments into the treaty because no State can be bound by a new or revised treaty without its consent.[110]

The parties are required to conduct good faith negotiations, which imply a general duty 'to seek, by preliminary negotiations, terms for an agreement' and 'to accept in good faith all communications and contracts which could, by a broad comparison of interests and by reciprocal good will, and they also provide States with the best conditions for concluding agreements'. States must 'conduct themselves so that the negotiations are meaningful'; and must act 'with a genuine intention to achieve a positive result'.[111]

It is, thus, apparent that during the negotiations between Namibia and South Africa on the dispute regards the Orange boundary, both states are required to act in accordance with these principles of good negotiations and communication because, for instance, substantial material loss may be caused by a recalcitrant State's insistence on exercising fishing rights acquired under the old legal regime and by its refusal to contemplate a revision.[112]

[108] Kontou (1994: 151).
[109] Ibid 152.
[110] Ibid 153. Although article 62 of the Vienna Convention on the Law of Treaties of 1969 does not expressly provide for this possibility, several members of the International Law Commission stated that, in their view, the *rebus sic stantibus* rule gave a party the right to demand the revision of a treaty and imposed on the other parties the obligation to negotiate in good faith, ibid.
[111] Ibid.
[112] Ibid 154.

3.3.3. Supervening custom as a ground of treaty termination or revision

Kontou adds that the legal basis of supervening custom as a ground of treaty termination or revision is State practice expressed in the form of claims made by some States and accepted by others as a legal obligation; and that the relationship between treaty and custom explains why new custom should have this effect on prior incompatible treaties, because in the process of international law creation, custom has logical priority over treaties in the sense that it forms the legal background against which contractual rights and obligations are created, which is genuine with regard to bilateral and multilateral treaties, including conventions codifying pre-existing custom.[113] When the general law changes, the basis of the normative unit through which custom and treaty form is altered, and the contractual relations derived from the prior legal regime need to be reassessed accordingly.[114]

As a consequence of treaty-making, the possibility that custom might evolve outside the treaty may need to be taken into consideration when the treaty is drafted: treaties concluded for an indefinite duration are not sheltered from change, while arrangements made 'in perpetuity' are open to challenge, unless it can be specifically shown that the parties intended to create a permanent derogation from custom.[115] Such intention can, for instance, be inferred from a provision to the effect that, irrespective of the development of new custom, the treaty shall continue to apply in the relations between the parties as originally drafted.[116]

Kontou postulates that new custom does not automatically abrogate a prior treaty but may bring it to an end following a joint act of the parties or a series of steps taken by one party in exercise of a right conferred by international law; however, new custom does not necessarily prove a specific intent to abrogate prior incompatible treaties, because the *opinio juris* required for its formation only reflects a will to change the general law.[117] Therefore, the meeting of wills expressed in the treaty cannot be regarded as having automatically been superseded by new custom, but needs to be reasserted in the light of the evolution of the law following a procedure based on the

[113] Kontou (1994: 156).
[114] Ibid.
[115] Ibid 157.
[116] Ibid.
[117] Ibid 156.

parties' initiative.[118] It is, thus, submitted that the conflict in the interpretation of the relevant Article III between the signatories, i.e. Germany and Britain, illustrates the absence of a meeting of wills which can open room for the non-application of this provision by any of the parties' predecessor States. However, such a lack of a meeting of wills is not automatically defeated by a new custom, such as the self-determination of Namibian people with regard to demarcating their own national boundaries, but this has to be established within the context of the evolution of this customary practice of international law, based on the initiative of the parties.

Kontou, further, illustrates that where the treaty is considered to have remained in force, a tribunal may have to determine which of two incompatible obligations- one deriving from the treaty and the other from the new custom- should apply to the matter at issue. If the tribunal holds that the treaty should be terminated or revised on account of supervening custom, it does not always prevent the application of the conventional rule to the matter at issue. Unless it is established that a ground for termination has operated to bring the treaty to an end, the tribunal cannot terminate the treaty but must consider it as a valid source of and obligations.[119] The tribunal itself may not revise the treaty, but may, at most, indicate the terms of a revised agreement it considers appropriate in the light of the new customary rules.[120]

[118] Kontou (1994: 156).

