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REPARTITIONING OF AFRICA: IMPERATIVES OF THE AFRICAN UNION
BOUNDARY PROGRAMME WITHIN CONTEMPORARY INTERNATIONAL LAW
AND PRACTICE

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ABSTRACT

“Frontiers are indeed the razors edge on which hangs suspended the modern issues of war and peace, life or death of nations.”¹ Spatial boundaries have ambiguous features: they divide and unite, bind the interior and link it with the exterior, are barriers and junctions, walls and doors, organs of defence and attack and so on. Frontier areas (borderlands) can be managed so as to maximise any of these functions. They can be militarised, as bulwarks against neighbours, or be made into special areas of peaceful interchange.² This paper explores the core issues surrounding Africa national boundaries within the context of national sovereignty and international laws.

Keywords: Africa, Boundary disputes, Partitioning of Africa

1. INTRODUCTION

When the African Union (AU) Assembly of Heads of State and Government at their eighth ordinary session in January 2002 mandated the AU Commission³ to pursue efforts towards the structural prevention of conflicts particularly through the implementation of the AU Border Programme on the delineation and demarcation of borders the apex body commendably opened a new and an illustrious chapter in the history of African relations and perhaps international peace and stability.⁴ The Commission in furtherance of the border programme immediately produced a 2004-2007 ‘Plan of Action’ which aimed *inter alia* at identification of trans-border areas that would serve as a basis for cross-border co-operation, consolidation of trade and free movement of people and goods. Pursuant to this minister in charge of border issues in the Member States deliberated on means and measures geared towards the achievement of greater unity and solidarity among African countries and peoples and the reduction of the burden of borders separating African States. This ministerial body drew up a Declaration on the African Union Border Programme and its Implementation Modalities in 2007.⁵

¹ Lord Curzon of Kedleston, Viceroy of India 1898-1905 and British Foreign Secretary 1919-24 1907 Romanes Lecture, Oxford.

² R. Strassoldo, “The State of the Arts in Europe” Asiawaju and Adeniyi (eds), *Borderlands in Africa: A Multidisciplinary and Comparative Focus on Nigeria and West Africa* (Lagos: University of Lagos Press, 1989) p. 359.

³ Hereinafter referred to as the Commission; materials relating to the African Union (AU) are available at www.africa-union.org.

⁴ “AU moves to ease border conflicts in Africa” *The Guardian* (Nigeria) Wednesday, May 23, 2007.

⁵ Declaration on The African Union Border Programme and its Implementation Modalities as Adopted by the Conference of African Ministers in Charge Of Border Issues held in Addis Ababa (Ethiopia), on 7 June 2007 available at <http://www.africa-union.org/root/au/publications/PSC/Border%20Issues.pdf>

A component of the Commission's 2004–2007 plan of action, in its border programme is the identification of trans-border areas that would serve as a basis for cross-border co-operation, consolidation of trade and free movement of people and goods. The Commission correctly noted that the transformation of border areas could be achieved through effective demarcation and monitoring by way of control logistics and infrastructure capacity building at both national and regional levels. Other objectives of the AU Border Programme include harmonisation of the integration policies of regional and sub-regional organisations, strengthening the capacity of decision-makers in the area of border management and regional integration, and funding of cross-border development projects. These noble aims rest on the principle of the respect of borders existing on achievement of national independence, as enshrined in the Charter of the Organization of African Unity (OAU), Resolution AHG/Res.16(I) on border disputes between African States,⁶ and article 4 (b) of the Constitutive Act of the African Union,⁷ (ii) the principle of negotiated settlement of border disputes, as provided for notably in Resolution CM/ Res.1069(XLIV) on peace and security in Africa through negotiated settlement of boundary disputes.

The determination of the AU to address comprehensively the problems of boundary and frontier determination and demarcation could not have come too soon as the tensions, skirmishes⁸ and outright war over boundaries have since the independence era (late 1950s) caused severe problems among African states and its peoples.⁹ The problems are indeed as rife in interstate relations as they are in intra state affairs. Guinea, Liberia and Sierra Leone continue to trade accusations of boundary incursions (some involving aerial raids) and many civilians have lost their lives¹⁰, abductions have taken place along the Angolan-Namibian border and not even aid workers are not spared violence.¹¹ Similar problems exist between Chad–Sudan, Mali–Mauritania¹² Burundi–Tanzania, Equatorial Guinea– Gabon, Eritrea–

⁶ Adopted by the 1st Ordinary Session of the Assembly of Heads of State and Government of the OAU, held in Cairo, Egypt, in July 1964.

⁷ This provision reiterates the age-old directive philosophy of African states regarding territorial boundaries by protecting, “[r]espect of borders existing on achievement of independence;” Constitutive Act of African Union, July 11, 2000. The Organization for African Unity (OAU) was officially replaced by the African Union on July 9, 2002. See Charter of the Organization of African Unity, 479 U.N.T.S. 39, entered into force Sept. 13, 1963.

⁸ Sudan Liberation Army fighters and nomads frequently have deadly skirmishes involving humans and even camels over boundary positions. See the AU Mission in Sudan Ceasefire Commission, “CFC Ceasefire Violation Report No. 37/05: Alleged SLA Attack on Nertiti on 16 Feb 05” AMIS/CFC/G/VIO/1 March 2005 pp. 1-2 available at <http://www.africa-union.org/DARFUR/Reports%20of%20the%20cfc/37-05.pdf> visited 9/12/2008.

⁹ Saïd Djinnit, Commissioner for Peace and Security at the African Union in a speech had reason to note that since African States gained independence, borders inherited from colonisation have been a factor of recurrent conflicts, adding that most of these borders were ill-defined and un-demarcated. AU, “Report Of The Meeting: Preventing conflicts, Promoting integration” Preparatory Meeting of Experts on the African Union Border Programme Addis Ababa, Ethiopia Conference of African Ministers In Charge Of Border Issues 4 - 7 JUNE 2007, BP/EXP/RPT(II), p. 1. Available at http://www.africa-union.org/root/au/Conferences/2007/june/PSC/7/Report_final.doc visited 9 December 2008. See also Samuel M. Makinda, F. Wafula Okumu, *The African Union: Challenges of Globalization, Security, and Governance* (Oxon: Routledge 2008) pp. 18, 75-76.

¹⁰ BBC Online, Guinean forces shoot Liberian Helicopter, Wednesday, 18 October, 2000, available at <http://news.bbc.co.uk/2/hi/africa/977835.stm>.

¹¹ BBC Online, Hundreds killed in Guinea attack, Thursday, 7 December, 2000, available at <http://news.bbc.co.uk/2/hi/africa/1059818.stm>.

¹² Joe Bavier, “Chadians Concerned Over Growing Tensions With Sudan” Voice Of America 28 December 2005, available at <http://www.voanews.com/english/2005-12-28-voa35.cfm>.

Sudan, Ethiopia–Kenya.¹³ Togolese rebels create refugee problems in Ghana by shelling border villages, Sudanese Lord's Resistance Army, frequently attack Ugandan border villages. It is necessary to note that in the African experience, the end of judicial and arbitral proceedings in relation to boundary conflicts do not necessarily indicate the end of the danger to the affected population. For instance, the Ethiopia-Eritrea Border situation remains volatile and dangerous to the population therein despite the award of the Eritrea–Ethiopia Boundary Commission (EEBC).¹⁴ It needs however be mentioned that territorial, boundary and border disputes are not unique to Africa and that they are indeed of global dimensions.¹⁵

2. AMBITIOUS DATES AND REALISM OF BOUNDARY MAKING, DELIMITATION AND DEMARCATION

It may be fair to say that since the Berlin conference of 1885 no comprehensive effort has been made to consider collectively the legal and political providence of African boundaries. The partitioning of Africa at the Berlin Conference in the mid-nineteenth century marked the beginning of the renewed interest in the continent of Africa by the imperialist powers of Europe. Of particular interest to them at the time were the hitherto unexplored central African regions, comprising modern-day Zaire, Zambia and Zimbabwe. This interest was based on the relentless rush for raw materials and investment that these territories provided for Europe's continuing industrialization. Competition between the European powers was severe as they coveted the opportunities that colonial subjugation assured. Much interest was concentrated on the Congo region (modern Zaire) upon which King Leopold II of Belgium had set his sights (it later turned out to be a lucrative source of rubber). However, the old colonial nation of Portugal, with African interests in Angola and Mozambique extending back over three centuries, also saw the Congo region as its historical sphere of influence. International rivalry and diplomatic conflicts between the principal European powers prompted France and Germany to suggest the notion of a European conference to resolve contending claims and provide for a more orderly 'carving up' of the continent. The Conference met at Berlin from November 1884 through February 1885 and resulted in an important agreement titled The Berlin Act of 1885. The participating states that sent representatives were Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, the Netherlands, Portugal, Russia, Italy, Spain, Sweden, Turkey and the U.S.A.

It will be the very unusual scholar who will stand behind the proposition that the Berlin Conference did a good job of the delimitation exercise of the African continent on nearly every level of enquiry. Despite the reality that cartography and mapping techniques have gradually improved over the years the very premise of colonial delimitation and demarcation which is the premise of what most of Africa is comprised is deeply flawed in very many ways. As far back as 1890, Lord Salisbury admitted:

We have been engaged . . . in drawing lines upon maps where no white man's feet ever trod; we have been giving away mountains and rivers and lakes to

¹³ Troops Deployed On Border, Kenya *Times* 25/03/1999, 25/3/99 (FBIS-AFR-1999-0325).

¹⁴ VOA News, UN: Ethiopia-Eritrea Border Remains Potentially Volatile, 29 December 2005 available at <http://www.voanews.com/english/2005-12-29-voa43.cfm>. Visited January 14 2006.

¹⁵ Severe problems are currently being faced by many of the states that were in the former USSR, as a result of the dissolution of Yugoslavia, in Northern Ireland and in the Basques area of the Franco-Spanish Border. See also below notes 169-173.

each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.¹⁶

Not only was the delimitation largely arbitrary but the mapping exercise was far from a precise art. As Botswana successfully advanced in relation to the maps in *Kasikili Sedudu case* early maps show too little detail, or may be too small in scale, to be of value. The World Court significantly also admitted of colonial maps as follows: "maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title."¹⁷ As alleged by Nigeria in its written submissions to the ICJ in the land and maritime dispute, it was not unknown for colonial surveyors "to round things up" in order to save themselves from further bother or embarrassment at doing a shoddy job and coming up with unsupportable maps. Thus, on mapping and cartographic grounds alone the AUBP initiative could not have come sooner.

The distinction between the two terms is exemplified by the experience of China which has delimited up to 90% of its 22,000km long international boundary with a total of 14 states but of which it has demarcated only about 10 boundary lines.¹⁸ The problem with much of delimitation and demarcation work achieved by the colonial powers is that it is much less the product of disciplined colonial record keeping romanticised by the leading international courts but has proven to be far less accurate and useful by demarcators in practice. This credibility gap is yet to receive the required attention it deserves in much of legal writing on African boundaries save by few but highly respected and candid writers and commentators from those peoples at the receiving end of the injustices perpetrated by colonial boundary making.

The problem is arguably complicated further by the conspiracy of silence involving both foreign and African writers and statesmen regarding the providence of the maps made by various colonial authorities presumably on the assumption that silence is necessary if the myth of *uti possidetis* is to have any meaning at all. There is, however, no reason to believe that the policy and determination of the AU expressed several times in the past to keep states faithful to the territory they inherited after colonialism will be irreversibly damaged if scientific methods are employed to verify boundaries. Those charged with delimitation and demarcation ought to be aware that they must remain watchful of the possibility that shoddy surveying and cartography may have become fossilised into boundary reality and there ought to be a healthy debate as to how to deal with this reality and perhaps prevent such output from surviving into present documents and treaties. It in fact accords with the true interests of all concerned not to be seen to give effect to absurdities. After all it is recognisable that the documents and provisions were products of previous centuries where scientific attainments was far more modest than at present. Brownlie in his seminal work *African boundaries* noted of the Benin-Niger border as follows:

¹⁶ See Memorial of Libya in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Vol.1, 25, para.3.01, quoted from *The Times*, 7 August 1890.

¹⁷ *Frontier Dispute (Burkinu Faso/Republic of Mali)* (I.C.J. Reports 1986, p. 582.

¹⁸ China is said to have inherited a boundary line full of problems when founded in 1949 and has had to settle up to 12 territorial disputes with its neighbours. Fu Fengshan, "China's Experience in Settling Boundary Disputes and its Border Management Practice" Paper Presented at 2nd International Symposium on Land, Maritime River and Lake Boundaries: Maputo, Mozambique 17-19 December 2008 p. 10- 13.

The alignment depends upon certain French arrêtes, of December 8, 1934, December 27, 1934, and October 27, 1938. The entire boundary consists of sectors upon the rivers Mekrou and Niger but the precise division of the rivers, and thus the allocation of islands, remains the subject of doubt since the relevant French instruments are not sufficiently precise.¹⁹

The imprecision of the delimitation and the inordinate apportionment of territory principally along the lines of mere convenience of colonial rule, have produced untold confusion, conflict, tensions and wars among African peoples that have reverberated around the continent at least in the last five decades and up till the present.²⁰ The declaration on the African Union border programme and its implementation modalities as adopted by the conference of African ministers in charge of border issues is potentially, therefore, one of the most significant legal events of the last century in relation to the African continent. The declaration is quite clear on the imperatives of the AU Border Programme particularly regarding the demands of an Africa wide delimitation and demarcation exercise. It also very significantly appears to have set a strict timetable for the implementation principles and processes in a manner that deserves closer scrutiny. It was stated:

The delimitation and demarcation of boundaries depend primarily on the sovereign decision of the States. They must take the necessary steps to facilitate the process of delimitation and demarcation of African borders, including maritime boundaries, where such an exercise has not yet taken place, by respecting, as much as possible, the time-limit set in the Solemn Declaration on the CSSDCA. We encourage the States to undertake and pursue bilateral negotiations on all problems relating to the delimitation and demarcation of their borders, including those pertaining to the rights of the affected populations, with a view to finding appropriate solutions to these problems.²¹

This particular significant decision appears to have originated earlier in the propositions and work of the Preparatory Meeting of Experts on the African Union Border Programme.²² The body of experts were in turn attempting to give life to the Memorandum of Understanding on Security, Stability, Development and Cooperation in Africa (CSSDCA) adopted in July 2002, which provided for the delimitation and demarcation of African boundaries, where such an exercise has not yet taken place, by 2012 latest. That particular instrument was not followed up by any concrete plan to facilitate the implementation of the ambitious plan—at least not one that is recognised as fast succeeding. Presumably therefore the AU has decided to give life to the noble aims expressed in the 2002 MOU. In this manner that

¹⁹ Ian Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopedia* (Berkeley: University of California Press, 1979) p. 161.

²⁰ Indeed it is widely recognised that European colonialism continues to underlie most territorial disputes in Africa. Recent examples include the Nigeria–Cameroon dispute over the Bakassi Peninsula; the Gabon–Equatorial Guinea dispute over the islands of Mbanié, Cocotiers, and Conga in the Corisco Bay; the Mauritius–United Kingdom dispute over the Chagos Archipelago; and the Comoros–France. Mi Yung Yoon, “European Colonialism and Territorial Disputes in Africa: The Gulf of Guinea and the Indian Ocean” Vol. 20, *Mediterranean Quarterly* No. 2, Spring 2009, pp. 77-94.

²¹ Paragraph 5 (a)(i), Declaration On The African Union Border Programme, *supra* note 3.

²² The meeting of government experts preparatory to the Conference of African Ministers in charge of Border Issues, scheduled for 7 June 2007, was held in Addis Ababa from 4 to 5 June 2007.

African ministerial conference appears to have set a timetable of 2012 for the AU to complete or at least significantly achieve its desired aim of delimiting and demarcating African boundaries.

It is recognisable that for lawyers, surveyors, cartographers, scientists etc. there is an attraction for the certainty and specificity of clearly demarcated boundaries rather than vagueness of mere frontiers.²³ But the optimism for generating more precise boundaries across Africa must be balanced against the realism of the vastness of the frontiers that potentially have to be covered. Africa has approximately 28,000 miles of international boundaries. The national boundaries are recognisably of high level of Porosity with up to 109 of its international boundaries characterised by permeability. It is significant that experts agree that up to 25% of African international boundaries are completely undemarcated.²⁴ Less than 50% of the world's maritime boundaries have been agreed upon, in Africa, the number is even less than the average. Africa has 27 mainland coastal states. There are also seven sets of island states whose impacts in various ways presence on the maritime fortunes of the mainland coastal states.²⁵ It is relevant that up to eight African states have utilised the avenue created under the law of the sea to make applications in order to extend their continental shelf by making Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982.²⁶ The aim of these states is to secure the valuable energy/natural resources that are found therein for national development.²⁷

²³ The near esoteric discussion of the spatial demarcation between airspace and outer space has not escaped heated academic discussion. Hence the present writer has been moved to consider this issue (and some may argue *ab absurdum*) elsewhere. See Gbenga Oduntan, "The Never Ending Dispute: Legal Theories on the Spatial Demarcation Boundary Plane between Airspace and Outer Space" *Hertfordshire Law Journal*, (2003) pp. 64-83 available at http://www.herts.ac.uk/fms/documents/schools/law/HLJ_V1I2_Oduntan.pdf visited 10 December 2008.

²⁴ African international boundaries are 'protected' by about 350 official road crossing points, or one for every 80 miles of boundary. Wafula Okumu, "Border Security in Africa" Presentation made at the African Union Border Programme Regional Workshop Windhoek, Namibia 22-23 October 2009, p. 3.

²⁵ Tim Daniel, "African Maritime Boundaries" in Jonathan I. Charney, David A. Colson, Robert W. Smith eds., *International Maritime Boundaries Vol V* (Martinus Nijhoff Publishers, 2005) p. 3429.

²⁶ UNCLOS III ILM 1245 (1982). Joint submission by the Republic of Mauritius and the Republic of Seychelles - in the region of the Mascarene Plateau, Côte d'Ivoire, Ghana, Joint submission by France and South Africa, Kenya, Mauritius - in the region of Rodrigues Island, Namibia, Nigeria, South Africa - in respect of the mainland of the territory of the Republic of South Africa.

²⁷ A geomorphological description of the continental shelf encompasses the gently sloping platform of submerged land surrounding the continents and islands, normally extending to a depth of approximately 200 meters or 100 fathoms at which point the seabed falls away sharply. The legal definition of the Continental Shelf as contained in Article 76 of the LOSC (1982) reads: "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." Note that according to paragraph 3, the coastal State may also establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either: (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base. Aware of the immense resources that lay buried in the continental shelf, certain coastal states from the mid

After a submission of Continental shelf claims to the UN Division of Ocean Affairs and Law of the Sea, and to the Commission on the Limits of the Continental Shelf (CLCS),²⁸ the deliberations and negotiations may involve a period of up to two and a half years. During this time, the African state will have to maintain a core team of experts that will have to be present at the UN offices. A fully fledged and equipped office will have to be maintained in New York by and there will be several rounds of technical deliberations and question-and-answer sessions, where the submitting state will be asked to defend portions of its submissions. Presumably this again is one of the areas which the AU and indeed the AUBP will prefer an early rather than latter finalisation of claims. The ambitious dates set for the completion of the AUBP will be further tested on this front.