[119] Ibid 155. In certain cases, one party may seek compensation for damages caused by the failure of other parties to behave in good faith in response to a request for termination or revision, or a tribunal may have to decide whether a party that refuses to comply with its treaty obligations on account of new custom has committed a breach of the treaty, ibid.

[120] Ibid. Kontou emphasises that international tribunals are not likely to tolerate unilateral attempts to modify a treaty under the guise of 'interpretation' and are not prepared to 'interpret' a treaty in the light of new customary law unless there are ambiguities or gaps in the treaty text, at 156.

Chapter 4 The Helgoland Treaty under Namibia's Constitution and Related International Law Principles

4.1. The Constitutional Position

The Constitution of Namibia provides that "all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament..."[121] Article 144 regulates the status and role of customary and conventional international law in Namibian municipal law by providing as follows:[122]

> Unless otherwise provided by the Constitution or an Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under the Constitution shall form part of the law of Namibia.

Erasmus observes from article 144 that public international law is *ab initio* part of the law of Namibia, and needs no transformation or a subsequent act of the legislature to become so.[123] Therefore, the Constitution generally does not require promulgation of statutory legislation in order for them to become part of the law of the land: the effect of the article is clearly that international agreements become part of the law of Namibia as of the time they came into force for Namibia.[124]

It is submitted, thus, that all existing international agreements, including the Helgoland Treaty, which were binding on Namibia at the date of independence generally remain in force. This would have the implication that the Constitution, or Parliament, must have passed a statutory enactment, in order to exclude the applicability of the said international agreement or certain of its provisions towards Namibia. In this respect, it is noted that the Constitution, although it does not mention the Helgoland Treaty in name, has excluded the binding effect of Article III of that treaty through article 1(4) by identifying the territorial sovereignty of the Namibian state as follows:

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[121] Article 140(1).

[122] Tshosa, O. *"The status of international law in Namibian national law: A critical appraisal of the constitutional strategy"* (2010) 2(1) *NLJ* 3, 11.

[123] Erasmus, G (1991). The Namibian Constitution and the Application of International Law, in Van Wyk, D., Wiechers, M., and Hill, R. (eds) *NAMIBIA- Constitutional and International Law Issues.* Pretoria: VerLoren Van Themaat Centre for Public Law Studies, University of South Africa, p 94.

[124] Erasmus (1991: 104).

The national territory of Namibia shall consist of the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia, and its southern boundary shall extend to the middle of the Orange River.

It should be emphasized that Namibia is concerned with settling its border along the Orange river and its rights to the water from the river and does not seem to be prepared to change its Constitution on this point;[125] which indicates, it is submitted, that the fact that the Constituent Assembly had chosen to express itself on where the territorial boundary of the southern part of the country shall end, while omitting to do the same for the other parts of the territory, was not an insignificant indication on the part of the Constitution negotiators.

Tshosa states that the effect of Article 144 is to accord the general rules of public international law and international agreements direct and automatic application in Namibian municipal law, subject to two qualifications:

a) the general rules of international law and international agreements may be excluded from applying directly, by the Constitution itself; and
b) they may be excluded by an Act of Parliament. In this regard, the general rules of international law and treaties are directly incorporated into Namibian municipal law and enforceable by municipal institutions, particularly the courts.[126]

Furthermore, Article 66(1) of the Namibian Constitution provides for the common law and customary law in force in Namibia on the date of independence to remain valid to the extent to which they do not conflict with the Constitution or any other statutory law. This clause, according to Tshosa, ensures the continuity of legal rules from the period of South African rule to the independence period and beyond, and introduces a possibility of considering the status and role of international law in Namibian municipal law on the same basis as it is under the South African Roman–Dutch common law; and therefore, complements Article 144 and reinforces the status of

[125] Verschuuren (2008: 59).
[126] Tshosa (2010: 11). This provision, referred to as the Namibian Constitution's international law clause, is viewed by Tshosa as an indication of the pro-activeness or friendliness of the Constitution towards international law, ibid.

international law in Namibian municipal law.[127]It is, therefore, submitted that international legal principles are, therefore, to be viewed as on par with the common and customary law and is to be regarded as applicable in Namibia unless it conflicts with the Constitution or a statutory provision.

With regard to the first qualification highlighted above, a clear and unambiguous clause in the Constitution overrides or would limit the direct operation of international law in municipal law- in effect, making international law subject to constitutional supremacy.[128] In *Kauesa v Minister of Home Affairs & Others*,[129] the court stated that the specific provisions of the Constitution of Namibia, where specific and unequivocal, override provisions of international agreements which have become part of Namibian law, and that the conditioning of the automatic application of international law by the doctrine of constitutional supremacy underscores the predominant nature of the Namibian Constitution.

Tshosa adds that the conditioning of the automatic application of international law by the doctrine of constitutional supremacy underlines the significance attached by the Namibian people to the Constitution as a compact that enshrines their goals and aspirations, although the Constitution does not provide guidelines on how it or a provision therein may exclude the operation of customary and treaty rules in Namibian municipal law; and that if, for example, an international agreement were in conflict with any clause in the Constitution, then the treaty in question would not form part of municipal law.[130] Therefore, if a treaty duly entered into or executed by an executive authority and confirmed by the Namibian Parliament (or by the predecessor administration) which conflicted with the substantive provisions of the Constitution, it would be possible to argue that, since the Helgoland treaty conflicted with some substantive clause(s) of the Constitution, such treaty would be overridden by the Constitution – notwithstanding the treaty being binding on Namibia under international law.[131]

[127] Tshosa (2010: 12).
[128] Ibid 24.
[129] *Kauesa v Minister of Home Affairs & Others* 1995 (1) SA 51 (Nm HC), at 86.
[130] Tshosa (2010: 20).
[131] Tshosa ibid.

Furthermore, whether or not the Namibian Constitution or a provision thereof is in conflict with an international law rule will depend on each case, and in regard to making any decision it will have to be borne in mind the responsibility incumbent upon the country not to violate its international obligations: the courts will have to construe Namibian law – particularly a constitutional rule – so as not to be in conflict with Namibia's international obligations.[132] In fact, the Namibian Constitution provides that the State shall endeavour to ensure that in its international relations it fosters respect for international law and treaty obligations.[133]

4.2. The Principles of State Succession and *Uti Possidetis*

According to Brownlie, it is of great importance to determine what happens to international boundaries when there is a change of sovereignty, a class of problems usually described as state succession, although such classification is not necessary to the solution of problems.[134] The International Court of Justice in the *Temple of Preah Vihear*[135] case accepted (on the merits) the principle that in international law it has long been accepted that a change of sovereignty does not as such affect international boundaries.

According to Akweenda, state succession occurs when one State ceases to exist in a territory while another takes its place, with the State acquiring the territory and the extinguished State being described as the successor and the predecessor, respectively; and this transfer of sovereignty may be effected in a variety of ways: by annexation, cession, revolution, and attainment of independence.[136] Related to this is the clean slate principle, in terms of which the occurrence of State succession is an act of free will of the successor state and assumption of rights and obligations is

[132] Tshosa (2010: 25).
[133] Article 96 (d).
[134] Brownlie (2002: 188). Article 2(b) of the Vienna Convention on Succession of States in respect of Treaties of 1978 provides that "succession of States", for purposes of the Convention means the replacement of one State by another in the responsibility for international relations of territory. The International Law Commission Report noted above states that this provision leaves aside from the definition all questions of the rights and obligations as a legal incident of that change, at 226.
[135] *Temple of Preah Vihear (Cambodia v Thailand)* 1962 I.C.J. Reports, 6.
[136] Akweenda (1997: 42).