Sight must also not be lost of two factors. First there is something quite African about adoption of frontiers as separating value between one village, community or peoples from one another rather than strict 'line in the sand' demarcation of late modernity (consisting of WGS 1984 Datum System of coordinates and derived from orthorectified satellite imagery) which has caught the imagination of European scholars. Admittedly this question is slightly more than of rhetorical value in the modern world which Africa has embraced in most respects but the practical difficulties this reality throws up are many. The pre-existing and historical attitudes of African peoples may also have had an effect on the archiving practice and low investment of time and efforts on records, thus, complicating further the enormity of the task. The place names and feature names that the local populations recognise and which have been given *defacto* legitimacy for decades and centuries are in many cases different from the scientifically generated ones in government or colonial archives. Proper scientific surveying have not been done over vast territories and even where such exist they predate the use of modern technology and quality control methods. Deliberate destruction and alteration of boundary markers and pillars are as a general rule common in rural largely illiterate areas.

Second, there is a possible argument that an inordinate and poorly executed rush towards strict demarcation in a continent that is held together by a controversial Latin American construct of *uti possidetis* (roughly described: snap shot of territory at independence) can produce potentially dangerous consequences. The issues should be handled with the utmost care especially where it is often the question of exactly what was inherited at independence that is in issue.²⁹ There is an undue optimism in academic writing that

1940's, introduced declarations to secure a beneficial utilisation regime for themselves over this maritime zone.

²⁸ Materials relating to the CLCS are available at

http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm

²⁹ The ascendancy of the *uti possidetis* principle in the jurisprudence of African international law and relations via its manifestation as a Latin American principle and as enshrined in Article paragraph 3 of the OAU Charter has theoretically transfixed African boundaries. Yet there is some merit to the argument that the limits of *uti possidetis* as policy must be recognised. The true target of the principle is the doctrine of protection of boundaries and borders. *Uti possidetis* was not even in the Latin American sense designed to answer neither back to separatists nor to trump the right of self determination. It definitely should not be an incantation against well founded exercise of the rights of a people to self determination. For critical views on *uti possidetis* see Ratner's excellent article *op.cit.*, See e.g. Crawford, *The Creation of States in International Law* (1979); Ardent supporters of the principle like Santiago Torres Bernardez, admit the *uti possidetis* doctrine still has to be reconciled with developments in law and "the evolution of the rules of international law governing, for example succession, self determination, acquisition of title to territory, frontiers and other territorial regimes, treaty law, intertemporal law, etc." See e.g. Torres Bernardez, 'The "Uti Possidetis Juris Principle" in Historical Perspective', in K. Ginther et al (eds), *Festschrift für Karl Zemanek* (1994), p. 436. International Crisis Group, "Central Asia: Border Disputes and Conflict Potential" p.6. Reports of the International Crisis Group are available at www.crisisgroup.org accessed June 5 2007.

uti possidetis is a magic wand that can resolve every territorial and boundary contest in ex colonial settings. There is indeed a certain danger that if the AU Border Programme is not successfully prosecuted events may conspire to endanger the delicate balance achieved under the *uti possidetis* principle in Africa.

The merits and demerits of the *uti possidetis* doctrine are beyond this paper and will not be delved into save as it may concern the AU Borders Programme. Yet it is possible if not desirable to question the time scale set for the programme. Perhaps instead of the present effort at simultaneous consideration of all undelimited and undemarcated territories across the continent time it may be better to proceed by adoption of a phased regional approach. Thus, for instance, West Africa may be the focus of the next 10 years followed by a move of the programme to East Africa, South Africa and then Africa north of the Sahara.³⁰ A phased approach reduces the severity of costs, risks and the overall demands on the institutions and experts involved. Lessons may be learnt from earlier phases and the experience would prove valuable during latter stages.

The phased implementation option in fact accords with international practice of demarcation and consideration of delimitation task by international courts. Sectoral analysis and demarcation in phases was applied by both the Courts and implementation bodies in the Cameroon-Nigeria and Eritrea-Ethiopia processes.³¹ For the AU Border programme to succeed it requires the input of a large number of experienced experts to undertake the enormous tasks ahead. These include competent and independent geologists, surveyors, hydrographers, cartographers and lawyers. There is also the need for capacity development in the requisite African international courts and tribunals in order to be able to competently handle complex boundary matters particularly of a maritime nature and to be able to develop a regional jurisprudence that will be able to cope with a possible upsurge in delimitation and demarcation disputes. It is fair to say that the required institutional and skilled capacity may be lacking presently unless drastic strategies are adopted. The choice is not really between allowing sleeping dogs lie and waking them up. It is arguably that of waking them up selectively and managing events in a controlled fashion and to deal with unexpected cases of rabid reactions not only among states but even within them.³²

In relation to the above it is reasonable to raise three queries. Could it be said that the dates set in 2002 by the Assembly of Heads of State and Government allowing for a ten year

³⁰ It has been suggested that the African border programme itself emanated from the desire to expand on achievements of the West African region. It may be that what is needed is to consolidate this further and then move on sequentially to other areas. OECD, *Cross-Border Diaries West African Borders And Integration Bulletin On West African Local-Regional Realities* Issue 06, June 2007. *The Cross-border Diaries* are published both in French and English and are available on www.oecd.org/sah ; www.afriquefrontieres.org ; visited 21 December 2008.

³¹ The EEBC adopted the three-sector delimitation of the international boundary between Eritrea and Ethiopia.

³² One of the consequences of changes and shifts in international boundaries is that it may create traumatic and irreversible changes within national boundaries. This phenomenon may be hardest hitting on resource rich federal states. As a result of the recent handover of Bakassi Peninsula to Cameroon by Nigeria in 2008, the Revenue Mobilisation, Allocation and Fiscal Commission (RMAFC) redefined the entire maritime territory of the federal states abutting the pertinent section of the Gulf of Guinea. As a result the entire maritime territory of Cross River State became ceded to its neighbouring Akwa Ibom state. The former state became declassified as a littoral state and became required to transfer 76 oil wells in favour of the latter. Cross River State Government, "RMAFC, Imoke Receives Report, Frowns at Data Collection News & Press Releases 2009/7/8

<http://crossriverstate.gov.ng/portal/modules/news/article.php?storyid=49> visited 8 Jan 10; News & Press Releases: Elders condemn delisting of Cross River as Oil Producing State 2009/7/1 available at <http://crossriverstate.gov.ng/portal/modules/news/article.php?storyid=44> visited 8 Jan 10.

period to complete such a major programme was in the first place very ambitious? Could that inscription have been an expression of a desire to begin to address seriously the issue and put in place a credible programme of action by 2012? Considering that the programme is just about to be meaningfully addressed could it be perhaps unrealistic for those charged with various aspects of the implementation to still stick to the 2012 date?³³ Indeed the period 2002 and 2012 would perhaps be best recognised as the consultative period for the Border Programme and the remainder of this period be judiciously and ever so seriously committed to deep studies and sociological, scientific and legal enquiries in to the nature of the important tasks before African states in terms of the delimitation and demarcation of international boundaries.

Perhaps a more practical strategy and one which in a very cynical world will present the African Union as a competent intergovernmental organisation is to cast the African Union Border Programme within a 30 year completion period. As will be argued below the delimitation of territory and the subsequent demarcation are complex tasks the seriousness of which may be sacrificed by underestimation and under-preparation by the parties and interests involved. Assuming for arguments sake that all factors necessary for achieving delimitation of remaining and yet to be demarcated African boundaries are presently available (including scientific data, adequate funds, reliable satellite imagery, cartographic evidence, appreciable political will etc.; it would hardly be possible to complete the task even within 10 years from now simply on the grounds of a dearth of qualified and experienced surveyors alone. Employment contracts will have to be developed, qualified and adequately experienced staff will have to be attracted to Africa from abroad. They will be relocated with their families, language and logistic problems will be significant and questions of impartiality that is required in international survey work will have to be reconciled in the employment pattern. There are also local realities that may make progress extremely difficult if not impossible. Example may be made of boundary areas that need to be cleared of mines from previous wars and conflicts before any reaffirmation or reconnaissance surveying work can be done. This is the case in certain boundary areas between Mozambique and Zimbabwe.³⁴

Since negotiations are the prescribed means by which Maritime delimitation is achieved it is clear that negotiating the important multilayered jurisdictional zones known to the law of the sea are not events that can be meaningfully rushed. The LOSC 1982 recognised 12 nautical miles (nm) for the territorial sea, 24nm for the contiguous zone, 200nm for the EEZ, and the 350nm maximum for the extended continental shelf. Delineating these zones in the special circumstances and under the influence of opposing coasts, competing islands, rocks, reefs etc have been known to last for decades between some countries. There is no doubt that this will also be the case in the African maritime setting. Having said this it is also fair to note that where there is good political will and determination much can be achieved in considerable little time even by African states. Example may be made here of the tremendous successes of Nigeria, Equatorial Guinea and Nigeria Sao Tome and Principe maritime negotiations.

³³ After the inception of the programme in 2002 about 5 years appear to have been lost whilst the infrastructure and funding for the programme was sought and put in place. Thus, the period of serious activity by the AUBP is quite recent although its productivity in that short time is clearly commendable given the immense tasks before it.

³⁴ A writer notes of this zone "these are bombs - not time bombs so much as timeless bombs - that have been strewn recklessly across the path of development in countries like Angola and Mozambique, a deadly legacy of the region's long agony of war. And they are primed, quite literally, to go off: again . . . and again". Alex Vines, "The southern Africa minefield", vol. 11 *Southern Africa Report Archive* no 1. p. 19. Available at <http://www.africafiles.org/article.asp?ID=3915> Visited 14 Dec. 2008.

Perhaps a few examples from the ongoing Cameroon-Nigeria exercise will be pertinent as illustration of the resource requirements and the extensive time scale of delimitation and demarcation work in a contemporary context. Comparisons may also be made with the implementation of the Namibia-Botswana judgment. The *Land and Maritime case* culminated decades of tensions between the two states.³⁵ The delimitation instruments governing the land boundary were many but easily agreed upon by the parties and the delimitation of the court in this case is in a sense not new as its task was to give recognition and effect to long standing colonial treaties.³⁶ On the whole, the Court's delimitation involved some 17 points that were in dispute along the entire land boundary.³⁷ In the Botswana Namibia case the international boundary between both countries was determined by delimitation attained in the provisions of article 3 of the Anglo-German Agreement signed in Berlin on the 1st July 1890. Similarly the implementation stage of the judgment was guided by the colonial treaty as well as the Agreement between Namibia and Botswana establishing the joint Commission among other varied but easily agreed upon.³⁸

³⁵ Relations between Cameroon and Nigeria have long been strained due to problems along their common border, which is more than 1700 kilometers long and extends from Lake Chad to the sea. These problems were aggravated by the mutual challenge of sovereignty over the Bakassi Peninsula and Lake Chad. On 29 March 1994 the Republic of Cameroon filed in the Registry of the Court an Application instituting proceedings against The Federal Republic of Nigeria a dispute concerning the question of sovereignty over the Peninsula of Bakassi, and requesting the Court to determine the course of the maritime frontier between the two States in so far as that frontier had not already been established in 1975. See *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea Intervening), Judgment, Preliminary Objections [1998] ICJ 2, 11 June 1998 (www.worllii.org/int/cases/ICJ/1998/2.html); *Request for Interpretation of the Judgment of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon) (www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_ijudgment_19990325_frame.htm); *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea Intervening), Judgment, Merits, 10 October 2002 (www.icj-cij.org/icjwww/idocket/icnjudgment/); see particularly para.30. For a brief pre-independence era outline of the disputed area see Mendelson op.cit., 224-227. Maurice Mendelson, "The Cameroon-Nigeria Case in the International Court of Justice: Some Territorial Sovereignty And Boundary Delimitation Issues" vol. LXXV *BYIL* (2004).

³⁶ The Court noted in para.82 that both States agree that the land boundary between their respective territories from Lake Chad onwards has already been delimited, partly by the Thomson–Marchand Declaration (Declaration made by the Governor of the Colony and Protectorate of Nigeria and the governor of the French Cameroons defining the Boundary between British and French Cameroons. Ian Brownlie, See *African Boundaries: a legal and Diplomatic Encyclopaedia* (London: C. Hurst & Company, for the Royal institute of International Affairs, 1979) pp 570 -578.) as incorporated in the Henderson–Fleuriu Exchange of Notes of 1931, partly by the British Order in Council of 2 August 1946 and partly by the Anglo–German Agreements of 11 March and 12 April 1913. The Court likewise noted that, with the exception of the provisions concerning Bakassi contained in Arts XVIII et seq. of the Anglo–German Agreement of 11 March 1913, Cameroon and Nigeria both accept the validity of the four above-mentioned legal instruments which effected this delimitation.

³⁷ See ICJ Reports 2002, 360, para.86. The interpretation and application of the Thomson–Marchand Declaration of 1929–30 constituted the major part of the Court's work.

³⁸ Other important working documents adopted for the demarcation exercise are the: Eason Survey report of 1912, Kalahari Reconnaissance of 1925; Kalahari Reconnaissance of 1943; 1943 aerial photographs of the area 1897 map by Schultz and Hamar; 1905 map of Ngamiland by Franz Seiner and Stigands, compiled between 1910 – 1922; 1987 mosaic with flight index and photography from Shaile up to Lake Liambezi; Eason Survey report of 1912, Kalahari Reconnaissance of 1925; 1925 aerial photography; Kalahari Reconnaissance of 1943; Kalahari expedition of 1945; 1943 aerial photographs of the area 1897 map by Schultz and Hamar; 1905 map of Ngamiland by Franz Seiner and Stigands, compiled bet 1910 – 1922; 1987 mosaic with flight index and photography from Shaile up to Lake Liambezi; Swampy Island correspondence of 1910.

The modus operandi of the parties in giving effect to the judgment of the court in both processes is widely regarded as the gold standard in contemporary post-boundary dispute demarcation work.³⁹ But it also reveals in its detail the painstaking work that attends a demarcation effort and the potentially time consuming nature of the task. In order to achieve the objective listed above, both Nigeria and Cameroon appointed six (6) members each to the Cameroon Nigeria Mixed Commission. The Federal Government of Nigeria appointed Prince Bola Ajibola (former judge of the ICJ) as Chairman to the Nigerian side.⁴⁰ Cameroon appointed His Excellency Amadou Ali as Chairman to the Cameroonian side.⁴¹ The activities and meetings are chaired from 2002 till 2007 by the United Nations Special Representative for West Africa, His Excellency, Ahmedou Ould Abdallah who was replaced in late 2007 by H. E. Lamine Cisse and in 2008 by Saïd Djinnit. In addition, the Mixed Commission found it necessary to establish the six Sub-Committees to handle the various facets of its assignments. They include: the Sub-Commission on Demarcation which subsumes a Joint Technical Team (JTT);⁴² Sub-Commission on Affected Populations;⁴³ Working Group on the Resettlement of those affected by the International Court of Justice (ICJ) Judgment in the Lake Chad area;⁴⁴ Working Group on Maritime Boundary;⁴⁵ Mixed Commission Observer Personnel;⁴⁶ Working Group on the Withdrawal and Transfer of Authority.⁴⁷

The Namibia-Botswana process was much shorter in time frame but of course the issues involved in the implementation exercise were different and perhaps not as complex as the Cameroon-Nigeria. The agreement for the establishment and the Terms of Reference of the Joint Commission of Technical Experts for the delimitation and demarcation of the boundary

³⁹ See Saïd Djinnit, "Opening Speech by the Chairman of the Mixed Commission" Twenty -Third Meeting of the Mixed Commission Yaounde 9 October 2008; Amadou Ali Chef De La Delegation Du Cameroun A L'Ouverture De Le La 23eme Session De La Commission Mixte Yaounde , Le 09 Octobre 2008; See also G. O. Uzochukwu Okafor, "Namibian Boundary: Experience With Delimitation and Demarcation", Paper presented at the Regional Workshop on African Border Programme (Windhoek 22-23 October 2009).

⁴⁰ Other members to the Nigerian side are: Mrs. Nella Andem-Ewa; Barrister Mohammed Monguno; Lt. General A. F. K. Akale OFR (rtd); Amb. Femi George; National Boundary Commission (Secretariat).

⁴¹ Other members of the Cameroonian side are H. E. Martin E. Belinga; H. E. Prof. Maurice Kamto; Gen. Pierre Semengue; H. E. John Dion Ngute; Mr. Ernest Bodo Abanda.

⁴² The Sub-Commission on Demarcation was established to ensure the demarcation of the land boundary between two countries in line with the ICJ judgment. This body continues impressively to carry out its important work along the estimated 2000 kilometre land boundary. The JTT is made up of technical officials from Nigeria, Cameroon and the United Nations and are responsible for the physical demarcation of the land boundary between the two countries.

⁴³ This Committee was established to identify and assess the situation of the people affected by the ICJ judgment and establish modalities for the protection of their rights. The Committee has since concluded its assignment. This Committee has since concluded its assignment of resettling Nigerians in the Lake Chad area.

⁴⁴ This Committee has since concluded its assignment of resettling Nigerians in the Lake Chad area.

⁴⁵ This is made up of Surveyors, Oceanographers and Lawyers from Nigeria, Cameroon and the United Nations. They are responsible for the delineation of the maritime boundary in accordance with the ICJ ruling.

⁴⁶ This is the group that goes to all the areas affected by the ICJ judgment on the land boundary. In particular, however, the group visits Bakassi every two months to assess the human right situation, violations of any type, economic and social issues and problems of the environment and ecosystem.

⁴⁷ With particular reference to the Bakassi Peninsula, the Mixed Commission established a Working Group on the Withdrawal and Transfer of Authority from the Bakassi Peninsula. The Working Group is made up of ten (10) officials each from Nigeria and Cameroon with representations from the United Nations. This body has met twice since its establishment. Given the complex and sensitive nature of the assignment in this sector, its work has to move step by step and each step strictly has to be approved at the highest level of Government particularly by the two Heads of State and the Secretary General of the United Nations.

between Namibia & Botswana along Kwando/Linyanti/Chobe river was signed in 1999. A team of 8 Commissioners divided equally between both countries was appointed. The Commissioners consisted of permanent secretaries and Directors from the relevant agencies. The Commissioners are supported by a technical team consisting of surveyors, lawyers and hydrologists. The first meeting was held on 8 March 2000 in Windhoek. The meetings (just as latter became the practice in the Cameroon-Nigeria process) alternated between the two countries and a total of 23 meetings were held before the conclusion at the 23rd meeting was held from 22- 23 June 2002.⁴⁸

The mandate of the Joint Commission was to use scientific methods to best interpret the provision of the original colonial boundary treaty based on the Berlin Conference of 1884. The difficulties before a demarcation tribunal charged with the technical and politically fraught task of transforming legal judgments into reality was exposed in many ways in both processes. With regard to a major river feature in the Namibia-Botswana process the Berlin 1884 treaty documents indicate the river boundary as the middle of the river. However, on this river there are multiple channels and in some cases the river is not visible (no water flowing on the surface). The Commission took a reconnaissance trip, by helicopter over the area. The joint technical support team inspected the reference beacons along the river, after which they drew up an action plan that was approved by the Commission. Aerial photos/orthophotos of 0.5 resolution were acquired. Apart from the master negatives all other documents were delivered in duplicates. Where stripes of negatives fall entirely on either country, that particular country will take custody of the complete strip of negatives. In case of overlaps, negatives are shared such that one party takes the odd numbered negatives while the other takes the even ones.⁴⁹

It is clear that the task of demarcation of boundaries in Africa much like that of demarcation anywhere in the world is difficult and complex nature. The work is very sensitive and cannot in the best of circumstances be rushed.⁵⁰ It is notable that the establishment of joint commissions and mixed implementation working groups on a multilayered level is now a standard practice of boundary making and management on the African continent and elsewhere. It may be necessary for one single state to engage in such arrangements with all its neighbors and to operate them simultaneously. Indeed the requirement to do so has become unavoidable for many states as a result of the AUBP.⁵¹ Note may be taken of the experience of Burkina Faso in the maintenance of its approximately 3,500 km common boundary with six other states -Benin Republic, Cote-d'Ivoire, Ghana, Mali, Niger and Togo. Although the argument is advanced here that the AU Border Programme appears to be ambitious in terms of time frame it is hoped that this is not taken to mean that its intentions are not based on the noblest intentions of the pertinent policy makers or not laudable. Indeed the question that suggests itself is why the policy took so long in coming.

⁴⁸ Okafor *op.cit.*, pp. 13-24.

⁴⁹ *Ibid.*, pp. 13-24.

⁵⁰ The Namibia-Botswana process was perhaps quite expeditious in comparison with the Cameroon Nigeria process. It included: Ground Marking (26-07-2000 to 20-08-2000); Photography (20-08-2000 to 31-08-2000); Mapping (31-08-2000 to 15-01-2001); Delimitation and Digitising (01-09-2000 to 15-03-2001) Study Report (Technical) (15-03-2001 to 15-04-2001); Study Report (Commission) (15-04-2001 to 25-05-2001); Report Approval by the Commission (01-06-2001) Demarcation (25-06-2001 to 24-08-2001) Commission Draft Report (24-08-2001 to 14-09-2001) Commission Final Report (30-09-2001).

⁵¹ Claude Obin Tapsoba "La Politique De Gestion Des Frontieres AU Burkina Faso" 2eme Symposium International Sur La Gestion Des Frontieres Terrestres, Maritimes, Fluviales Et Lacustres Maputo, Mozambique 17 – 19 Decembre 2008, p. 3.

The continent has had more than its fair share of international disputes and boundary related problems that it is to near universal acclaim that the policy is received.⁵² It goes without saying that the African Union Border Programme if it is to succeed at all must complement the exercise of sovereignty among African States through mutual respect for national governments.

3. STATUS OF THE IMPLEMENTATION OF THE AFRICAN UNION BORDER PROGRAMME

The implementation of the AUBP was designed to be effected at several levels – national, regional and continental. It is also notable that the responsibility of each of these levels should be determined on the basis of the principle of subsidiarity and respect for the sovereignty of States. In this regard, the Declaration specifies the respective roles to be played by Member States, the Regional Economic Communities and the AU with respect to the various components of the AUBP, namely border delimitation and demarcation, local cross-border cooperation and capacity building. With respect to resource mobilization and partnership, the Ministers requested the AU Commission to coordinate and implement the AUBP on the basis of an inclusive governance involving the Member States, the RECs, locally elected representatives, parliamentarians, and civil society, as well as the European border movement, particularly the Association of European Border Regions (AEBR),⁵³ the United Nations and other AU partners having experience in cross-border cooperation.⁵⁴

In order to launch the AUBP, in accordance with the decisions as adopted by the Conference of African Ministers in charge of Border Issues, held on 7 June 2007 a number of initial measures to be taken by the Commission were identified. These include: launching of a Pan-African survey of borders, through a questionnaire to be sent to all Member States, in order to facilitate the delimitation and demarcation of African borders; identification of pilot regions or initiatives for the rapid development of regional support programmes on cross-border cooperation, as well as support for the establishment of regional funds for local cross-border cooperation; working out modalities for cooperation with other regions of the world to benefit from their experiences and to build the necessary partnerships; initiation an assessment with regard to capacity building; preparation of a continental legal instrument on cross-border cooperation; and the launching of a partnership and resource mobilization process for the

⁵² Department of Public Information News and Media Division “Secretary-General Pledges Support for African Union Border Demarcation Efforts”, In Message To Seminar On Implementation Of Regional SG/SM/11309AFR/1626, New York Available at <http://www.un.org/News/Press/docs/2007/sgsm11309.doc.htm> visited 8 December 2008; Federal Foreign Office, “Speech by Dr Frank-Walter Steinmeier, Federal Minister for Foreign Affairs, at the luncheon for African Heads of Delegation” (New York, 23 September 2008) available at <http://www.auswaertiges-amt.de/diplo/en/Infoservice/Presse/Rede/2008/080924-BM-UN-DelegationsleiterAfrika.html> visited 12 December 2008.

⁵³ The Association of European Border Regions (AEBR) was founded in 1971. It acts for the benefit of all European borders and cross border regions. The aims of the AEBR include making their particular problems, opportunities, tasks and projects intelligible; representing their overall interests to national and international parliaments, organs, authorities and institutions; initiating, support and co-ordinate their co-operation throughout Europe (creation of a network); exchanging know-how and information in order to formulate and co-ordinate common interests on the basis of the various cross-border problems and opportunities, and offering adequate solutions. Visit <http://www.aebr.net/>

⁵⁴ African Union, “Report of the Commission on the Implementation of the African Union Border Programme” Executive Council Fourteenth Ordinary Session” 29 - 30 January 2009 Addis Ababa, Ethiopia EX. CL/459 (XIV) p. 1.

implementation of the AUBP. These measures and strategies appear to be in line with good practice. However, whether they are effective and sufficient to achieve the purposes of this elaborate project, remain to be seen considering the time frame left for performance.

It needs be mentioned that a number of years were initially lost after the announcement of the AUBP. Inaction in the next few years after the Assembly of Heads of State and Government announcement of January 2002 has been as disruptive of the process as it has perhaps been surprising given the tight schedule of the initial completion date and given the apparent enormity of the tasks. It is hardly possible to overestimate the negative effect of these lost years on the possibility of a comprehensive and qualitative attainment of the tasks set before the AUBP, certainly within the regulation time. The most obvious reason for the delay appears to be the difficulties of raising enough monetary support for the programme. It may be fair to say that real work started in 2007 when the AU Commission, with the financial support of the German Technical Cooperation (GTZ),⁵⁵ organized a workshop in Djibouti, on 1 and 2 December 2007, to assist it in elaborating a three-year plan of action for the implementation of the AUBP. Representatives of RECs and other African integration organizations, African river basin institutions, the African Development Bank (AfDB),⁵⁶ the UN Secretariat and other UN institutions, the European Union (EU), the Organization of American States (OAS) and a number of specialized institutions and experts brainstormed on the programme.⁵⁷ It is not insignificant that the period after this successful workshop represents the beginning of real implementation as the vigorous discussions helped to develop strategies based on a synergy among the African and foreign experts and technocrats. Experience shared with those outside the continent focused the attention of decision makers within the AU and African governments to the financial and logistic requirements of their aspirations.

In pursuance of the Accra Decision⁵⁸ and based on this highly complex implementation matrix, the AU Commission has undertaken the following activities: a) Pan-African Survey of Borders involving principally the formulation of a highly detailed questionnaire to be sent to all Member States, in order to facilitate the delimitation and demarcation of African borders.⁵⁹ On 15 April 2008 the erstwhile Chairperson of the AUBP

⁵⁵ The Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH is an international cooperation enterprise for sustainable development with worldwide operations. It supports the German Government in achieving its development-policy objectives and provides viable, forwardlooking solutions for political, economic, ecological and social development in a globalised world. GTZ has operations in more than 130 countries in Africa, Asia, Latin America, the Mediterranean and Middle Eastern regions, as well as in Europe, Caucasus and Central Asia. It maintains its own offices in 87 countries. The company employs nearly 13,000 staff, almost 10,000 of whom are national personnel. Materials and information about the GTZ are available at <http://www.gtz.de/en/>

⁵⁶ Visit <http://www.afdb.org/>

⁵⁷ The workshop made it possible for the Commission to elaborate an implementation matrix, which covers a number of areas: capacity building; popularization; delimitation and demarcation, including the survey of African borders, the mobilization of resources and exchange of experiences; cross-border cooperation, including the elaboration of the required legal frameworks and the establishment of regional funds; partnership and resource mobilization. African Union, "Report of the Commission on the Implementation of the African Union Border Programme" Executive Council Fourteenth Ordinary Session p. 3.

⁵⁸ At its 11th Ordinary Session held in Accra, Ghana, from 25 to 29 June 2007, the Executive Council endorsed the Declaration on the African Union Border Programme (AUBP) and its Implementation Modalities, as adopted by the Conference of African Ministers in charge of Border Issues, held in Addis Ababa, on 7 June 2007.

⁵⁹ See Appendix II: AU Boundary Questionnaire -Boundary Survey for the African Union Border Programme.

Alpha Oumar Konaré, wrote to all Ministers of Foreign Affairs/External Relations of Member States, to forward the questionnaire to the appropriate Ministries and/or departments in their respective national territories, highlighting its importance in the overall implementation of the AUBP. The questionnaire covers issues relating to the status of Member States' continental and maritime boundaries, as well as the contact details of the institutions responsible for border issues (See Appendix I). By the end of 2009 only ten Member States had responded to the questionnaire. The respondent states are: Algeria, Burkina Faso, Cameroon, Mali, Mauritius, Mozambique, Namibia, Niger, Sudan and Tunisia. It is recognisable that the rate of response to the questionnaire is slow and that this will certainly make the tight deadlines imposed by the AU on the AUBP even more difficult if not impossible to achieve. Only one out of 5 countries have filled their questionnaire. Reasons for the slow responses that may be suggested include difficulties in pinpointing which precise governmental agencies/department is in a position to fill in responses; unavailability of required data; political interference; loss of data as a result of civil or other wars and conflicts such as in the Sierra Leonean experience and perhaps sheer disinterest.⁶⁰ Although there are not really many of such instances there are also factors such as the peculiar situation of Mauritania which would like to settle its northern lateral maritime boundary in the light of massive offshore oil resources but face serious problem of the uncertain status of Western Sahara whose statehood has yet to be recognised internationally and especially by Morocco.⁶¹

The second aspect of the progression of the AUBP is the establishment of a Boundary Information System (BIS) that aims to analyse and facilitate the utilization of the information received in response to the questionnaire. On 15 July 2008, the Commission organized, in Addis Ababa, a technical meeting on the establishment of the BIS which brought together experts from the RECs, the UN, GTZ and relevant African and international institutions. The core functions of the BIS are to provide an overview of the status of all African borders based on the questionnaire returns. The information received so far has been used to monitor progress towards the delimitation and demarcation of national boundaries inter se. Other functions of the BIS include the formulation of a database of African border experts and cross-border cooperation initiatives in the continent.⁶² The value of such a resource is inestimable in a continent with perhaps a predictable active future of territorial determination and redetermination. The Commission has been mobilizing the required expertise, as well as acquiring the IT equipment needed to facilitate the operation of the BIS. The value of a centralised database of boundary positions and markers in the possession of the AU cannot also be overestimated. In a continent that has been prone to destabilising internal and international conflicts and wars a dependable and trustworthy custodian of important territorial records is inestimable.

The third aspect of the AU Commission's work involves the sensitization of the governments and institutions of African states about the goals and aspirations of the AUBP. This aspect has taken the shape of (i) Regional workshops on the AUBP; ii) Publication of a

⁶⁰ The delegate of Sierra Leone pointed out at the Regional Workshop on African Border Programme (Windhoek 22-23 October 2009) held in Namibia that his country lost a lot off its geographic data during the civil war and that they are still in the process of shoring up that database by recourse to the AU records.

⁶¹ Daniel op.cit p. 3429.

⁶² African Union, "Report of the Commission on the Implementation of the African Union Border Programme" opcit., p. 5.

brochure on the AUBP⁶³; (iii) Elaboration of an Outreach Strategy. Between 2008 and 2009 five regional workshops have been concluded. The workshops targeted the various stakeholders across the continent on the AUBP and sought to mobilise their support for its implementation. The African RECs of which there are eight were particularly targeted in order to elaborate regional action plans within the framework of the implementation of the Programme. The RECs are expected under the process by the AU to have security plans to assist with the prioritisation of boundaries marking and management. The security plans are expected to be presented before the council of ministers in the near future and to receive approval. After such ratification each of them are expected to sign the plan and the process will be accelerated. The problem with this is the principle of subsidiarity operating within the AU which devolves responsibilities to states and therefore the bulk of the work can only take place meaningfully bilaterally.⁶⁴ The goal of the outreach programme is to create awareness and support for the AUBP among Member States and other actors, including civil society organizations and border communities. The strategy, thus aims to build a sustainable dialogue with key stakeholders by highlighting the potential benefits of the programme as a platform to transform African borders from barriers to bridges. The elaborate plans for information dissemination, some of which are clearly unique in the history of territorial demarcation law and practice are perhaps summed up in the following statement:

In the coming months, the Commission will embark on the implementation of the pan-African aspects of the strategy. Among other activities, it is planned to feature articles and place adverts in in-flight magazines of major African airlines, especially given their role in connecting the African countries and allowing exchanges between nations; carry out specific activities with pan-African TV broadcasters; and work with existing African film festivals to introduce awards for film making competitions on border issues.⁶⁵

One of the ways the AUBP has been presented to stakeholders is that it contains measures that are aimed at facilitating cross-border cooperation of local initiatives. The basic framework of a database on legislation relating to border cooperation and the outlines of a continental legal framework for the engagement of cross-sector initiatives involving both the

⁶³ In mid-August 2008, the Commission, with the assistance of UNHCR, published in a booklet format the Declaration on the AUBP and its Implementation Modalities. This booklet was circulated to all diplomatic missions in Addis Ababa, as well as to a number of institutions in the continent and outside Africa. It has also been posted on the AU website. FIND

⁶⁴ The first regional workshop took place in Kampala, from 24 to 25 September 2008, under the joint auspices of the AU and the EAC. The workshop was attended by the following members of the Eastern Africa region: Comoros, Djibouti, Ethiopia, Kenya, Mauritius, Seychelles, Somalia, Sudan, Tanzania and Uganda. Other participants included CENSAD, COMESA, ECCAS, ECOWAS and IGAD, the United Nations, GTZ and other partner organizations. The second regional workshop took place in Algiers, for the Northern African Region, from 16 to 17 October 2008. Algeria, Egypt, Libya, SADR and Tunisia participated in the workshop. Other participants included representatives of CENSAD, COMESA, EAC, ECCAS and ECOWAS, as well as the UN, GTZ and other institutions. The three other regional workshops were held in 2009. The workshop for Central Africa took place in Libreville from 19 to 20 February 2009; the one for Southern Africa in October 2009 and the one for West Africa, in Ouagadougou, in April 2009. African Union, "Report Of The Commission on the Implementation of the African Union Border Programme" Executive Council Fourteenth Ordinary Session 29 - 30 January 2009 Addis Ababa, Ethiopia EX. CL/459 (XIV) pp. 5-6.

⁶⁵ African Union, "Report of the Commission on the Implementation of the African Union Border Programme" Executive Council Fourteenth Ordinary Session 29 - 30 January 2009, *opcit.*, p. 7.

public and private sector are for the first time in African history emerging. The AU Commission, has also taken steps aimed at facilitating the communication by the former colonial powers of all information in their possession concerning the delimitation and demarcation of African boundaries, in line with paragraph 5 (a - iii) of the Declaration on the AUBP and its Implementation Modalities. Certain preliminary conclusions may be reached on these developments. Whether or not the AUBP succeeds in its objectives within the specified time is certain to be a subjective assessment but the continent can not but benefit tremendously from the strategic and systematic exercises conducted under the AUBP. The law, diplomacy and politics of the AUBP and its current direction is an indication of the political maturity and coming of age of African states. This process and its modest achievements deserve closer study and attention than is currently accorded to it by lawyers, social scientists and other scholars -even those on the African continent itself.

4. FRONTIERS AND BOUNDARIES IN THE CONTEXT OF INTERNATIONAL LEGAL FRAMEWORK OF TERRITORIAL SOVEREIGNTY AND JURISDICTION

It is necessary to set the ambition of Africa to successfully demarcate and delimit its independent and sovereign territories within the context of international law and international relations. Terms like boundaries, border, frontiers, delimitation demarcation and territory are often used interchangeably in language without much deference to their technical legal connotations. It is necessary to formulate clear distinctions between these terms, which sometimes even in legal literature, are treated as synonyms and are virtually indistinguishable to the layman while recognising at the same time the interconnectedness of the pertinent concepts.

Sovereignty in law is often considered to be the essence of the state. It explains the powers of a state over its entire territories and its inhabitants. The normal complements of state rights including the typical case of legal competence are described commonly as sovereignty.⁶⁶ The concept is political in conception and is popularly symbolised by the Leviathan of Hobbes. It implies the supreme authority of a state, which recognises no higher authority in the region.⁶⁷ Bodin developed the concept in terms of internal strength and external limitation of power.⁶⁸ Jowitt picks up on this theme and defines sovereignty as: “[t]he power in a state to which none other is superior”.⁶⁹ As the respected jurist Max Huber wrote in his opinion in the *Island of Palmas Arbitration between the U.S.A and the Netherlands*, “[s]overeignty in the relations between states signifies independence. Independence in regards to a portion of the globe is the right to exercise therein to the exclusion of any other the functions of a state...”⁷⁰ In modern literature the term sovereignty has been employed in four different ways, which do not necessarily overlap in the sense that a state can have one and not necessarily the other.

They are namely -international legal sovereignty, Westphalian sovereignty, domestic sovereignty and interdependence sovereignty. Reference to international legal sovereignty

⁶⁶ Ian Brownlie, *Principles of Public International Law*, (Oxford: Clarendon press, 1998) p. 106.

⁶⁷ G.S. Sachdeva “Sovereignty in the Air - A Legal Perspective”, 22 *Indian Journal of International Law* (1982), p. 398.

⁶⁸ Imre Anthony Csaffi, , *The Concept of the State Jurisdiction in International Space Law: A Study in the Development of Space Law in the United Nations*, (Hague: Martinus Nijthoff, 1971), p. 50.

⁶⁹ *Jowitts Dictionary of English Law*, 2nd Edition, Vol. 2 John Burke (ed.), (Sweet and Maxwell Ltd., London, 1977) p. 1678.

⁷⁰ *Island of Palmas Case* (1928) R.I.A.A.; 2 829.

denotes the practices that are associated with mutual recognition, usually between territorial entities that possess formal juridical independence. Westphalian sovereignty refers to political organisation, which is based on the exclusion of external actors from authority structures within a specific territory. Domestic sovereignty explains the ability of a state to exercise effective control within its territory and the competence to construct formal organisation of political authority within the polity. Lastly, interdependence sovereignty is used in reference to the ability of public authorities to regulate the flow of information, ideas, goods people, pollutants, or capital across the borders of their state.⁷¹

The Chinese view on state sovereignty is that it is tantamount to territorial integrity and that ascertainment of territorial boundaries is a factor necessarily “conducive to the sound development of relations with neighbours” and “peace and stability in the border regions”⁷² A likely model in terms of legal and political attitude to boundary cooperation and management is that expressed by a Chinese delegate who asserted:

We would continue to uphold the policy of friendship and partnership with all neighbours and concurrently promoting security and development in the border regions, so as to create an East Asia of everlasting peace and common development.⁷³

This Westphalian conceptualisation of sovereignty constitutes the predominant approach of African states and is in many ways based on their shared history of colonial experience and hard fought independence struggles. Territorial jurisdiction is seen as the sum total of the state’s powers in respect of a portion of *terra firma* under its governmental authority including all persons and things therein, and the extra-territorial activities of such persons.⁷⁴ It denotes the power of legislation, executive and judicial competence over a defined territory.⁷⁵ It is generally derived from territorial sovereignty, but it may also be derived from treaties, as in the case of mandated, trust or leased territories. It may also derive from *occupatio pacifica* or *bellica*.⁷⁶ The principle of territorial supremacy arises from the view that a state has absolute and exclusive authority over people, things and events within its own territory and therefore may exercise jurisdiction over them in all cases.⁷⁷ But the problem of

⁷¹ International legal sovereignty and Westphalian sovereignty centre upon issues of legitimacy and authority but exclude control. However, they are both based on what Krasner calls “certain distinct rules or logic of appropriateness”. The rule for international legal sovereignty is that recognition is extended to territorial entities which possess formal juridical independence while the rule for Westphalian sovereignty is the exclusion of external actors both *de facto* or *de jure*, from state territory. On the other hand domestic sovereignty involves both authority and control in the sense that it encompasses the specification of legitimate authority within a given state and the extent to which that authority may be exercised. Interdependence sovereignty is exclusively concerned with control and not authority as it explains the inherent capacity of the state to regulate movements across its borders. See Stephen D. Krasner, *Sovereignty: Organised Hypocrisy*, (New Jersey: Princeton University Press, 1999) pp. 3-4.