not compulsory under international law, although the rights of the predecessor state, as opposed to the obligations, passed to the successor.[137]

However, there is a category of treaties called ‘transitory’ or dispositive’ which is an exception to the clean slate principle’s rule: This class includes treaties of cession by which the sovereignty in a treaty is transferred by one State to another; and boundary treaties; ‘dispositive’ treaties survive changes of sovereignty because they are less contractual than in the nature of territorial settlements.[138]

According to the International Law Commission, the word "succession", as a convenient term, can be describe as any assumption by a State of rights and obligations previously applicable with respect to territory which has passed under its sovereignty without any consideration of whether this is truly succession by operation of law or merely a voluntary arrangement of the States concerned. The Commission adopted the approach to succession after its study of the topic of succession in respect of treaties as based upon drawing a clear distinction between, on one hand, the fact of the replacement of one State by another in the responsibility for the international relations of a territory and, on the other hand, the transmission of treaty rights and obligations from the predecessor to the successor State.[139] A further element in the concept is that a consent to be bound given by the predecessor State in relation to a territory prior to the succession of States, establishes a legal nexus between the territory and the treaty and that to this nexus certain legal incidents attach.[140]

According to Akweenda, the term *uti possidetis* was used in Roman law to denote an edict of the praetor, the purpose of which was to preserve, pending litigation, an existing state of possession of an immovable (*nec vi, nec clam, nec precario*), as between opposing individual claimants.[141] When Latin American States proclaimed their independence in the 19th century, they adopted a doctrine of constitutional and international law to which they gave the name of *uti possidetis*, the effect of the

[137] Makonnen (1983: 132).
[138] Akweenda (1997: 43).
[139] Report of the International Law Commission on the Work of its Twenty-Fourth Session (1972: 227).
[140] Ibid.
[141] Akweenda (1997: 47).

doctrine being that the boundaries of the newly-constituted republics would be those of the Spanish provinces which they succeeded.[142] In the *Guatemala-Honduras Arbitration (1933)*,[143] case the Tribunal stated that 'for the purpose of drawing the line of *uti possidetis* of 1921, i.e. date of independence, we must look to the existence of that administrative control we are to seek the evidence of administrative control at that time'.[144] The principle of *uti possidetis* was adopted in Latin American practice so as to deal with problems arising when a former sovereign relinquishes control over large areas of colonial empire which then fragment into new states because the principle of state succession would not be able to cover problems.[145]

Shah notes that a country gaining independence, under *uti possidetis*, inherits the original borders of the predecessor state; that such borders, including river boundaries, were predominantly delimited based on the vested interests, expertise, and power relationships of colonial empires, which had no correlation with the customs, culture, historical title, or conduct of the indigenous people; and that at times, border delimitations were a product of compromise between colonial powers and local governments, and were intended to be temporary or were procured under duress.[146]

Brownlie cites the American jurist Hyde as reporting the following on the principle of *uti possidetis*:

When the common sovereign power was withdrawn, it became indispensably necessary to agree on a principle of demarcation, since there was a universal desire to avoid resort to force, and the principle adopted was a colonial *uti possidetis*, that is, the principle involving the preservation of the demarcations under the colonial regimes corresponding to each of the colonial entities that was constituted as a State.[147]

[142] Akweenda (1997: 47).
[143] *Honduras borders (Guatemala v Honduras)* Reports of International Arbitral Awards1933, 23.
[144] Akweenda ibid.
[145] Brownlie (2002: 190).
[146] Shah (2009: 380).
[147] Brownlie (2002: 188).