⁷² Fengshan *op.cit.*, p. 14.

⁷³ *Ibid* p. 56.

⁷⁴ B. Cheng, “The Extra-Territorial Application of International Law,” *Current Legal Problems* (1965), p. 135.

⁷⁵ See U.O. Umzurike, *Introduction to International Law* Lagos: Spectrum Law Publishing (1993) p. 86.

⁷⁶ Cheng, *op. cit.*, p. 135.

⁷⁷ Some authors like Starke choose to refer to these overwhelming powers as territorial sovereignty. The question then arises as to whether there is a possible distinction between territorial sovereignty and territorial jurisdiction. Oppenheim seems to have effectively answered this query by stating that he sees

what may properly be considered state territory for purposes of jurisdiction is not always clear. This brings us to the concept of territory itself.

The corpus of state territory and its appurtenances (airspace and territorial sea together with the population and government), comprise the physical and social manifestations of the state, which is the primary type of an international legal person.⁷⁸ The territory of a state is separated from those of other states by boundaries. A boundary may be natural or artificial.⁷⁹ Apart from land territory, which is permanently above low-water mark, territorial sovereignty may be exerted over all the geographical features associated with or analogous to land territory. Permanence, accessibility and natural appurtenance are naturally essential qualities. Furthermore, it is clear that, no one knowledgeable in international law can deny that the territory of a state including its earth surface, "... a sector of the earth below and a sector of space above"⁸⁰ are within the areas of exercise of jurisdiction permitted by international law. Indeed, the tridimensionality of state territory is recognised in customary International Law. A state's territory is considered to consist of three sectors;⁸¹ (1) legitimately owned land mass within its borders, including the internal water territories, rivers, lakes, reservoirs, canals and the territorial sea; (2) the land mass below the surface of the soil (including its mineral resources) down to the centre of the earth and; (3) the airspace and atmosphere above the ground level up to an extent which is still the subject of intense debate in academic circles.⁸²

The tridimensionality theory of territorial jurisdiction received judicial assent in relation to African situation in the reasoning of the ICJ in the *Frontier Dispute (Benin / Niger)* 2002. The Chamber took note of Niger's claim that its boundary with Niger in a particular sector is situated at the middle point of each of a set of bridges given that the construction and maintenance of these structures has been financed by the Parties on an equal basis and that the bridges are their joint property. Benin, for its part, submitted to the Court that a difference between the location of the boundary on the bridges and the course of the boundary in the river beneath would be incoherent.

The Chamber observed that, in the absence of an agreement between the Parties, the solution would be to extend vertically the line of the boundary on the watercourse and noted

"Independence and Territorial as well as personal Supremacy (which Starke seems to have referred to as territorial sovereignty) as aspects of Sovereignty". (Brackets mine). Cf. Brownlie (1998), *op. cit.*, pp. 105-106. See J.G. Starke, *Introduction to International Law* (London: Butterworths 1984) pp. 151-152. Oppenheim *op. cit.*, p. 286. See also D.H. Ott, *Public International Law in the Modern World*, (Britain: Pitman Publishing, 1987), p. 135.

⁷⁸ Brownlie (1998), *op. cit.*, p. 107.

⁷⁹ Umozurike, *op. cit.*, p. 107.

⁸⁰ J.C. Cooper, "High Altitude Flight and National Sovereignty", *Explorations in Aerospace Law: Selected*, (Montreal: McGill Univ. Press, 1968) p. 157.

⁸¹ G.I. Tunkin, ed. *International Law*, (Moscow: Progress Publishers, 1988), p. 400.

⁸² In spatial terms the law knows two other types of regime, which must be highlighted. They are the *res nullius* and the *res communis*. The *res nullius* is that land territory or environment legally susceptible to acquisition by states but not as yet placed under any state's territorial sovereignty. The European powers made use of this concept which though legal in form was often political in application in that it involved the occupation of areas in Asia and Africa which were often in fact the seat of previously well organised communities.⁸² There have also been some unsuccessful attempts to forge a link between this concept and outer space territory. In fact it would appear that with or without the use of the technicality of *res nullius* certain states are set to embark on the introduction of property rights over outer space based resources for national and private ends despite the position of current international law on this issue. The *res communis* is that territory or environment such as the high seas or Antarctica, which is not capable of being legally placed under state sovereignty. In accordance with customary international law and the dictates of practical convenience, the airspace above and subsoil below each of the three categories, state territory, *res nullius* and *res communis* are included in each category.⁸² Ian Brownlie, *Principles of Public International Law*, (Oxford: Clarendon Press, 1966), pp. 98, 118.

that this solution accords with the general theory that a boundary represents the line of separation between areas of State sovereignty, not only on the earth's surface but also in the subsoil and in the superjacent column of air.⁸³ Moreover, the solution consisting of the vertical extension of the boundary line on the watercourse avoids the difficulties which could be engendered by having two different boundaries on geometrical planes situated in close proximity to one another. Following this line of reasoning, the Chamber concluded that the boundary on the bridges between Gaya and Malanville follows the course of the boundary in the river.⁸⁴

5. SYNTHESIS OF SOVEREIGNTY AND JURISDICTION WITHIN THE CONTEXT OF FRONTIERS AND BOUNDARIES

Sovereignty and territorial sovereignty are thus, key concepts of public international law. They define essential attributes of a state, the primary subject of international law.⁸⁵ Sovereignty is said to constitute "the basic constitutional doctrine of the law of nations, which governs a community constituting primarily of states having a uniform legal personality"⁸⁶ The presence of sovereignty imposes a duty of non-intervention in the exclusive jurisdiction of other states. In this way territorial integrity is an integral part and a "necessary corollary to the principle of territorial sovereignty"⁸⁷ Very importantly the existence with respect to a state of "territorial sovereignty extends to the mineral resources in the soil and subsoil of their land territory and territorial sea to an unlimited depth".⁸⁸ It follows, therefore, that no state may exercise rights over mineral resources of other states without their consent.⁸⁹

There are a total of 351 separate geographic entities in the world today. This includes 194 independent States⁹⁰; several dependencies and areas of special sovereignty, such as the

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⁸⁴ This finding was made without prejudice to the arrangements in force between Benin and Niger regarding the use and maintenance of the road in issue. The Chamber specifically observed in particular that the question of the course of the boundary on the bridges is totally independent of that of the ownership of those structures, which belong to the Parties jointly. The logic of the Courts jurisprudence in this area is particularly useful for those tasked with the role of demarcation according to the courts decision. This is in that even where the delimitation achieved by the Court deprives a state of the ownership of a boundary road, bridge or maintained track it may still access to that feature for the purposes of maintenance and/or use. Similar issues have cropped up at the demarcation stages of the Cameroon-Nigeria process in relation to the implementation of the Courts judgment in the Northern sector.

⁸⁵ J.P. Bouvet, *L'Unite de Gisement* (Jan 13, 1997) Doctoral Thesis at Univaersite Pantheon-Assas-Paris, vol. 15.

⁸⁶ Ian Brownlie, *Principles of Public International Law* 287 (4th ed. 1990).

⁸⁷ Rainer Lagoni, *Oil and Gas deposits Across National Frontiers*, 73 *Am. J. Int'l Law* 215-16 (1979) p. 217.

⁸⁸ L. Oppenheim, *International Law* 462 (H. Lauterpacht, 8th ed. 1955); See also P. Fauchille, *Traite De Droit International Public* 99 (H. Bonfils, 8th ed. 1925)); Lagoni op. cit., p. 216.

⁸⁹ *North Sea Continental Shelf Cases*, 1969 ICJ 1969 ICJ at 22.

⁹⁰ The independent states are as follows: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, The Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Burma, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Democratic Republic of the Congo, Republic of the Congo, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, The Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati,

Australian - Ashmore and Cartier Islands, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Heard Island the McDonald Islands; and areas of indeterminate sovereignty such as Antarctica, Gaza Strip, Paracel Islands, Spratly Islands, West Bank, and Western Sahara.⁹¹ The land boundaries in the world total add up to approximately 251,060 km (if care is taken not to count shared boundaries twice). There is a high incidence of states with multiple neighbours with which they share boundaries.⁹² Just slightly under a quarter of all independent states are landlocked and two of these, Liechtenstein and Uzbekistan are in fact doubly landlocked.⁹³

This rich diversity has led to a variety of conflict situations ranging from traditional bilateral boundary disputes to unilateral claims of one sort or another. Adjudication over disputes relating to international terrestrial and maritime boundaries has occupied the attention of numerous international courts and tribunals particularly in the last hundred years. Nevertheless a staggering number of wars and military conflicts have arisen due to border, frontier and territorial questions. Because many of these remain unresolved and as a result of pending geopolitical questions, or irredentist issues the comment attributed to Verzijl remains apposite. He wrote:

“Political reality shows *ad nauseam* how much weight is still in the present time attached to the frontier as a strict line of separation between territorial sovereignties and how necessary it remains to keep arms at the ready with the object of defending the national territory against treacherous foreign invasions, intrusion of spies, infiltration of subversive propaganda etc. Frontiers as defensive partitions remain indispensable.”⁹⁴

Boundaries whether natural, geographic, strategic, secure or artificial should at all time remain ascertainable. They should be difficult to violate and strongly defensive and verifiable in character as nature, art, agreement or convention can make them. The importance of international boundary delimitation however transcends the defence and security factor. In

North Korea, South Korea, Kosovo, Kuwait, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Federated States of Micronesia, Moldova, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nauru, Nepal, Netherlands, NZ, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russia, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tajikistan, Tanzania, Thailand, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, UAE, UK, US, Uruguay, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Zambia, Zimbabwe. See the CIA, *The World Factbook* available at <https://www.cia.gov/library/publications/the-world-factbook/docs/notesanddefs.html> visited 10 December 2008

⁹¹ See *The World Factbook* *ibid*.

⁹² China and Russia, for instance each border 14 other countries.

⁹³ The list of presently recognised 45 landlocked states and territories include: Afghanistan, Andorra, Armenia, Austria, Azerbaijan, Belarus, Bhutan, Bolivia, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Czech Republic, Ethiopia, Holy See (Vatican City), Hungary, Kazakhstan, Kosovo, Kyrgyzstan, Laos, Lesotho, Liechtenstein, Luxembourg, Macedonia, Malawi, Mali, Moldova, Mongolia, Nepal, Niger, Paraguay, Rwanda, San Marino, Serbia, Slovakia, Swaziland, Switzerland, Tajikistan, Turkmenistan, Uganda, Uzbekistan, West Bank, Zambia, Zimbabwe.

⁹⁴ JHW Verzijl, *International Law in Historical Perspective*, Vol. III (Netherlands: A.W. Sijthoff Leyden, 1970) pp. 516-7.

the long run a boundary may determine for millions the language to speak and the laws that govern their lives. Even mundane aspects of municipal existence such as the books and newspapers which people will be able to buy and read, the kind of money they shall use, the markets in which they must buy and sell and perhaps the kinds of food they may be permitted to eat are all factors of the territorial boundaries in which they belong⁹⁵ The boundaries of a State also determine the lateral limits of the airspace appertaining to that State. However the inherent difficulties that attend human efforts to develop infallible boundaries or frontier is revealed in the existing accounts of border villages in South East Asia which indulge in removing or shifting boundary pillars at the time tax collectors of their own government arrive in autumn and voluntarily and temporarily placing their area in a neighbouring country. Many such opportunistic approaches to boundaries exist in Africa. In the tripoint between Cameroon, Nigeria and Chad around the area of the Lake Chad the local populations simply move along with the increasingly declining valuable resource of the Lake water without regard to national sovereignty.⁹⁶

The placement or misplacement of borders has traditionally presented grave problems. Till date there exists no consensus as to what constitutes a boundary in international law. Neither is there clear guidance as to the criteria for measurement or delimitation. There is however a distinction between 'boundary' and 'frontier' which is necessary to mention here because of its possible relevance in the emerging African process. In its geographical sense a natural boundary consists of such features as water, a range of rocks or mountains, deserts, forests and the like.⁹⁷ In contrast 'artificial boundary' includes such signs as have been purposely put up to indicate the way of the imaginary line. Natural boundaries would apply mostly to land territories, whereas artificial boundaries are *prima facie* more suited for the delimitation of airspace and maritime zones. However, the distinction between natural and artificial boundaries in the geographical sense has been criticised on the ground that it is not sharp, in so far as some natural boundaries can be artificially created. Thus a forest may be planted and desert may be created, as was the frequent practice of the Romans of antiquity for the purpose of marking frontiers. In essence, qualities, which really belong merely to the surveyor's lines of demarcation, have been attributed to boundaries as political lines of separation and given legal significance.

In reality the regional movements of civilisation have not in fact conformed themselves in all cases to the physical contour line of nature.⁹⁸ This is particularly true of African states. Indeed, the utility of natural features as a marker of natural boundaries breaks down irretrievably in the delimitation of certain environments such as great ocean expanses, air space and outer space. Indeed natural boundaries are difficult to determine in a totally natural environment where there are no visually perceptible differences in features. Thus, most

⁹⁵ S.W. Boggs, *International Boundaries: A Study of Boundary Functions and Problems* (1940) p. 5.

⁹⁶ Nigeria handed thirty one (31) villages in the Lake Chad area to Cameroon. The Nigerian population had been following the receding water in the direction of Cameroon. The villages are: Aisa Kura, Ba Shakka, Chika'a, Darak, Darak Gana, Doron Liman, Doron Mallam, Dororoya, Fagge, Garin Wanzam, Gorea Changi, Gorea Gutum, Jibrillaram, Kafuram, Kamunna, Kanumbari, Karakaya, Kasuram Mareya, Kalti Kime, Kolaram, Logon Labi, Loko Naira, Mukdala, Murdas, Naga'a, Naira, Nimeri, Njia Buniba, Ramin Dorina, Sabon Tumbu and Sokotoram. Nigeria also gained the village of Dambore in this sector. All these exchanges and transfers between the two countries took place in December, 2003 as a result of the Judgment of the ICJ in the Cameroon Nigeria case. See UNOWA, Cameroon–Nigeria Mixed Commission: Background (www.un.org/Depts/dpa/prev_dip/africa/office_for_srs/cnmc/bkgground.htm) visited 14 December 2008.

⁹⁷ Oppenheim and Lauterpacht, *International Law* Vol. 1 8th edition (1955) p. 531.

⁹⁸ C. Fenwick, *International Law* 4th ed., (New York: Appleton-Century-Crofts (1965), p. 437.

boundaries today result from conscious and arbitrary delimitation exercise. For this reason certain jurists are of the view that nowadays no boundaries can be regarded as 'natural' boundaries and that consequently all boundaries are artificial. According to this view, rivers, mountains, deserts etc. are 'derived artificial boundaries' as distinct from the more commonly referred to 'artificial boundaries' -such as Parallels of latitude and meridians of longitude. These latter categories are, therefore, artificial boundaries properly so called.⁹⁹ It is important to highlight the limitations of reliance on natural boundaries. Simply because a line is marked along natural or geographical lines does not necessarily imply that it is a 'natural' line of separation between neighbouring peoples or territories. There are a host of other considerations, which must be given effect to in arriving at a consensus with legal significance.

'Frontier' on the other hand cannot be used interchangeably with 'boundary' because (a) boundary denotes a line whereas a frontier is more properly a region or zone having width as well as length and therefore merely indicates, without fixing the exact limit, where one State ends and another begins. In effect a boundary girds a frontier and more often than not, it is the expansion of a frontier owing to pressure from within which so frequently renders a boundary necessary.¹⁰⁰ A frontier is but a vague and indefinite term until a boundary is set putting a hedge between it and the frontier of a neighbouring State. The term 'Boundary', therefore, denotes a line such as may be defined from point to point in an arbitral award, treaty boundary commission report agreement etc. A frontier is more properly a region or zone having width as well as length. Therefore, while delimitation and then demarcation of boundary were the central tasks before the Eritrea-Ethiopia boundary Commission, and the Cameroon-Nigeria Mixed Commission,¹⁰¹ it is more apt to speak presently in terms of the frontiers of airspace and outer space - for there exists in the present no specific boundaries between the two in international law.¹⁰²

One may, however, observe that the wide acceptance of the existence of a frontier makes the establishment of a boundary possible but not necessarily easy. In fact in many instances it may be the seeming impossibility of establishing a boundary or the lack of satisfactory technical details that makes States and international lawyers settle for the recognition of frontiers. It is in this category that majority of African 'frontier-boundaries' exist.

The importance of clearly defined borders, boundaries and frontiers becomes more discernable when 'boundary disputes' or 'frontier disputes' occur. As a matter of principle the determination of the location in detail of boundaries is distinct from the issue of title to territory. This is because considerable dispositions of territory may take place in which the grantee enjoys the benefit of a title derived from the grant although no determination of the precise frontier line is made. On the other hand precise determination of the frontier may be made a suspensive condition in a treaty of cession. On occasion the distinction between cession and the fixing of a boundary involves considerations of convenience rather than logic. Nevertheless there is no gainsaying the fact that questions of territory and frontiers are quite

⁹⁹ See Paul de Lapradelle, *La Frontiere* 1928 p. 175; see Yehuda Z. Blum, *Secure Boundaries and Middle East Peace: In the Light of International Law and Practice* (Jerusalem: Hanakor Press, 1971).

¹⁰⁰ O. Cukwurah, *The Settlement of Boundary Disputes in International Law* (Manchester University Press, 1967) p. 11. For the distinction between boundaries and frontiers see further Sarga P. Sharma, *Delimitation of Land and Sea Boundaries between Neighbouring Countries*, (New Delhi: Lancers Books, 1989) et seq. see also Blum, *ibid*, p. 15.

¹⁰¹ See Progress Report of the Secretary-General on Ethiopia and Eritrea to the Security Council of 13 December 2001 available at <http://www.pca-cpa.org/PDF/UNSG%20Report3.pdf>

¹⁰² See further on this issue Gbenga Oduntan, (2003) *op.cit.*, et seq.

interrelated and at times it may be difficult, and perhaps serve no useful purpose to determine whether a frontier or boundary dispute is in fact a territorial one or vice versa in as much as the relevant legal criteria are applicable to either class of the dispute.