Apart from the principle of continuity of former administrative boundaries, this concept also has two corollaries: first, it was presumed that the dissolution of the Spanish Empire did not have the effect of leaving any territory as *terra nullius*; in other words, the intention was not to allow space for intervention and occupation of territory from outside the continent.[148] Secondly, given the difficulties of proving the precise locations of ancient administrative divisions in poorly mapped areas, the strict principle of *uti possidetis juris* was supplemented in the practice of international tribunals by *uti possidetis* de facto, the latter involving a reference to the exercise of jurisdiction and the carrying out of acts of administration by governments. Both in origin and function the principle constituted a part of Latin-American regional international law, and was seen as such in the literature of the law.[149]

Akweenda states that the doctrine of *uti possidetis* has become discredited as a criterion for settling boundary disputes, having proven to be indefinite and ambiguous; and cites Waldock as noting that 'the ambiguity lies in the question whether *uti possidetis* refers to possession *de jure*, that is, to the administrative boundaries as theoretically defined in Spanish Royal Decrees or whether it refers to possession *de facto*, that is, to the boundaries actually respected by the former colonial administrations'.[150] Some writers assert that the *uti possidetis* doctrine should be discarded. With its major weakness being ambiguity, the boundaries of old Spanish administrative divisions, for example, were themselves frequently 'uncertain or ill-defined, or, in less accessible regions, not factually established, or they underwent various changes. In such circumstances, *uti possidetis* would not easily offer a solution.[151]

Despite these criticisms, the doctrine of *uti possidetis* has been accorded universal acceptance. It was recognised in principle by the Organisation of African Unity in the Cairo Resolution of 1964.[152] Furthermore, leaders of East and Central Africa approved a 'Manifesto on Southern Africa' on 16 April 1969 in Lusaka, which was later adopted by the Assembly of Heads of State and Government at Addis Ababa in

[148] Brownlie (2002: 189).
[149] Ibid.
[150] Akweenda (1997: 49).
[151] Ibid.
[152] Akweenda (1997: 53).

September of the same year.[153] Paragraph 11 of this Manifesto emphasised the doctrine of *uti possidetis* by declaring:

"....As far as we are concerned the present boundaries of the States of Southern Africa are the boundaries of what will be free and independent African States. There is no question of our seeking or accepting any alternations to our boundaries at the expense of these free African nations".[154]

Furthermore, in the *Frontier Dispute (Mali v Burkina Faso)*[155] case the court stated that *uti possidetis* 'is therefore a principle of a general kind which is logically connected with this form of decolonisation wherever it occurs': this form being the disintegration of a colonial territory into its separate administrative units which then appeared as independent states.

According to Brownlie, *uti possidetis* does not freeze (colonial) boundaries, but consists essentially of the single principle that the change of sovereignty does not as such change the status of a boundary, and thus pre-existing disputes will subsist as an aspect of the principle of continuity.[156] It has a certain effect but is limited and has thus played a significant role in limiting the possibilities of instability deriving from the formation of new states; and in this regard, it has been reinforced by the general importance given to 'the fundamental principle of stability of boundaries' by the jurisprudence of the International Court, as, for example, in the Judgment in the Libya/Chad[157] case, which resolved a major dispute between Libya and Chad relating to an area known in the press as the Aouzou strip.[158]

As to the stability of boundaries between states, the International Court of Justice is referred to as affirming an overall policy of finality and stability, with the principle of state succession in the case of boundaries complementing this general policy.[159] However, these concepts must also have certain limits and the concept of stability is

[153] Akweenda (1997: 53).
[154] '*MANIFESTO ON SOUTHERN AFRICA* 'proclaimed by the Fifth Summit Conference of East and Central African States, 14th-16th April 1969, Lusaka, Zambia: available at <http://kora.matrix.msu.edu:>, last accessed on 12 August 2011.
[155] *Frontier Dispute (Burkina Faso v Mali),* 1986 I.C.J. 155.
[156] Brownlie (2002: 190).
[157] *Territorial Dispute (Libya v Chad),* 1994 I.C.J. 6.
[158] Brownlie ibid.
[159] Ibid 194.

question begging and one should look at the legal situation generally and therefore the concept of finality does not in itself provide an answer or a short cut.[160]

Brownlie notes that this is also true of the principle of *uti possidetis*, referring to it as an element in maintaining stability in international affairs. But it does not mean that no dispute arises, what it means is that disputes do not arise simply as a result of the change of sovereignty: thus, if at the time of decolonisation there were existing ambiguities such pre-existing disputes will subsist.[161] At the same time subsequent modification of the colonial boundary by agreement is perfectly lawful and the boundary is not frozen. Moreover, the Cairo Resolution does not forbid lawful changes in African boundaries but simply provides that decolonisation as such does not change the legal status of a boundary. So, Gambia has made an agreement with Senegal making local changes so that certain villages will have a more comfortable position in relation to neighbouring villages.[162]

Brownlie states that *uti possidetis* applies in retrospect, and refers to the *Rann of Kutch* case, that followed a small war between India and Pakistan, and the Court of Arbitration investigated the status quo during the 19th century, within the paramouncy of Great Britain and India which treated the state of Kutch as an independent state subject only to the overarching paramouncy system and the part of British India known as Scind.[163] The arbitration applied the status quo and treated that relationship as though it were a relationship between completely independent states, and this was exactly the way the two now independent parties, India and Pakistan, had fought their case. And so *uti possidetis* was taken back into the affairs of British India because that provided a legal outcome to a difficult dispute. In the *Libya/Chad*[164] case, therefore, while Chad had only become independent in 1960 and the treaty in dispute was concluded in 1955, the International Court of Justice found no difficulty in applying the principle of *uti possidetis*, and although it was only

[160] Brownlie (2002: 194).
[161] Ibid.
[162] Ibid.
[163] Ibid.
[164] *Territorial Dispute (Libya v Chad),* 1994 I.C.J. 6.

formally approved by African states in 1964: the principle was, therefore, applied in retrospect.[165]

In the *Frontier Dispute (Benin v Niger)*[166] case, the International Court of Justice's Chamber delimited a disputed river boundary between Benin and Niger and upheld the principle of *uti possidetis juris,* maintaining the immutability of boundaries fixed by colonial rulers at the time of independence, though it added that assessments in delimitation were to be influenced by current "physical realities," such as the "possible appearance or disappearance of certain islands in the stretch concerned."

Confirming the principle of *uti possidetis juris*, the Chamber considered evidence of the effective exercise of authority practiced by the colonial power during its rule, under the principle of "*effectivités.*" The Chamber determined that there was a *modus vivendi* that the main navigable channel of the river constituted the river boundary, and the line of the deepest soundings in the Niger River was delimited as the frontier, and that the river boundary followed the line of the deepest sounding of the main navigable channel at the time of independence, and rejected Benin's argument that the boundary followed the left bank of the Niger River in favour of that of Niger.

To comply with the principle of *uti possidetis juris* and in order to decide the legal status of the contested islands, it was also set out to determine the Thalweg of the Niger River as it existed at the time Benin and Niger gained independence. It was decided not to consider the current location of the Thalweg, which since independence could have potentially shifted due to accretion. The Chamber utilised the Thalweg in existence at the time of independence to award the islands between the Thalweg and the left bank of the river to Niger and between the Thalweg and the right bank to Benin and the island of Lete Goungou was, as a result, awarded to Niger.[167]

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[165] Brownlie (2002: 195).

[166] *Frontier Dispute (Benin v. Niger),* 2005 I.C.J. 90.

[167] Ibid 140. Shah notes that the fact that the Chamber delimited the river boundary by specifying exact coordinates seems to strongly support the view that it aimed to freeze and permanently fix the river boundary at the time of independence and uphold the supremacy of the principle of *uti possidetis juris, at* 389.