Sometimes the distinction between disputes that concern international boundaries and disputes arising out of the acquisition of territory are blurred. Indeed both boundary and territorial questions are part of the larger question of territorial sovereignty.¹⁰³ In the *Temple of Preah Vihear* (Cambodia v. Thailand) even though the dispute in principle involved conflicting claims to sovereignty over the disputed regions the I.C.J. nevertheless dealt at length in its decision on the legal boundary line between the two.¹⁰⁴

From a strict legal point of view however, factual and legal differences exist between the two types of disputes. Boundary issues are involved when two (or more) adjacent governmental entities contend about the line to be drawn between their respective territorial domains. In such cases it is common ground that both (or more) States have lawful claims to adjacent territory. The real question to be decided is how the territory can be divided between them. For instance, in accordance with the provisions of the 12 December 2000 Agreement Between The Government of the Federal Democratic Republic of Ethiopia and the Government of The State of Eritrea, the mandate of the *Eritrea-Ethiopia boundary Commission* is to delimit and demarcate the colonial treaty border based on pertinent colonial treaties of 1900, 1902 and 1908) and applicable international law (*Eritrea-Ethiopia boundary Commission Arbitration 2000*)

On the other hand territorial disputes may not always involve the drawing of lines between adjacent territorial communities. In fact disputes relating to territorial acquisition will involve the intent by one party to exercise sovereignty and jurisdiction over either the entire territory or large parcels of it, belonging to another State including a denial of the rights of the competing party to that territory. Even though disputes about the acquisition of territory are strictly competitive as between the claimants, in the sense that one must lose completely, a boundary dispute on its own may not involve the complete suppression by one entity of another in relation to the particular region. There is the possibility of a boundary dispute involving more than two parties in. The Somali claims in the 1970's incorporating as it did all Somali dominated adjoining areas involved a four-way controversy between Kenya, Ethiopia, the French, and Somali land. Similarly disputes relating to territorial control may involve more than one State and may occur in a territory, which historically belongs to no State, such as the overlapping claims over Antarctic sectors made by Chile Argentina and the United Kingdom.

Territorial questions would ordinarily involve the traditional rules governing modes of acquisition of title (e.g. discovery, occupation, conquest, cession or prescription) whereas boundary questions involve only those rules, which are relevant to specifying functions performed in the fixation and maintenance of boundaries (e.g. determination, delimitation, demarcation and administration.. The Iraqi attempt to annex Kuwait in 1990 is a classic case of a dispute relating to territorial acquisition. So also is the continuous challenge in recent times by Turkey of the sovereignty of several hundred Greek islands, Greek territorial waters, and of Greek national airspace. The *Land and Maritime Boundary between Cameroon and Nigeria* case is an example of a boundary dispute that involves territorial (Bakassi Peninsula) and boundary (land and maritime) aspects.

¹⁰³ Surya P. Sharma, "Boundary Dispute and Territorial Dispute: A Comparison", Vol. 10 *Indian Journal of International Law* (1970) No. 2 (1970).

¹⁰⁴ ICJ. Rep. 1962 p. 14.

Certain principles assist international courts and tribunals in the resolution of boundary and territorial disputes. In the words of the arbitrator in the *Island of Palmas case*, “the act of peaceful and continuous display (of sovereignty) is still one of the most important considerations in establishing boundaries between States.” To this extent territorial disputes and boundary or frontier disputes are interrelated. In most cases boundary changes imply the diminution or enhancement of territory and jurisdiction for the affected states. The principle of *uti possidetis* operates to ensure that boundaries have a compelling degree of continuity and finality. In order to avert numerous boundary conflicts and wars among the African States, in 1963 and 1964, the founding fathers of the Organization of African Unity (OAU) found it appropriate to adopt the principle so as to preserve the territorial *status quo*.¹⁰⁵ The Permanent Court of Arbitration established this as far back as 1909 in the *Grisbadarna case* when it stated that “it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible.”¹⁰⁶ The International Court of Justice has followed this principle in the *Temple case*¹⁰⁷ as well as the *Frontier Land Case*¹⁰⁸ Furthermore a party’s statements and actions with respect to a boundary may preclude it from asserting inconsistent claims or contesting the sovereignty over the territory at a later stage.¹⁰⁹ Acquiescence however is not to be lightly presumed and each case will be examined individually with due consideration of all the facts (*La Palena case*).¹¹⁰

In sum it is clear that matters of delimitation and demarcation of boundaries and frontiers between territories are important in law and in fact. The saying that good fences make good neighbours holds true in international relations and has particular significance in terms of territorial sovereignty and jurisdiction. Settling disputed borders on a mutually acceptable basis removes an important irritant to relations and the means and methods as to which this can be achieved must continue to receive scholarly attention.

6. SECURITY, POWER AND POLITICAL DIFFERENTIALS IN AFRICAN BOUNDARY MANAGEMENT

International borders are a security issue for all governments but particularly so in Africa because of its porous national borders. Free movement across national boundaries is not necessarily a negative development especially in a continent that was carved up rather insensitively as recently as the last century. However what is witnessed is that border communities have become host to people smuggling, drugs, illegal weapons and contraband, organized crime syndicates, cattle rustling, wildlife poaching, insurrection, incursion and terrorist activity, auto theft, Illegal and undocumented immigrations as well as illegal border crossings. It is ironic that the same states that have such severe problems are have a reputation for excessive red-tape, that slows down if not render impossible genuine legal international and cross border trade. It is estimated that it takes an average of 40 paper documents and 200 data elements to undertake one customs transaction across an African border. While it takes one day to clear customs in Estonia, it takes 30 days on average in an African country. The

¹⁰⁵ See Article III (3) of the OAU Charter and resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964

¹⁰⁶ Scott, Hague Court Reports (1916), p. 122.

¹⁰⁷ ICJ Reports 1962, p. 6.

¹⁰⁸ ICJ Reports 1959, p. 209.

¹⁰⁹ See *Legal Status of Eastern Greenland*, 1933 P.C.L.J. (ser. AB) No. 53, at 193-94

¹¹⁰ *La Palena case* (Argentina-Chile), 38 I.L.R. 10 (1966)

insecurity surrounding boundary posts ought therefore to be of paramount interests to the existing RECs.¹¹¹

Clearly there is a need for more policing and security presence but this alone will not solve the many security problems posed by borders. A more innovative and progressive approach is for the states and the RECs to provide more investments and targeted economic help to the boundary communities to spark economic activities. This will make such areas less attractive to criminal elements that prey in the present shadowy 'no man's land' that boundary areas have been turned into since the colonial era and to the present time.

Power and political differentials between neighbouring states can make boundary conflicts difficult and rather intractable. The difference between Anglophone and Francophone traditions, democracies and military dictatorships, resource rich and resource poor states can assume profound importance in boundary issues. Yet the destinies of big and small countries are in many ways shared when they are contiguous territories and to this extent boundary justice save in very limited circumstances must be blind. It is, therefore, imperative that the AU Border Programme develop means and methodologies that are designed to level the playing field for smaller and economically least developed states that may have to undergo delimitation and demarcation exercises. One of the issues that have dogged the land and maritime dispute between Cameroon and Nigeria even before it was brought before the International Court is the political reality of the power differentials between the parties. Cameroon is a smaller state in size population and economic circumstances in comparison to its giant of Africa neighbour a veritable and long standing member of the Organisation of Petroleum Exporting Countries (OPEC) with substantial oil reserves as the 7th leading producer of oil in the world. The delicate balance that has had to be achieved by all concerned has therefore been how to adhere to the equality of states principle without necessarily creating disenchantment among the Nigerian government and peoples in furtherance of executing a judgment which has caused the loss of sizeable population to a smaller state.

As geographical neighbours with an approximately 2000 long common land boundary, a shared colonial history and the experience of a UN referendum which reshaped both countries it is impossible to overemphasise the fact that more factors connect the two states together than divide them. It can be recalled that despite the many years of boundary tensions in certain sectors and particularly in relation to Bakassi Peninsula, children on both sides of the boundary communities attended schools that are based in the neighbouring country without let or hindrance and farmers relied on regular vaccination of their livestock from whichever state that was close enough. In 2004, some 17,000 Nigerian refugees were reported to have fled ethnic conflicts between pastoralists and farmers in 2002 and found refuge in Cameroon where many of them still reside.¹¹²

The ties between both States run very deep and cut across all strata of their societies. There are currently an estimated three million Nigerians permanently resident in Cameroon. The pattern of settlement of these Nigerians is quite diverse and spread not only in the urban centres but also in rural areas. They are engaged in many professions from trading to farming and fishing. A census was recently conducted by Cameroonian officials, which revealed that out of an estimated 20,000 fishermen plying their trade in a region of Cameroon 19,000 of them were Nigerians. It is, therefore, easy to see that both parties must retain a view of the big picture of things and must maintain good and cordial relations.

¹¹¹ Okumu op.cit., pp. 14, 19, 26, 36.

¹¹² See the discussion on Nigeria transnational issues in *World Fact Book* available at <http://www.cia.gov/cia/publications/factbook/geos/ni.html> visited 2nd April 2006.

Another boundary regime of long and complex history with power differentials between the parties that show the importance of keeping both the less and more powerful states in full confidence of the fairness of the process and negotiations is that of Shatt-al Arab river. Kaikobad wrote:

The history of the Shatt question has shown that the distribution of power between Iran and Iraq has frustrated a final and conclusive settlement of *all* the issues, and has on every occasion prompted an agreement which the weaker State was less inclined to accept. Yet in legal terms there were no outstanding problems: the alignment had, in every case, been 'conclusively' settled.¹¹³

It is indeed true that the politico-historical provenance of a frontier question is perceived as assuming considerable legal significance by those placed in charge of resolving the situation. It is important not only because it provides perspective to the dispute, but also because details of the political history tend to reveal the incidents and distribution of power between the parties and the role played by it in the development of the frontier.¹¹⁴ Without a proper analysis of the political and power differentials the appropriate solutions may elude mediators, negotiators and those charged with resolving territorial or boundary disputes between states. The role that the particular colonial experience of African states has on their national geographic image and their attitude towards irredentism deserves closer cross-disciplinary studies. Both set of facts, viz. the questions of power and of the historical sources of difficulties, tend to create problems for legal analysis and featured largely in the Cameroon-Nigeria process. It is to the credit of the Mixed Commission that it minimised as much as possible these power differentials at the very stage where it tends to afflict the parties most – outside the Court and away from the protection of the equality of arms principle of the adversarial system practiced therein.

It helps if the neighbouring states involved in a border implementation and/or demarcation process do their best to reassure each other of their support on the broadest issues of foreign and domestic policies in which they agree. Cameroon and Nigeria sent messages of good will to each other before major events such as elections. Sessions of the CNMC were sensitively scheduled to avoid allowing the meetings to clash with national celebrations and elections. Important concessions to delay or accelerate the process were granted on both sides to coincide with major national elections in which the incumbent government sought an advantageous impression in the minds of the electorate or to manage parliamentary crisis. Similarly after 40 years of negotiations China and Russia in 2006 heightened their level of diplomatic relations with visits and favourable pronouncements at the highest levels around the period they attained the difficult task of resolving boundary disputes along their 4,300-km-long border. Russia expressed its strong support for the one China policy and opposed Taiwan joining the United Nations and other major international organizations. Russia was also in agreement with China that the Tibet Autonomous Region is as an inalienable part of China.¹¹⁵

¹¹³ Kaikobad p. 103.

¹¹⁴ Kaiyan Homi Kaikobad "The Shatt-Al-Arab River Boundary A Legal Reappraisal" *LVI BYIL* 1985 p. 103.

¹¹⁵ The Russian President announced during a visit to his Chinese Counterpart "The Russian side will continue to adhere to the one-China policy and recognize the government of the People's Republic of China as the sole legitimate government of the whole of China," the statement says. And "Taiwan is an inalienable part of the Chinese territory." See Xinhua News Agency March 21, 2006, China Internet

It is indeed important that states maintain the best of diplomatic relations with each other since the existence of a clearly delimited and demarcated border does not constitute the end of cooperation in boundary matters. As the experts to the 2nd International Symposium on Land, River and Lake Boundaries Management rightly concluded:

Delimitation, demarcation, mapping and management are essential steps towards creating peaceful and prosperous borderlands, but on their own they will not achieve these goals. Hence, the need for sustained efforts to promote cross-border cooperation and set targets to be achieved within a specific period of time, including the establishment of joint border management mechanisms between Member States. Reaffirmation of boundaries (e.g. erection of intermediate markers) and their maintenance will facilitate the achievement of this objective.¹¹⁶

7. FISCAL IMPLICATIONS OF INTERNATIONAL LITIGATION AND ARBITRATION

Costs are doubtless a factor deterring African states with limited resources from addressing their delimitation and demarcation needs. Where the matter has been allowed to fester enough to demand third party adjudication or arbitration the costs of appearing before international courts are certainly not negligible.¹¹⁷ It has been recognized that “the cost of boundary delimitation will run into the millions of dollars (US Currency) if pursued via negotiations and may exceed tens of millions of dollars if achieved via third party settlement, as in the Barbados-Trinidad and Tobago case”.¹¹⁸ The African Boundary Programme must as a matter of utmost priority keep the economics of two separate sets of issues in mind. First the cost of resolving disputes through the various mechanisms known to law. Second the costs of actual demarcation. The imperative actions are again two fold. First the AU may position itself to

Information Center, “China, Russia Sign Joint Statement” available at www.china.org.cn accessed 5 August 2007.

¹¹⁶ Management and regular clearing of the vista are also reasons for which continuing peace and cooperation between neighbouring states sharing common boundaries. See the AU, “Conclusion of the 2nd International Symposium on Land, River and Lake Boundaries Management” Maputo, Mozambique 17 – 19 December 2008 AUBP/EXP/3(VI) p. 3. There is no reason why joint policing cannot be engaged in by cooperating states to increase transparency and ‘*esprit de corp*’ between security services. Indeed juxtaposed control zones which are a feature of some western European states may where applicable be introduced. See generally Gbenga Oduntan, *Arriving Before You Depart: Separating Law and Fiction in the Development and Operation of International Juxtaposed Control Zones*. In: Shah, Prakash, ed. *Migration, Diasporas and Legal Systems* (London: Cavendish Publishers, 2006). Note also that arrangements towards joint inspection and management is standard practice all around the world. Even where boundary markers are diligently fixed tectonic plate shifts lead to changes in the exact position of beacons. By a special Agreement the Finnish-Russian Boundary is jointly repaired and inspected. Field inspection is done every summer and boundary markers are renovated or replaced. A boundary corridor is maintained on either side or trees and bushes in this corridor are cleared. Both parties pay their own costs. See Pekka Tatila, “Inspection of the Finnish-Russian Boundary” paper presented at the Paper Presented at 2nd International Symposium on Land, Maritime River and Lake Boundaries: Maputo, Mozambique 17-19 December 2008 p. 5.

¹¹⁷ David H. Anderson, “Trust Funds in International Litigation” N. Ando, E. McWhinney & R. Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International, 2002), pp. 793-794”; P. Bekker, “International Legal Aid in Practice: The ICJ Trust Fund”, 87 *AJIL* (1993) 659. Charles C. Okolie, *International Law Perspectives of Developing Countries: The Relationship of Law and Economic Development to Basic Human Rights*, (Lagos: MOK Publishers, 1978) pp. 50-51.

¹¹⁸ Clifford Griffin, *The Race for Fisheries and Hydrocarbons in the Caribbean Basin* (Ian Randle Publishers, 2007) p. 152.

provide free or subsidised services in both areas above such as by creating a well endowed trust fund for such purposes. Secondly the AU may have to provide diplomatic clout to concerned African states to access the existing trust funds that exist and/or attract fresh sources.

Just as in the municipal setting the financially well to do find it easier to institute civil action to address their grievances and defend themselves in criminal cases, so also in the society of nations those with better financial resources appear to have a better chance at seeking adequate justice. It is therefore, the case that some States cannot litigate or arbitrate for financial reasons. For as Castaneda rightly noted of litigation before the ICJ, it makes little difference whether the case is a contentious suit or one requiring an advisory opinion, the costs are comparable and frequently too high.¹¹⁹ Litigation at the ICJ, depending on the nature of the dispute may require several millions of dollars even before the cost of implementation are considered. In many cases the cost of implementation will be several times fold the cost of litigation. Maritime boundary litigation for instance, involves exceptionally high open and hidden costs.¹²⁰ There would usually be the need for experts on geography, cartography, oceanography, geologists, and other specialists in addition to costs for exhibits, memorials and lawyers. Land boundary demarcation may also be equally prohibitive. Acquisition of satellite imagery, ground surveys, mapping and erection of boundary pillars would require immense sums to accomplish. In many cases both land and maritime issues are at stake from litigation through to implementation. Even for wealthy nations there is the problem of competing priorities and considerations of opportunity cost.¹²¹ The implications are certainly more dire in relation to developing states.

The administrative cost of instituting proceedings at an international court is just the beginning of a series of serious expenditure. Ironically in comparison to the hidden financial cost of litigation the administrative fees appear modest. In the PCA a non-refundable registration fee of 2000 Euro is accruable to the Institution to perfect the commencement of proceedings.¹²² However the cost of the services of each key staff can go up to as much as 250 Euro per hour. Several Registry staff may be needed at a time and the hours to be paid for may run into thousand of hours. This of course does not include the cost of use of facilities for each period of use and of

¹¹⁹ . Max Planck Institute for Comparative Public Law and International Law Judicial Settlement of International Disputes: An International Symposium. New York: Max Planck Institute, 1974.p. 30.

¹²⁰ Ironically because of the relatively daunting problem of costs facing African states particularly in the delimitation of their maritime boundaries, decision taking suffers from a unique double handicap. Where the maritime sea does not disclose apparent mineral riches negotiations are hindered due to the absence of a compelling case to invest scarce financial resources and the time of few available technical experts in light of competing national and bilateral issues. Where, however, studies reveal a rise in prospects of off-shore drilling for oil and other mineral resources found on the subsoil and seabed, and possibly the Extended Continental Shelf then negotiations get bogged down in political wrangling and disputes. The net effect of this paradox, therefore, is that the delimitation of the African seas may in time prove to be the most intractable part of the work of the AUBP.

¹²¹ The Australian government, for instance, has on many occasions resorted to US law firms to advise it on matters relating to litigation before the WTO as a result of a dearth of home grown expertise. US firms have also been resorted to where there is a need to research into domestic law aspects of the US domestic sugar program and to prepare the lamb meat case. Department of Foreign Affairs and Trade, Australia's Relationship With The World Trade Organization (WTO): Submission to the Joint Standing Committee on Treaties by the Department of Foreign Affairs and Trade September 2000 p. 58. available at http://www.dfat.gov.au/trade/negotiations/wto/aust_wto.pdf

¹²² The designation of an appointing authority pursuant to the UNCITRAL Arbitration Rules requires Non-refundable processing fee of € 750. Acting as an Appointing Authority Pursuant to the UNCITRAL Arbitration Rules requires a non-refundable processing fee of € 1,500. The Schedule of Fees of the PCA including the fees structure for guest tribunals that use the PCA facilities are available at the PCA website http://www.pca-cpa.org/showpage.asp?pag_id=1028

course the remuneration of Arbitrators. It is usual that each party to a Commercial dispute pay for the arbitrator(s) they nominate whereas the cost of the presiding arbitrator/umpire will be shared between the parties. Since the average PCA case lasts several years it becomes clear then that the costs of proceedings before this court is also prohibitive. For poorer and developing states, the risk of defeat might carry far greater financial weight especially since it is for sure that "there was always a winner and a loser"¹²³ in any such legal encounter. Thus the problem of costs needs urgent attention, especially as these costs are as should be expected, on the increase.

8. THE RELEVANCE OF LEGAL AID IN DELIMITATION AND DEMARCATION ACTIVITIES

The first fifty years of the World Court's life was characterised by a relatively poor number of appearances by developing States. It was thought that a major reason for the poor turn out at the Court is that some states cannot just afford the rising cost of justice. It is thus no wonder that the Secretary-General of the UN in 1989 announced the creation of a legal aid scheme to financially assist developing states in litigating before the ICJ.¹²⁴ It comes as no surprise either that the first beneficiaries of this very laudable scheme were two African states involved in a boundary dispute.¹²⁵ The trust fund idea might also have been inspired by Switzerland's commendable \$400,000 assistance to Burkina Faso and Mali to help them implement the ICJ boundary decision in the Frontier Dispute Case.¹²⁶ In the final analysis, however it was the UN Secretary General, Senor Javier Perez de Cuellar who took the

¹²³ Max Planck Institute for Comparative Public Law and International Law Judicial Settlement of International Disputes *op.cit.*, p. 30.

¹²⁴ UN Doc. A/44/PV.43, at 7-11 (1989). This was based upon a directive of the U.N. General Assembly. See Provisional Verbatim Record of the Forty-Third Meeting, 44 UN GAOR (43rd Mtg.) at 7-11 UN Doc./44/PV.43 (1989). It is necessary to note laudable initiatives such as the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice (document A/59/372). The Trust Fund was established in 1989 under the Financial Regulations and Rules of the United Nations. It provides financial assistance to States for expenses incurred in connection with a dispute submitted to the Court by way of a special agreement or the execution of a judgement of the ICJ resulting from such a special agreement. The Fund is open to all States parties to the Statute of the Court, as well as non-member States that have complied with the conditions stipulated in Security Council Resolution 9 (1946).

¹²⁵ The many accounts of where the greatest impetus for the introduction of the various legal aid schemes came from attest to the success of the idea. Many states, writers and jurists have been known to jostle for primacy of position in the chronology of the creation of the schemes. The non-aligned states majority of which are indigent sensibly pushed through the agenda for the creation of a trust fund in order to enhance the use of the Court by member States. Ministerial Meeting of Non-Aligned Countries, U.N. Doc. A/44/PV.59, at 2 (1989); the Hague Declaration of the Meeting of the Ministers of Foreign Affairs of the Movement of Non-Aligned Countries to discuss the Issue of Peace and the Rule of Law in International Affairs, U.N. Doc. A/44/191 (1989); Bien-Aime, *Enhancing the Role of the World Court: An Examination of the Secretary-General's Trust Fund Proposal*, 22 *New York University Journal of International Law and Practice* (1991), p. 671.

¹²⁶ *Burkina Faso v. Mali* 1987 I.C.J. Rep. 7 (Nomination of Experts, Order of 9 April 1987). The dispute was so contentious that an outbreak of military hostilities ensued during the case. However, when the court ruled, the two States found they could not afford the cartographers needed to actually turn the Court's decision into a useable map. Switzerland's financial help supplied the needed experts. See O'Connell M. *op. cit.*, p. 235.

initiative in 1989 to create the Trust Fund.¹²⁷ In 2004 the Fund received one joint application from Benin and Niger to defray the expenses incurred in connection with the submission of their boundary dispute to the Court (*Frontier Dispute (Benin/Niger)*). Subsequently, on 24 May of that year, \$300,000 were awarded to each applicant to defray the staffing, production and legal expenses incurred in the demarcation of the border of the two countries. In the same year Finland, Norway and Mexico contributed \$34,665 to the Fund.

Similarly the PCA has commendably created a Financial Assistance Fund for Developing States.¹²⁸ In October 1994, the Administrative Council agreed to establish a Financial Assistance Fund and approved the Terms of Reference and Guidelines for the operation of the Fund. This Fund, to which contributions are made on a voluntary basis, provides financial assistance to qualifying states to enable them to meet, in whole or in part, the costs involved in international arbitration or other means of dispute settlement offered by the Hague Conventions. Qualifying states are state parties to the Conventions of 1899 or 1907 that: (1) have concluded an agreement for the purpose of submitting one or more disputes, whether existing or future, for settlement by any of the means administered by the PCA; and (2) at the time of requesting financial assistance from the fund, are listed on the "DAC List of Aid Recipients" prepared by the Organization for Economic Co-operation and Development (OECD). A qualifying state may seek financial assistance from the fund by submitting a written request to the Secretary-General of the PCA. An independent Board of Trustees decides on the request.¹²⁹

Since the establishment of the fund, Norway, Cyprus, the United Kingdom, South Africa, the Netherlands, and Costa Rica have made contributions, and four grants of assistance have been made: one to a Central Asian state, one to an Asian state, and two to African states. These grants have allowed the parties to defray the costs of arbitration."¹³⁰

Even after litigation is complete it is clear that the costs of implementation are significant. First there are structures of implementation to be created and the time scale for implementation is not negligible. The normal practice is that both states contribute equally towards the entire costs of demarcation and pay incidental costs for visits to sites on their side of the border. In the *Rio Palena Arbitration*, (Argentina-Chile Frontier Case (1966)), the two countries split the \$168,000 cost of the arbitration.¹³¹ In the Cameroon-Nigeria process the implementation process started in December 2003 and continues till the present. The Eritrea-Ethiopia process is even one year older and progress is much slower. Example of the costs of demarcation alone without reference to the costs of diplomatic activities and party controlled technical costs (surveyors, technical staff and field visits) are over 12 million Dollars. To ensure the demarcation of the boundary, both countries had by 2004 contributed the sum of

¹²⁷ On the occasion of the consideration of the Report of the Court 1989, the Secretary-General announced the initiative to the General Assembly, referring to his responsibility to promote the settlement of disputes by the Court. In a very rare move whereupon there was no proposal, debate or decision in the General Assembly, the Secretary-General established by his own motion a permanent Trust Fund with its own terms of reference. Annex to United Nations Document A/47/444 of 7 October 1992. See also 28 ILM (1989) 1589.

¹²⁸ Article 47 of the 1907 Convention states: "With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Contracting Powers undertake to maintain the Permanent Court of Arbitration, as established by the First Peace Conference, accessible at all times."

¹²⁹ PCA Annual Report 2005 p. 7, Documents and materials relating to the PCA are available at www.pca-cpa.org

¹³⁰ Ibid.

¹³¹ "Two Queens to the Rescue" Time Magazine Friday, Dec. 30, 1966 available at <http://www.time.com/time/magazine/article/0,9171,901916,00.html> visited 7 August 2007.

three million US Dollars (US\$3m) each. The United Kingdom contributed one million pounds sterling (£1m) while the European Union donated four million, four hundred thousand Euros (€4.4m). The total sum so far collected is about twelve million US Dollars (\$12m). This sum is currently in a Trust Fund with the United Nations. The costs however continue to rise as the demarcation continues and the funds collected diminish in value due to devaluation of the currencies as well as rise in costs of services and equipments.

Legal aid certainly has a pride of place in the ongoing AUBP processes. It is ironic and poetic that the very states that are blamed for the balkanization of the African continent and its carving up into sometimes inconvenient and/or indefensible political units are the states that have financially aided the AUBP process.¹³² It is particularly gratifying that the Federal Republic of Germany the host nation of the historical Berlin Conference which carved Africa into colonial fiefdoms is at the vanguard of the financial rescue of the AUBP.¹³³ The aid which was structured through the GTZ is designed to provide financial and technical support for the development of the BIS; human resource capacity of the Commission; development of a handbook covering methodology and best practices in the area of delimitation and demarcation; convening of meetings and workshops relating to the AUBP; and financial and technical support to relevant African institutions and individual AU member States for the implementation of the AUBP.

In 2008, the German Government, through the GTZ, gave about 3.35 millions Euros to support AUBP related activities; out of this amount, 800,000 were directly allocated to the AU. These resources were used to support the convening of activities such as the preparatory meeting with the RECs, held in Addis Ababa on 13 and 14 July 2008; the technical meeting on the BIS held in Addis Ababa on 15 July 2008; the two regional workshops held in Kampala and Algiers; and the 2nd International Symposium on Land, River and Lake Boundaries Management, held in Maputo from 17 to 19 December 2008.¹³⁴ GTZ has also provided equipment and financial support for the payment of salaries of the staff working on the implementation of the AUBP. Additional funds were allocated in 2009 with some part of the budget having been provided as direct support to individual AU member States. These include monies for the demarcation of parts of the Mali/Burkina Faso boundary, as well as activities relating to the delimitation and demarcation of Mozambican borders with some of its neighbours.

Financial aid has also been offered and received from Italy another state with a controversial and irredentist past in relation to Africa with the dubious record of having invaded a fellow League of Nation member. As part of the implementation of the Italian-African Peace Facility (IAPF), the Italian Government committed itself to funding some components of the AUBP to an amount of about US\$1.8 million.¹³⁵ Aside from individual state donations from some of the erstwhile colonial powers the EU has allocated a total amount of about 8 billions Euros for cross-border cooperation. It is particularly comforting to

¹³² *Supra* footnote 19.

¹³³ On 13 February 2008, the German Minister for Foreign Affairs, Dr. Frank-Walter Steinmeier, extended the German States offer of technical and financial support towards the AUBP. In his letter to the AU, the Minister stressed the importance of the delimitation and demarcation of African borders, as well as the promotion of cross-border cooperation, for the overall efforts aimed at preventing conflicts and ensuring the economic development of the continent. African Union, "Report of the Commission on the Implementation of the African Union Border Programme" *op.cit.* pp. 8-9.

¹³⁴ See the AU, "Conclusion of the 2nd International Symposium on Land, River and Lake Boundaries Management" Maputo, Mozambique 17 – 19 December 2008 AUBP/EXP/3(VI).

¹³⁵ An exchange of letters to this effect took place, on 30 June 2008, on the margins of the sessions of the Executive Council and the Assembly of the Union in Sharm El Sheikh, Egypt, in June 2008.

note that support has also been promised in principle by the International Monetary fund and the World Bank for border area initiatives in furtherance of the aims of the AUBP. In addition to all these the UN itself commits extra budgetary and budgetary resources to the process.¹³⁶

More generally there is much scope for assistance from all friendly states and regions of the world in relation to the AUBP. It is not in all cases that money is required but there is much need for targeted or purpose built technical aid. For instance those African states that have as a result of many years of civil and/or international crises faced particular challenges in boundary demarcation due to the presence of landmines in border areas need urgent assistance and aid from the international community. Scientific and other targeted assistance are required to clear mined areas in order to facilitate demarcation exercises and other cross-border activities.¹³⁷ A very simple but important form of aid that will be very useful to smaller African states that are presently charged with the task of demarcation of their boundaries under the AUBP may take the form of assistance in the acquisition of documents relevant to boundary delimitation and demarcation exercise from colonial archives. For smaller African states accommodation for researchers in the major cities of Europe and/or free access to archive buildings and copying or borrowing facilities will go a long way to granting access to much needed information without which the necessary documents that are needed for demarcation exercises will be difficult or even impossible.

The donations received from the European states are commendable and important for at least three reasons. First, it has provided the pump funding for what is a costly and highly technical exercise which would have degenerated into a white elephant project but for the provision of much needed funds at crucial stages. Second, in a sense the donating European states had contributed to the African territorial quagmires by interfering with the political destinies of the continents peoples sometimes with significant brutality. It is, therefore, equitable that they assist in abating the problems that have resulted from the colonial creations. Third, such targeted assistance will arguably prevent many of the tensions and conflicts over land and maritime boundaries in Africa which would cause much displacement and refugee problems for the international system.

9. AFROCENTRIC SOLUTIONS TO THE PROBLEMS OF DELIMITATION AND DEMARCATION

It is necessary that home-grown legal and judicial expertise on boundary matters must be developed. What is advocated here is not protectionism or restraint of trade but it must be realised that there is abysmal participation of African lawyers and judges in the area of boundary cases. The EEBC has only one African on board as an Arbitrator. The lawyers that present cases on behalf of African countries at the World Court are invariably Western lawyers. Whereas the facts and incidences that will generate dispute on the continent from now till eternity will be invariably African. The potential for this skill gap to continue or grow

¹³⁶ Letter by UN Secretary General Ban Ki Moon to the President of the Security Council Mr Neven Jurica in 2008 in UN Secretary General's Memoranda to the Security Council. See A.I. Asiwaju "Getting Bordered to be De-Bordered: The African Union Border Programme in Global Focus" Paper Presented at 2nd International Symposium on Land, Maritime River and Lake Boundaries: Maputo, Mozambique 17-19 December 2008 p. 4.

¹³⁷ AU, "Conclusion of the 2nd International Symposium on Land, River and Lake Boundaries Management" op.cit. See paragraph VII, pp. 3-4.

in this century is real.¹³⁸ The AU border programme thus, presents an opportunity to address this deficit of legal and technical skills base. Strategies ought to be put in place to encourage the training of African boundary experts in all relevant fields. It is indeed possible to plug the skills deficit and reverse the trend towards reliance on foreign experts within a generation. Particular emphasis should be made to encourage the bespoke training (in boundary studies) of lawyers and judicial officers that will form the bar and bench of the pertinent courts particularly the African Court of Justice. There are certain facts and elementary considerations, which a Court composed, of persons with local geographical or customary knowledge would very easily take judicial notice of. This would save time and reduce the possibility of the Court inadvertently endorsing the disputants' claims that are obviously unnecessary, mischievous or inflated. Africa has to put to good use its peculiar advantage of multiculturalism in its legal heritage. This rich heritage can only serve it well if it is harnessed and recognised as strength rather than a hindrance to the resolution of boundary marking and resolution of disputes. African rivers and lakes boundaries create special challenges in terms of (a) delimitation and demarcation; and (b) the management of shared water and other resources. Just as there have been severe problems, there are also many instances of Afro centric solutions and approaches to the sharing of common aquatic bodies that have to be studied. The sharing of experiences and best practices is, therefore, of paramount importance for African states.¹³⁹

The call for home-grown expertise in all aspects of boundary making and boundary marking is justifiable on many grounds. In certain instances the close involvement of nationals is an essential; part of boundary delimitation exercise. The United Nations Commission on the Limits of the Continental Shelf insist on the involvement of citizens from a State making submission in all phases of the Continental Shelf Claims Project, since nationals, and not the contractors or consultants they employ, are allowed to participate in the conduct of oral submissions and respond to interrogatories before the Commission during the examination of submissions.¹⁴⁰

10. RESOLUTION OF INTERNATIONAL DISPUTES INVOLVING AFRICAN NATIONS: ALTERNATIVE FUTURES

The argument has often been made by African scholars that resort to Eurocentric adjudication and arbitrary mechanisms is unsuitable for resolving African disputes because of the inadequate attention that is paid to significant regional peculiarities and realities. Without prejudice to the importance of the main international courts and tribunals that deal with boundary and territorial disputes, there is no convincing reason to believe that many of the African boundary and territorial disputes cannot be satisfactorily resolved through other means

¹³⁸ The skilled gap pertains to nearly all areas of delimitation and demarcation practice but it is most revealing in the area of maritime law and scientific practice. Technical experts, notably hydrographers and cartographers, are invariably used in negotiations for a new boundary. A jurist wrote "...it would be unthinkable to undertake negotiations for a new boundary, for instance, without first conducting a hydrographic study". It is possible however, that technical experts are supplied by intergovernmental organisations such as the UN and the Commonwealth Secretariat (David Anderson, Resource, Navigational and Environmental Factors in Equitable Maritime Boundary Delimitation in Charney, Colson and Smith (eds.), *op.cit.*, p. 3219.

¹³⁹ This was also one of the conclusions of African experts in AU, "Conclusion of the 2nd International Symposium on Land, River and Lake Boundaries Management" *op.cit.* para VIII, pp. 3-4.

¹⁴⁰ *Supra* note 25.

of dispute resolution.¹⁴¹ One such means that is highly recommended for resolving territorial disputes is the use of carefully conducted plebiscites, preferably organised and monitored by the new African Union. This might prove a more pragmatic solution in comparison with the dogmatic adherence to colonial treaties upon which many such disputes are decided presently. This argument is particularly resonant for Africa and other parts of the New World due to whose collective efforts the principle of self-determination was specifically developed in the last century. It is relevant to note that even the colonial powers appreciated and resorted to the mechanism of plebiscites in the resolution of territorial questions in Africa.¹⁴² This of course is not to say that colonial treaties would have no further relevance in the determination of disputes by international courts. There is in fact no reason why colonial treaties cannot delineate the geographic scope (features and coordinates) of the territory and indicate other relevant issues while the ultimate decision as to whose sovereignty prevails should be decided directly by the population affected. This is probably the point that was made by the Attorney General of one of the states in the Nigerian federation, which is directly affected by the Bakassi decision of the Court. She stated:

“It is shocking to note that the ICJ would disregard the impact of its decision on the people of Bakassi in particular, and deliver a judgment ... The failure or omission to conduct plebiscites in Bakassi is not only discriminatory but offends against the Purposes and Principles of the UN and the Charter of the African Union with regard to self determination. All persons have the right to their abode, within their ancestral territory, and should not be subjected to unjustifiable consignment of their ancestral land to a foreign government, country and alien culture without their consent or due consultation”.¹⁴³

In the short term, it is advisable that when African States enter into agreements regulating the resolution of boundary disputes and in drafting *compromis* clause submitting

¹⁴¹ The argument has been made elsewhere that perhaps the ICJ and the PCA have in the past been incapable of handling African affairs as well as those of the developing world, it is necessary to bring certain facts, figures and historical accounts into analytical perspective. Examining two major issues or charges will do this. The first is that throughout their existence the Courts have either by institutional design or inadvertently been applying an Eurocentric international law in a manner that compromises the interest of African and other developing States. Second, it is argued that the composition and staffing of these two institutions is inherently insufficient and probably biased against the overall interest of African and other developing states. Gbenga Oduntan, “How International Courts Underdeveloped International Law: Economic, Political and Structural Failings of International Adjudication in Relation to Developing States”, *African Journal of International and Comparative Law* (2005).

¹⁴² As a result of a plebiscite conducted under the auspices of the United Nations in October 1961, the Southern Cameroons joined the Republic of Cameroon while the northern portion of the Territory of the Cameroon under the administration of the United Kingdom of Great Britain and Northern Ireland joined the Federal Republic of Nigeria. T.O. Elias *The International Court of Justice and Some Contemporary Problems*, (Hague: Martinus Nijhoff Publishers 1983) p. 322; Note however, Cameroun Government White Paper alleging irregularities in the Northern Cameroons plebiscite and arguing for its nullification. Republic of Cameroon, Ministry of Foreign Affairs and the Secretariat of State for Information. Position of the Republic of the Cameroon following the plebiscite of 11th and 12th February 1961 in the northern portion of the Territory of the Cameroon under the administration of the United Kingdom of Great Britain and Northern Ireland. Yaoundé, 1961. 48 pp. Cameroun Government White Paper alleging irregularities in the Northern Cameroons plebiscite and arguing for its nullification.

¹⁴³ Nella Andem-Ewa ‘Bakassi: Legal Options for Nigeria’ *This Day* (Lagos) December 3, 2002 available at <http://allafrica.com/stories/200212030216.html>

disputes to the main international courts they should (a) insist upon a regional international court with competent jurisdiction or arbitration tribunals with their seat in Africa (b) infuse the applicable laws with the needed flexibility such as ability of the tribunal to decide *ex aequo et bono* or with reference to African traditional law. Only in this way would African states escape the deleterious effects of arguing their cases before courts that at best may have demonstrated a lack of understanding of their peculiar interests and history in international relations and at worst have consistently by their jurisprudence established a bias against the collective interest of developing states.