Chapter 5 Conclusion and The Way Forward

5.1. Conclusion

Taking Akweenda's determination that the Orange River is a non-navigable river, it can generally be presumed that the position of Namibia in regard to its boundary along the river has strength because state practice generally recognise the middle of the river as the international boundary, in the absence of an agreement between the nations, stating otherwise. However, the predicament is that, as with many other African borders, Namibia's territorial boundaries were laid down by treaties concluded by European nations.

In this regard, the question of validity and determination of the boundary along Orange River is connected with the status in law of the Helgoland Treaty, which determined the boundary of Namibia and South Africa along the Orange River, raising the question whether the demise of colonialism and the establishment of the principle of self-determination have resulted in a change of circumstances concerning particular boundary treaties, and whether**,** in view of the 'clean slate' principle the treaties of a predecessor State renders such boundary treaties lapse upon independence.

The view of the International Law Commission is that the clean slate principle does not bring about a total rupture in the treaty relations of a territory which emerges as a newly independent State. It is pertinent to highlight, therefore, that the clean slate principle does not relieve Namibia of the obligation to respect a boundary settlement and certain other situations of a territorial character established by treaty by its independence on 21 March 1990. Therefore, Namibia was generally not relieved of any obligation in terms of observing the terms of the Helgoland Treaty; even though the treaty was concluded without of consideration of the interests of the Namibian people at the relevant time. In this respect, it can be said that the principle of self-determination is suited to meet the situation of newly independent States which emerge from former dependent territories, which is reflected by numerous United Nations Resolutions concerning the legality of South Africa's occupation of Namibia between 1919 and 1990.

Regarding the interpretation of the Helgoland Treaty, the Vienna Convention on the Law of Treaties would be of crucial importance and, although it has no retrospective effect, it was accepted to be applicable in the *Kasikili/Sedudu* Island case between Botswana and Namibia, especially regarding the interpretation of the Helgoland Treaty, where Article 31 of the Convention was held to be relevant, in as much as it reflects customary international law and provides that a treaty shall be interpreted in good faith. An example of where the Convention was applied to treaties which predated the entry force of the Convention is found in the *Gabcikovo case*, the Court disregarding the question of the possible non-applicability of the Convention's rules to questions of termination and suspension of treaties and applied certain provisions as reflecting customary law.

Although a possibility to revise the terms of Helgoland Treaty is raised by self-determination, Kontou would assert that to permit the revision of a nineteenth-century territorial arrangement on the grounds of the post-1945 principle of self determination might have the effect of not only ignoring inter-temporal law but also of opening the door to a large number of territorial claims, especially in Africa, and might, further, lead to confusion if the principle of self-determination is applied within the context of the *rebus sic stantibus* rule.

It is submitted that, due to the problems which might ensue should the revision of the Helgoland Treaty be premised on the right to self-determination, the only likely ground for taking a position which is in opposite to the general approach taken on where the boundary is located is the ambiguity in language of Article III. This is reflected by the conclusion that Article III (1) of the Agreement does not define the alignment with precision, the precise 'commencing' point at the mouth of the River and the spot from where the line should 'ascend' to the 'north bank' is not identified; and that the Article appears to be a restatement of the line established by a Proclamation of 17 December 1847.

The exposition of Klabbers on the issue of intent illustrates that where international agreements are involved a reference to a state's intentions in international agreements should not hide the fact that the state is but an abstract entity, composed of individuals and entities whose intentions need not always coincide in order to meaningfully analyze the intent of the parties to the Helgoland Treaty. This

is shown by the changing positions of the German and British government officials in the period after the Treaty was concluded.

Should the negotiations between Namibia and South Africa fail and the dispute is referred for international arbitration, and it is found that the treaty should be terminated or revised on account of supervening custom the tribunal cannot terminate the treaty but must consider it as a valid source of obligations. Equally, the tribunal itself cannot revise the treaty but it may, at most, indicate the terms of a revised agreement it considers appropriate in the light of the new customary rules.