There are also other ADR techniques, which may be better suited for the resolution of certain kinds of disputes between African States, which have already proven themselves very useful in resolving many conflict situations but remain under-utilised.

The African Border programme and the law and practice it will set into motion is a veritable opportunity for African scholars, judges, lawyers, civil servants to reengineer international law and make it more user friendly to the needs of their continent. It is certainly not the time to engage in undue conservatism despite the alluring nature of the 'stability' it appears to offer. Africans do have a way of settling disputes and even land disputes and this must reflect in the AU Border programme. It must rely on what has been achieved by the universalist sentiments of international laws but it must not be slavish to same. It will not be the first time Africa has set or established trends that become acceptable worldwide. African states have given a new life to the concept of reconciliation after events or periods of national trauma. Examples exist in South Africa, Rwanda, Nigeria and others. It is easy to predict that the development of this method would be yet another innovation and contribution to world legal traditions emanating from the African continent.¹⁴⁴ It may also be envisaged that Afrocentric solutions would provide the necessary panacea to many of the festering boundary related disputes all over Africa.¹⁴⁵

¹⁴⁴ The inter ethnic fragmentation and ethnic rivalry that was produced by the colonial experience in Africa and which in many cases was carefully engineered by the colonial power makes reconciliation a particularly valuable means of dispute resolution on the African Continent. There is no reason why such mechanism may not find usefulness even in disputes of an inter-continental nature. It may also be noted that the concept of reconciliation is a very important theme in Christian theology. The term reconciliation is derived from the Latin root word, '*conciliatus*', which means to come together, to assemble ... Reconciliation refers to the act by which people who have been apart and split-off from one another begin to stroll or march together again. Essentially, reconciliation means the restoration of broken relationships. For a clearer exposition of reconciliation as an ADR technique, see: Kader Asmal, Louise Asmal & Ronald Suresh Roberts, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance*, (Cape Town: David Philip Publishers, 1996) p. 47. Joseph V. Montville, "The Healing Function in Political Conflict Resolution", in Dennis J. D. Sandole & Hugo van der Merwe, *Conflict Resolution Theory and Practice: Integration and Application*, (Manchester: Manchester University Press, 1993) pp. 112-127; Institute for Multi-Track Diplomacy, "Consultation on Reconciliation II: Final Report", Washington, DC: IMTD, July 28-29 1995.

¹⁴⁵ The need to critique the law has been echoed by Professor Issa G. Shivji. He wrote "whatever the achievements of Western bourgeois civilisation, these are now exhausted. We are on the threshold of reconstructing a new civilisation, a more universal, a more humane, civilisation. And that cannot be done without defeating and destroying imperialism on all fronts. On the legal front, we have to *re-think* law and its future rather than simply talk in terms of re-making it. I do not know how, but I do know how not. We cannot continue to accept the value-system underlying the Anglo-American law as unproblematic. The very premises of law need to be interrogated. We cannot continue accepting the Western civilisation's claim to universality. Its universalization owes much to the argument of force rather than the force of argument. We have to rediscover other civilisations and weave together a new tapestry borrowing from different cultures and peoples"; See Issa G. Shivji, *Law's Empire and Empire's Lawlessness: Beyond the Anglo-American Law International Conference on: Remaking Law In Africa: Transnationalism, Persons, And Rights*, 21ST-22ND May, 2003 – Edinburgh p. 5.

It is possible to envisage that the African States may more frequently avail themselves of the mechanism of the Court of Justice of the AU, which is the principal judicial organ of the African Union.¹⁴⁶ Of particular significance are the provisions of the Protocol on Eligibility to Submit Cases (Article 18), Competence/Jurisdiction (Article 19), Sources of Law (Article 20), Summary Procedure (Article 55) and Special Chambers (Article 56). Article 18 would arguably also be useful to the extent that it also recognizes the right of 'third parties' to submit cases to the Court of Justice under conditions to be determined by the AU Assembly and with the consent of the State Party concerned (Article 18 (d)).¹⁴⁷ Furthermore, the assembly is empowered to confer on the Court of Justice power to assume jurisdiction over any dispute (Article 19 (2)).

It is desirable that the Court of Justice develops and establishes clear jurisprudence in the area of boundary disputes, resource exploitation, maritime delimitation and environmental disputes. If indeed judicial settlement proves to be the favoured mechanism by African states in resolving boundary matters it would be desirable if not crucial that the Court of Justice makes good use of the unique provisions allowing (inter alia) the general principles of law recognized by African States (Article 20 (d)) to form part of its jurisprudence in deciding territorial and boundary matters.

It is also noteworthy that the provisions establishing the Court of Justice share many similarities with those that establish the jurisdiction of the ICJ. For instance, the provision on competence of the court and sources of law are drafted largely along the lines of Articles 36 and 38 of the Statute of the ICJ. Apart from the controversial compulsory jurisdiction mechanism in Article 36 (2 a–d of the Statute), the jurisdiction of both courts includes (a) the interpretation of treaties; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.

Both courts have as their function the making of decisions in accordance with international law through the application of: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law and the ability to decide a case *ex aequo et bono*, if the parties agree thereto. African scholars and critics of the perceived 'eurocentricity' of public international law would follow the jurisprudence of the Court of Justice very closely to see what principles it would recognize as 'general principles of law recognized by African States' and indeed how much diffidence it would pay to this invitation to enrich international judicial practice. The power of the Court of Justice to appoint experts and commission enquiries under Article 30 are also useful mechanisms of the court which may assist it to quickly attain world class judicial competence.

11. THE SETTLEMENT OF INTERNATIONAL BOUNDARY DISPUTES ADR, LITIGATION OR ARBITRATION

¹⁴⁶ The Court was established in consonance with the Constitutive Act of the Court of Justice of the African Union. See Protocol of the Court of Justice of the African Union in (2005) 13 *African Journal of International and Comparative Law* 115–28.

¹⁴⁷ It is arguable that in time this could be a basis for the eventual acceptance of Multinationals into the Courts jurisdiction as parties.

Dispute resolution mechanisms and procedures are certainly some of the more important aspects of any serious enquiry into the future of delimitation and demarcation of African territories. Africa undoubtedly has produced most of the recent territorial and boundary disputes that have captured the attention of the World Court. Of the 17 separate contentious cases between African states submitted to the Court, 12 of them concern territorial and/or boundary disputes.¹⁴⁸ Four of the remaining five contentious cases were instituted in the same year and relate to the armed activities on the territory of Congo.¹⁴⁹

The AU Border Programme will in time accelerate the introduction of new boundary related treaties among African states. Dispute resolution clauses naturally constitute a crucial part of any such treaty. It is, thus, necessary that this is the stage that serious thinking must be done as to the best Afrocentric procedures to encourage and promote among African states considering the quite prevalent view of African scholars and statesmen that pre-existing mechanisms that have been dogmatically adopted by African states in the past have produced poor and unsatisfactory results in African international relations.¹⁵⁰

Reference may be made here to the recent attempt by some African states to act decisively and imaginatively in creating specific dispute resolution routes and institutions for their recent collaborations in territorial and boundary matters. Examples must be made here of regional cooperation in the Gulf of Guinea leading to the recent establishment of the Gulf of Guinea Commission. The recently concluded Treaty Establishing the Gulf of Guinea Commission¹⁵¹ outlines the framework of the Gulf of Guinea Commission and prescribes its objectives powers and responsibilities. With the huge interests generated among the major oil producing multinational corporations (MNCs), the newer Independent producers and the

¹⁴⁸ *Ethiopia v. South Africa, Liberia v. South Africa: (South West Africa) 1960-1966; Cameroon v. United Kingdom (Northern Cameroon) 1961-63; Tunisia v. Libya (Continental shelf) 1978-1982; Libya v. Malta (Continental shelf) 1982-1985; Burkina Faso v. Republic of Mali (Frontier Dispute) (Case referred to a Chamber) 1983-86; Tunisia v. Libya (Applications for Revisions and interpretation of the judgment of 24 February 1982 in the case concerning the Continental Shelf) 1978-1982; Guinea Bissau v. Senegal (Arbitral Award of 31 July 1989); Libya Arab Jamahiriya v. Chad (Territorial Dispute 1990-94); Cameroon v Nigeria (Land and Maritime Boundary Dispute); Kasikili/Sedudu Island (Botswana/Namibia); Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon); Frontier Dispute (Benin/Niger).*

¹⁴⁹ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda 1999); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda 1999); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda 1999); Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi 1999).*

¹⁵⁰ Professor Abbink noted, for instance, that the decisions of the EEBC ignore “the deep-rooted mutual suspicion still reigning between the two countries as well as the scepticism and distrust of citizens of their national governments on the issue”. He identified Badme an apparently insignificant village as the fons et origo of the Ethiopia Eritrea Conflict and describes how it has acquired the status of a highly symbolic prize. President Isayas Afewerqi of Eritrea is quoted, as having said after the conquest of the village of Badme in May 1998 that giving up Badme would be like saying that the sun would set in the east. For the government and people of Ethiopia, however, serious damage to national pride has been perceived by the potential loss of a territory that has been administered as part of national territory since the founding of the state. This is guaranteed to make recapture of Badme by any means highly desirable. These are problems, which a court ruling *simpliciter* cannot resolve. See Jon Abbink, *Badme and the Ethiopian–Eritrean Conflict: Back to Square One?* (2003) (www.erpac.org/Badme.html)

¹⁵¹ Hereinafter referred to as the Treaty. A Bill for an Act to Enable Effect to be given in the Federal Republic of Nigeria to the Treaty Establishing the Gulf of Guinea Commission has been placed before the National Assembly of Nigeria. The bill is sponsored by the Executive and has had its first reading on Tuesday, 1/2/05. See further <http://www.nassnig.org/bills/BILLS%20PAGE%202004.htm> visited 6 March 2006.

participating states it was clear to the participating states that the treaty to govern this massive rich and strategic littoral zone which is largely un-demarcated must apart from facilitating a sustainable and responsive regime for the anticipated explosion of exploitative activities, prepare a reliable dispute resolution mechanism. The parties to the Treaty stated they are “[a]nxious to settle our disputes by peaceful means” (Preamble). Article 20 of the Gulf of Guinea treaty thus provides:

Member States shall act collectively to guarantee peace, security and stability as prerequisites to the realization of the objectives set forth in this Treaty. To this end, they undertake to settle their disputes amicably. Failing which either party shall refer the matter to the Ad Hoc Arbitration Mechanism of the Treaty or any other mechanism for peaceful resolution of conflicts stated by the Charters of the United Nations, the Organisation of African Unity and the African Union.

State members are, thus, generally enjoined to act collectively to guarantee peace, security and stability as prerequisites to the realization of the objectives set forth in the Treaty. To this end the member States are enjoined to settle their disputes amicably. Where a dispute persist the State parties may refer the matter to the Ad Hoc Arbitration Mechanism of the Treaty or another mechanism for peaceful resolution of conflicts stated by the Charters of the United Nations, the Organisation of African Unity and the African Union. The formulation of Article 20, therefore, arguably suggests a hierarchy of dispute management techniques for the member states. Attempts should first be made to reach amicable settlement and by this the drafters appear to refer to bona fide negotiation. Secondly, Ad Hoc Arbitration may become applicable. Thirdly, parties to the dispute may make reference to any of the means of resolution contained in the UN Charter. The principal means are to be found in Article 33 of the Charter.

It is, however, doubtful that reference is being made here to Article 33 because the provision therein largely refers to methods which form part of the ‘amicable means’ already envisaged in the first sentence of Article 20.¹⁵² It appears, therefore, that reference is being made to the jurisdiction of the International Court of Justice (ICJ). The ICJ is the principal judicial organ of the UN and its basic instrument is the Statute of the Court, which forms an integral part of the Charter and is annexed to it. It must, however, be noted that reference of the dispute to the Security Council or the General Assembly of the UN under Article 34 and 35 (1) of the Charter is also a possibility.¹⁵³ Fourthly, the matter may be dealt with in accordance with the African Union (AU) Charter. It is however possible to also argue that the parties to the Treaty being African states themselves would have a preference for the mechanisms under the AU Charter and would prefer to seek resolution of the dispute under the AU regime before the UN regimes. Indeed it may be suggested that the provisions of Article 20 are somewhat sketchy and clumsily drafted. The formulation of this article ironically

¹⁵² Article 33 provides that: “the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”.

¹⁵³ Indeed Article 34 and 35 make provision for any Member of the United Nations to bring any dispute, or any situation which might lead to international friction or give rise to a dispute or endanger the maintenance of international peace and security to the attention of the Security Council or of the General Assembly.

appears to make all structures of dispute resolution it recommends appear not to be part of the initial requirement that parties “settle their disputes amicably”. The question this raises is whether or not judicial settlement, mediation or arbitration is not amicable or peaceful means.

It is important to mention the pride of place that arbitration has also played in the resolution of territorial and boundary disputes. As Hazel Fox eloquently stated of the arbitration route:

“The first element, and the one which historically has induced States to submit disputes to arbitration, is the necessity for consent of the arbitrating parties to every stage in the arbitration. Selection of judges of their own choice is only one aspect of the very wide powers of supervision and control given to States under the usual arbitration agreement”¹⁵⁴

The idea that consent, not only given at the beginning of the arbitration proceedings, but that which “...continues throughout the proceedings until the tribunal retires to make its award, is therefore, an essential ingredient to the completion of any arbitration” is certainly true. However, this does not assure a party that it can withdraw consent so as to disrupt the arbitration opportunistically and forestall an unfavourable award.¹⁵⁵

Boundary experts are beginning to converge on the position that there is a possible hierarchy of dispute resolution mechanisms to be resorted to for territorial and boundary disputes.¹⁵⁶ This position falls in line with the demands of the LOSC (1982) that negotiations should be the principal means of resolving maritime delimitation.¹⁵⁷ Although clearly each case would be unique and may deserve a different conclusion it has been observed that the preponderance of practice is in favour of bilateral negotiation, conciliation and mediation.¹⁵⁸ The results of any of these are capable of being binding by signature to a document or treaty. This is followed by judicial settlement, which includes arbitration and ad hoc tribunals. Preference for negotiation is borne out of the need to avoid the perceived arbitrariness of judicial decisions or the rigidity with which legal principles are followed in a situation, which may call for sensitivities unknown to law. Negotiation also reduces or even removes the costs of legal representation. Negotiation is also viewed as being in line with the instinct of states to engage in international politics.

In many cases even after the long and expensive route of adjudication has been completed parties find themselves returning to the table to negotiate raising the presumption that that is perhaps where the matter would have been best resolved. Although technically

¹⁵⁴ Hazel Fox “Arbitration” *International Disputes: The Legal Aspects* (London: Europa Publications, 1972) p. 101.

¹⁵⁵ Fox, *op.cit.*, p. 100.

¹⁵⁶ Derek Smith, “Principles of Dispute Resolution: A practical Route to Follow” *International Boundary Disputes in Oil & Gas Houston Texas* (2004); Justin Stuhldneher, “Steps You Need to Take to Negotiate and Operate Within a Production Sharing Agreement: A Roadmap to Success” *International Boundary Disputes in Oil & Gas Houston Texas* (2004). It is indeed possible to locate this commendable development within the provisions of Article 33 (1) of the UN Charter which arguably betrays a possible hierarchy Article 33 (1) reads: The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

¹⁵⁷ Griffin, *op.cit.* pp. 151-152.

¹⁵⁸ On occasion, the UN itself will, at the request of the parties, appoint a mediator in an attempt to resolve matters (for instance in the *Guatemala/Belize*; *Guyana/Venezuela* disputes).

speaking the dispute has been decided upon by the ICJ, it is clear that there is no unanimity as to how to give effect to all aspects of the Court's judgment and the Court itself has enjoined the state parties to enter into further negotiations with respect to certain issues.¹⁵⁹ With these considerations in mind it is necessary that full weight is given to recommendation of the conference of African ministers in charge of border issues that concluded "encourage the States to undertake and pursue bilateral negotiations on all problems relating to the delimitation and demarcation of their borders"¹⁶⁰ Clearly Africa does not lack "very heavy weight and competent representatives" who can conduct international negotiations in the best traditions of the term.¹⁶¹

Recent examples in the Cameroon-Nigeria and Namibia-Botswana and other processes denote certain commonalities and peculiar trajectories. The parties must set up joint negotiation teams comprising of equal numbers of high level officials and experts as much as possible of coordinate grade levels.¹⁶² One of the first tasks that the negotiating team will have to deal with is to agree on the common treaty instrument and compare their interpretations of such instruments.¹⁶³ Effort must be made to identify areas of agreement. Regarding such areas agreement may be made as soon as practicable in relation to the demarcation specifications. This include agreement as to pillar types, pillar interval mapping corridor, map scales etc. The attention of the teams will inexorably have to shift to areas of differences where the parties have opposing or divergent views. Consensus would have to be reached on how to delimit and demarcate these areas. Where necessary compromises and agreements have been made on the above, the parties must then produce final demarcation maps with all boundary pillars and coordinates to be domesticated by each party and circulated to all stakeholders. Parties may then set up joint Boundary Management and Transboundary activity related structure¹⁶⁴

Where parties have, however, taken the judicial settlement route, in all likelihood they would still have to resort to many aspects of the foregoing in that the decision of the Court or arbitration panel will in practice be referred to a joint commission with (preferably) or without a facilitator of the process who will be part of the Commission. In the case of the Eritrea-Ethiopia process the decision was taken by the State parties to retain the same Commission that decided this process as the demarcators. Joint commissions usually work out the

¹⁵⁹ See our discussions on straddling villages below.

¹⁶⁰ Paragraph 5 (a)(i), Declaration On The African Union Border Programme, *supra* note 3.

¹⁶¹ (See Opening Remarks By The Chairman Of The Mixed Commission And Special Representative Of The Secretary-General Of The United Nations, Mr. Ahmedou Ould-Abdallah Yaoundé, 1 December 2002 available at

http://www.un.org/Depts/dpa/prev_dip/africa/office_for_srs/cnmc/speeches/spchlist.htm).

¹⁶² This factor does admit of the introduction of experts who may have difficulty fitting into known governmental or civil service grade structure. The equivalence of such person will in fact depend on their reputation or expertise value. In many cases this will be easily explicable by the nature of the specialism or added value they bring to the process. It is highly discouraged that countries use any slots available in boundary negotiation/implementation commissions to advance the course of political appointments as the matters at hand are of grave importance and it is in the interest of all that only competent persons of value to the process practical, theoretical or doctrinal are brought on board.

¹⁶³ Where as in the 17 cases completed on territorial issues by the ICJ the matter having been already decided through a judicial process, the parties would already in all probability have this task accomplished for it by the Court and demarcation is all that is left to the parties.