It is noted that, through Article 144 of the Namibian Constitution, the general rules of public international law and international agreements binding upon Namibia under the Constitution form part of Namibian law, unless they are expressly excluded by the Constitution or an Act of Parliament. It is submitted that Article III of the Helgoland Treaty is excluded from being binding on Namibia by Article 1(4), which declares the territorial position of Namibia's southern boundary. In this regard, the *Kauesa* case illustrates that a clear and unambiguous clause in the Constitution, such as Article 1(4), overrides or would limit the direct operation of international law in Namibian law: "...specific provisions of the Constitution of Namibia, where specific and unequivocal, override provisions of international agreements which have become part of Namibian law".

It would appear that, regarding the question of whether the succession of the newly independent state of Namibia from South West Africa, international law generally accepts the principle that a change of sovereignty does not as such affect international boundaries, as was stated in the *Temple case* between Thailand and Cambodia. On other hand, Brownlie was referred to as stating that the principle of *uti possidetis* can be viewed as an essential element in maintaining stability in international affairs: while disputes may still arise, the disputes do not arise simply as a result of the change of sovereignty. Furthermore, a subsequent modification of the colonial boundary by agreement is lawful and the boundary is not frozen. Moreover, the Organisation of African Unity Cairo Resolution of 1964 provides that decolonisation as such does not change the legal status of a boundary but does not forbid lawful changes in African boundaries.

5.2. The Way Forward

As was observed by the writer in an encounter with an official at Namibia's Ministry of Foreign Affairs and the South African High Commission in Namibia, the subject of the Orange River boundary is not one to be taken lightly and no attempt should be made to underestimate its seriousness in the eyes of either the two respective governments or to the inhabitants of Namibia and South Africa. As for the inhabitants, especially those who secure a living from the water of the Orange, its significance cannot be over-emphasised. With this in mind, the writer of this paper makes the following recommendations with a view to resolving the dispute in an amicable manner:

1. During the on-going negotiations, the parties shall, as a starting point, apply the spirit of article 31 of the Vienna Convention on the Law of Treaties when it comes to the interpretation of the Helgoland Treaty. The negotiating parties must carry out the process in good faith and with an intention of achieving a positive result.
2. It shall be highlighted that, as provided by the Cairo Resolution of 1964, decolonisation as such does not change the legal status of a boundary, while lawful changes in African boundaries is not forbidden. Therefore the two States can agree to modify the treaty in order to accommodate their interests as regards access to and usage of the Orange River, as it appears that both countries make valuable usage of the river for economic purposes.
3. Demhard notes that the *bank* of the Orange would have to be given specific attention, as it is a good example of illustrating the diverse interpretation possibilities of a seemingly clear juridical contract formulation by the surveyors who practically have to execute the agreed border line.[168]
4. If an agreement cannot be reached as to the precise boundary of the river, it is suggested that one State can modify its stated position on the matter, with the provision that its residents having a living from the river shall continue benefit from the usage of the river, in the same manner as Gambia's agreement with Senegal ensures that certain of its villages will have a more

[168] This being noted by Demhard, who, furthermore, queries whether the term bank means a line following a low water or the high water mark or even the embankment of the high bank; and how should be dealt with far inland reaching high water bays?, at 69.

comfortable position in relation to neighbouring villages on the Senegalese side of the border. In this regard, regard shall be had to the claims to minerals rights in the river, the grazing in the mid-channel islands, and fishing by various communities close to the river.

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SCHEDULE A

I, the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LL B (Honours), is my own original work and that I have not used any sources than those listed in the bibliography and quoted in the references.

Signature: …….

Date: ……

Supervisor's certificate

I, AL Zender, hereby certify that the research and writing of this dissertation was carried out under my supervision.

Supervisor's signature……..

Date…….