¹⁶⁴ S.M Diggi, "Negotiation and Demarcation of International Boundaries-The Experience of National Boundary Commission of Nigeria" p. 4.

modalities for the implementation of the decision of the judicial process.¹⁶⁵ Although theoretically the Court or arbitral body should have resolved the dispute and all that should remain is an implementation plan it turns out that in practice what the Court or panel does is to 'decide' or 'award'. Resolution in the true sense of the word belongs to the parties thus, an implementation party will in all likelihood find itself having to work out modalities to resolve knotty issues and lingering problems between the parties. This phenomenon should be seen as strength rather than a shortcoming of boundary determination processes. It is, therefore, possible to argue that for future African 'state versus state' boundary disputes the following applies:

- (a) good faith negotiations must be pursued diligently at first.
- (b) Where that is insufficient or concomitantly mediation and/or conciliation with the assistance of good offices within the AU should be employed.
- (c) Where the dispute turns strictly on the reading of a point of law and the ultimate effect of a judgment will not jeopardise national interests, litigation may be a desirable route. Where however the points of law are subsidiary to crucially matters of national interests, such as the loss of an indigenous population negotiations assisted by plebiscites if necessary is still the most desirable routes with the possible assistance of a composite of mediation-arbitration. In this way the process can accommodate better than litigation does the factual, historical, sentimental or other issues to arrive at sensitive or holistic results. This sensitive treatment of issues and bottom line drawing can be attained in many ways and particularly through carefully drawn out submission or arbitral clause. In all cases, however, it is the position that decision, judgments and consent awards are to be final and binding. It is important to note that the litigation route via the ICJ enjoys the privilege and possibility of enforcement via the Security Council intervention or other coercive diplomacy through the UN system.
- (d) Nothing in the above commendations may, however, be interpreted to prevent African states that are parties to a dispute from adopting any of the general ADR mechanisms found in national and/or international law including use of African traditional methods.

12. STRATEGIES AND MODALITIES TO RESOLVE STRADDLING COMMUNITIES AND RESOURCES WITHIN THE AFRICAN BOUNDARY PROGRAMME.

¹⁶⁵ The funding for the activities of Joint Commissions are usually by equal contributions of the parties and/or assistance or grants from donor agencies and friendly countries *supra* note 121; see also Diggi, *ibid.*, p. 6.

Delimitation of boundaries is rendered more difficult where villages and communities straddle the boundaries of two states. The existence of these straddling communities in many cases complicates the situation and prevents agreement between state parties. In many ways the situation is worsened where valuable economic resources straddle the boundaries between the states. The very existence of a boundary dispute may have emanated from the discovery of valuable hydrocarbons or other such important minerals. It is predictable that acceleration of delimitation and demarcation activities under the African Boundary Programme will precipitate the discovery or reigniting of these issues on a large scale. The potential for conflict or perpetuation of injustice in both cases is great. Certainly there is no unanimity in state practice on the issues and there is very little guidance in international law in dealing with the problems that may arise. In light of this it is necessary to consider the issues with the intention of offering Afro-centric positions and solutions which ought to guide these important issues from the very inception of the programme.

13. BOUNDARY DEMARCATION AND THE PROBLEM OF STRADDLING COMMUNITIES AND ENCLAVES

Interestingly, Africa has so far produced a lesser number of controversies in relation to international straddling villages despite the predominant number of such occurrences all over the continent.¹⁶⁶ In many cases the inhabitants of straddling communities continue to live peacefully side by side while the states they belong to engage in hostile political posturing, litigation or worse still military skirmishes. It is perhaps remarkable that there are not many examples of enclaves in the classical sense (i.e. territory belonging to one state in the foreign territory of another) in Africa at all. Indeed enclaves exist on only two continents: Europe and Asia.¹⁶⁷ Africa is, however, host to at least one successful case of complete enclosure of one state in another. Reference is here made to Lesotho's existence as an enclave inside South Africa.¹⁶⁸

Fortunately the pattern that reveals itself so far is that African States hesitate to dissect settlements into two during boundary demarcation despite the contents of the delimitation instrument. Where the main path of the boundary is parallel to a road or along a meridian/parallel, it is diverted around villages which otherwise straddled the boundary. A good instance is the Benin/Nigeria at 10 deg N, which has semi-circular offsets to let Nigeria retain villages along the road the boundary follows. Similarly, the Ghana/Burkina Faso boundary along the 11deg N parallel between 1deg W and the Red Volta River was demarcated by rectangular offsets in order to leave straddling villages to either country.¹⁶⁹ As

¹⁶⁶ Only further research can reveal whether this is because the existence of straddling villages, and *de facto* enclaves are largely ignored by governments in the light of other pressing economic and political problems or perhaps this is as a result of the relative recentness of the making of African Boundaries. See above footnote ...

¹⁶⁷ In the main these have a feudal origin and date back several hundred years. Whyte, n.34, 43.

¹⁶⁸ Note, however, that this is a different legal and political situation from the cases discussed below relating to enclaves of independent states that are planted in another, (usually neighbouring) state. Note also the ten self-governing territories for different black ethnic groups which were established as part of the apartheid policy of the erstwhile apartheid South Africa. Four of these were granted "independence" by the infamous South Africa regimes although (they were recognized only by South Africa and each other). These former South Africans Homelands or Bantustans ceased to exist 27 Apr 1994 and were re-incorporated into South Africa, and all were absorbed into the new provinces.

¹⁶⁹ Maps and descriptions of the boundary treaties can be had in Ieuan Griffiths, *The Scramble for Africa: inherited political boundaries*, 152 *Geographical Journal*, 2 (1986), 204-216, especially 207-8.

a result of the dependence of African traditional societies on communal or customary lands and property there is also the problem of straddling customary lands recognized by the customary communities but ignored or disputed by the state parties. This issue, however, is yet to receive the academic attention it deserves in African legal jurisprudence.

As a general rule, however, it would appear that African States are more inclined towards the view that 'good fences make good neighbours' but would in the event of boundary demarcation adopt a clear boundary demarcation which leaves whole communities and villages intact. It appears, however, that the inclination not to separate or split existing communities in the name of demarcation is far more likely where the demarcation does not follow military hostilities and protracted litigation as was unfortunately the case in the recent history of Cameroon and Nigeria. It is for this reason that the parties to that process have continued to be handle issues surrounding straddling villages with reasoned diplomacy.

The implementation of post boundary dispute decisions and awards is a desirable end in itself but a close eye must be placed on the larger picture in light of past experience on the African continent. Nothing less than a sensitive implementation of ICJ and arbitral decisions is required and concerned parties as well as demarcation commissions ought not to be limited by a slavish attitude to judicial decisions where such decisions imply an insensitive dissection of lives and organic communities. There is no shortage of condemnable practices elsewhere outside of Africa which the implementation plan of the AU Border Programme must actively seek to avoid taking root in Africa. Such identifiable 'bad practices' in state practice along boundary communities include the creation of impenetrable barriers,¹⁷⁰ inordinate creation of visa regimes,¹⁷¹ the use of armed village militias¹⁷² intermittent exchange of gunfire at frontier

For the Ghana/Burkina boundary see the Russian 1:200,000 map C-30-xii available at <http://sunsite.berkeley.edu/EART/ghana/200k/03-30-12.jpg>

¹⁷⁰ On 9 January 1999 the state government of West Bengal (India) set the target of fencing 900km of the border with Bangladesh during. 500km out of the total of 1600 km had been fenced with barbed wire, with central government funding. The West Bengal state government also favoured the creation of a 150 mile 'no man's land', affecting 450 villages in the border area, in its attempts to stem the influx of migrants from Bangladesh. India is currently building a fence along its 4,000-km (2,500 miles) border with Bangladesh. See "Border tense over push-in, fence erection bids by BSF" *New Age Dhaka* Sunday March 6, 2005 available at <http://www.newagebd.com/2005/mar/06/front.html> visited 30th December 2005; M. Rama Rao, India's interior ministry favours fencing more stretches of border with Bangladesh, *Asian Tribune* New Delhi available at http://www.asiantribune.com/show_news.php?id=11656 visited 30 December 2005. The Russian border, with Estonia was also fortified with watchtowers and barbed wire presenting problems among people who were accustomed to moving freely across the border. Estonian - Russian Border Troubles *The Baltic Observer* 13 March 1994, 5. It may be noted that despite the long history of enthusiastic self preservation strategies and irredentism that are available in human history at least within the last century the idea of boundary fences and walls between states have not retained any appreciable acceptability in law and public perception.

¹⁷¹ Witness the introduction of visa regime between Russia's Baltic enclave of Kaliningrad and its neighbouring states with which it had coexisted in peace prior to their joining the European Union. Peoples Daily Online "Russia Criticizes Visa Regime between Kaliningrad, Neighbouring States" Tuesday, June 11, 2002 http://english.people.com.cn/200206/11/eng20020611_97585.shtml visited 30th December 2005. Similarly a visa regime was introduced for persons travelling between Russia and Poland on October 1 2003 consequent upon Poland's upcoming entry into the European Union. Prior to this time rural populace in both Russia and Poland conducted large-scale formal and informal trade across their common boundaries freely. The resultant situation is long and debilitating ques and the hampering of trade between the neighbours. See further RIAN, "Russia, Poland introduce visa regime" *Pravda* 01-10-2003 available at <http://newsfromrussia.com/world/2003/10/01/50268.html>

¹⁷² Consider the reports of Turkish Militia actions against Kurdish populations along the Iraq-Turkey border Owen Bowcott, Buffer Zone Proposal, *The Guardian* (LONDON) 11 Feb. 1997, 11.

positions.¹⁷³ Other unsupportable antecedents which have been employed with debilitating effect include policies, which serve to freeze the natural development and spread of the citizens of the other state. This may involve restrictive use of building permits, enforced by selective house demolitions, arrests, fines and daily harassment, all designed to confine such population to small enclaves.¹⁷⁴

In place of this the AU Border Programme must actively promote and where possible help arrange international funds for bilateral and multilateral projects designed to bridge the border regions into regenerative zones of economic and cultural revival. Examples include the joint development of resorts, parks, and “international villages” along part(s) of the common boundary of states. Other viable options include the unitisation of the straddling oil fields (discussed below), joint Eco-tourism, territorial trade off, and land for oil trade-off, among others.¹⁷⁵

There is much precedent for innovative thinking and cooperation among African states in post boundary dispute implementation. In the Cameroon –Nigeria situation immediate post litigation processes included negotiations regarding the revival of projects under the Lake Chad Basin Commission (LCBC). The CNMC is in continuous discussion relating to the reactivation of the work of the LCBC. An extraordinary Summit of all the member states was held recently in Abuja. The World Bank has also approved a grant for the work of the

¹⁷³ Exchange of fire between Indian and Bangladeshi border guards at a frontier outpost is a feature of the tense border relations between the two countries since the partition of the subcontinent into India and Pakistan in 1847. The ownership of several villages on both sides of the border are disputed and claimed by both countries. BBC News, “India-Bangladesh border battle” Wednesday, 18 April, 2001, available at http://news.bbc.co.uk/2/hi/south_asia/1283068.stm visited 1st January 2006. Note also long standing Israeli-Lebanon problems. See BBC News, Fighting erupts on Lebanon border Sunday, 26 November, 2000 available at http://news.bbc.co.uk/2/hi/middle_east/1041319.stm visited 1st January 2006.

¹⁷⁴ Such an unfortunate regime has been described as the matrix of control in relation to Palestinian villages bordering Israel (i.e. within the context of Israeli dominance). See Jeff Halper, *The Key To Peace: Dismantling The Matrix Of Control*, June 28, 2002 available at http://www.jerusalemite.org/facts_documents/peace/28.htm.; See also Habitat International Coalition, Housing And Land Rights Committee Statement Before The Committee On Economic, Social And Cultural Rights 24th Session, Geneva, 13 November 2000 General Item: Follow-up Procedure (Israel) Available at <http://www.cesr.org/programs/palestine/hicgeneva.pdf>.

¹⁷⁵ One such laudatory example which may be adopted with respect to one or more of the straddling communities is the International Peace Garden created to commemorate over 150 years of peace between the United States and Canada. This feature straddles the world’s longest unguarded international boundary and is situated in the scenic Turtle Mountains between North Dakota and Manitoba, and half way between the Atlantic and Pacific coasts. Situated at the mouth of this feature are the flags of both nations, and on a boundary marker is inscribed, “To God in his glory, we two nations dedicate this garden and pledge ourselves that as long as man shall live, we will not take up arms against one another.” The most prominent structure, the Peace Tower, with its four pillars, stands over 100 feet tall astride the exact geographical coordinates separating the international boundary. Inspiration for the idea came through the private efforts of a certain academic (Dr. Henry Moore of Islington, Ontario) and culminated in the gathering of 50,000 people on July 14, 1932 to dedicate the territory to peace. Spreading over 2,339 acres, the territory displays a spectacular mosaic of flowers, trees, fountains, and paths. Visitors can stroll through the formal gardens, camp under aspen and oaks, or even get married in the Peace Chapel. Concerts, arts festivals, and renowned youth summer camps in music and athletics are also held in there. Over 250,000 people visit the Garden during the summer months alone to help renew the pledge of friendship between Canada and the United States. See Green, Sheldon. *A Garden for Peace*, Vol.21 North Dakota Horizons, No.3 (1991); See also Sonja Rossum, International Peace Garden Centre for Great Plains Studies, University of Nebraska, - Lincoln available at <http://www.unl.edu/plains/publications/egpentries.html#peace>.

LCBC.¹⁷⁶ Note may also be taken of certain bilateral confidence building efforts the parties have embarked upon, such as; the upgrading of the Mamfe-Abakaliki road to Kumba and Mutengene on the Cameroonian side and the development of early warning system to alert the relevant local authorities and affected populations about potential natural or other disasters. It may be suggested that if the two states exhibit high levels of political resolve, significant financial help could be expected for innovative territorial arrangements such as parks and conservation gardens from the international donor community which has already responded in various ways to the positive attitude of the parties after the ICJ judgment.¹⁷⁷

In the situations where a boundary decision or award has been given by an international court, it is advocated here that the spirit of the Yoruba philosophical and legal maxim be adopted as the guiding principle. As the maxim goes; “*bi a ba ran eniyan ni ise eru ologbon a fi ti omo je*” (Where instructions are insensitive and befitting of a slave, reasonable men must amend it sensitively and deliver it in a manner befitting the free).

It is particularly crucial that post adjudication negotiations regarding straddling villages are as comprehensive and as honest as possible given the fact that both family and economic life of the inhabitants of these villages may become disrupted as a result of insensitive ‘line in the sand’ approach to the demarcation tasks. The reasonable policy which ought to be encouraged by the AU Border Programme is that, as much as possible, post adjudication demarcation must proceed along the lines determined by the Court but that where it would occasion manifest injustices or absurdities such as splitting a school compound into two halves or separating families from their means of subsistence, the legal boundary would cease to be useful and will only be indicative of the direction in which the demarcation must follow for as long as the manifest absurdity is avoided.¹⁷⁸

If the option of splitting of straddling villages is eventually adopted it is necessary to point out that the right of inhabitants of straddling villages to leave the country should be guaranteed in a watertight agreement. Human rights NGOs have for long noted discrimination in the treatment of groups wishing to exercise freedom of movement within straddling communities. Often whole populations would be equated with the activities of one individual, a particular regime or incidents which occurred during previous political disputes between the neighbouring states. At other times when the communities have been split up into two states the right of freedom of movement would only be extended to those regarded as coming from the favoured side.¹⁷⁹

It is perhaps important at this stage to advance certain criteria by which the demarcation of straddling villages may be resolved. The extent to which a settlement straddles the state(s) in question would naturally differ from case to case. Rarely will the straddling

¹⁷⁶ See Communiqué adopted at the second meeting of the Cameroon-Nigeria Mixed Commission established pursuant to the Joint Geneva communiqué of 15 November 2002, Abuja, 4-5 February 2003.

¹⁷⁷ See Para 8 and 11 Communiqué adopted at the Third meeting of the Cameroon –Nigeria Mixed Commission established pursuant to the Joint Geneva Communiqué of 15 November 2002, Yaoundé 2-3 April 2003. See also Communiqué adopted at the fourth meeting of the Cameroon –Nigeria Mixed Commission established pursuant to the Joint Geneva Communiqué of 15 November 2002, Abuja, 10-12 June 2003.

¹⁷⁸ Gbenga Oduntan, *The Demarcation of Straddling Villages in Accordance with the International Court of Justice Jurisprudence: The Cameroon-Nigeria Experience*. 5 *Chinese Journal of International Law*, (1). (2006) pp. 79-114

¹⁷⁹ International Service for Human Rights (ISHR), *Fight against Discrimination and Protection of Vulnerable Groups* available at <http://www.ishr.ch/About%20UN/Reports%20and%20Analysis/Sub%2052%20-%20Discrimination.htm>.

village/community or city be geometrically spread equally over the territories involved because human settlements as organic phenomena rarely have such natural symmetry. A straddling settlement may therefore 'straddle' with respect to one of the territories with only a few dozen houses, houses or homesteads. It is, suggested that permanence of the structures that straddle into foreign territory would be a relevant factor in the consideration of the rights and interests of the affected people and states in the search for an equitable solution.

Where only tents, caravans or other moveable architectural structure are at issue especially where they are few, it may be suggested that a court can afford to carry out delimitation exercise in a much more stricter fashion. It may however, be that a straddling settlement straddles not by virtue of human habitation but by virtue of the fact that the farmland or other economic or vital resource such as river upon which the human settlement depends is to be found within the territory of another state. In such cases the appurtenance and close geographical relation to the human settlement, the crucial importance of the resources, the length of time that the settlement has spread into foreign territory as well as other "effectivité"-oriented criteria would all be relevant facts.¹⁸⁰ In such cases there is a strong basis for the exercise of judicial discretion to vary the line in the interest of human justice even where no single dwelling is in issue. It is argued that this view is supportable especially where there is no adjacent settlement that competes for the use of the river or fertile land on the other side. Where significant economic resources are at stake such as oil and gas or fisheries it is suggested that the issue is no longer that of merely protecting the indigenous people and the territorial state into which the settlement has spread into ought to retain full rights over such resources (subject to our discussions on sharing mineral resources and fisheries below).

Where just few compounds or farmlands spreads into another territory a court may decide not to treat this as an instance of the existence of a straddling settlement and strict delimitation may be exercised. But when, for instance, the majority of the village's farmland is now to be excised away into another state then perhaps this will raise the presumption that some form of exchange of coaxial or proportionate territory may be arranged. Boundary demarcators in such cases may also adopt a strict adherence to the delimitation line. Where an international court has not exercised discretion along the lines suggested above and this would lead to manifest injustice to a significant population, there is much credence for the view that those charged with the implementation of the judgment should seriously explore possibilities of ameliorating the harshness of the delimitation.¹⁸¹

The centre of the village, the location of its religious places (such as shrines mosques, churches, ancestral groves) the palace of the king or chiefs (in the case of the affected Cameroon Nigeria boundary villages the *Bullama*) or its oldest quarter may be a useful indication of which state may claim ownership but these features do not offer conclusive evidence of the ownership of one state or the other to the extent that the people themselves may consider themselves to be rightfully the citizens of another state in spite of where the centre of the village or its oldest parts lie. It is indeed not inconceivable that villagers may

¹⁸⁰ Note should be taken that effectivité remains a potent consideration in determination of boundary and territorial issues despite the courts disregard of the principle in the Cameroon-Nigeria case. This conclusion is clear from the Court's conclusion in the *Frontier Dispute* (Burkina Faso/Republic of Mali) case that "where the territory which is the subject of the dispute is effectively administered by a state other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the effectivité does not co-exist with any legal title, it must invariably be taken into consideration" (emphasis added). *Frontier Dispute* (Burkina Faso/Republic of Mali) 586-587, para. 63.

¹⁸¹ Note should however, be taken that the discussion so far is in relation to straddling villages the sovereignty over which is not dispute. A dispute over the determination of which state can lay claim to a straddling settlement as a whole is a territorial dispute and not a boundary dispute.

move around frequently creating confusion as to where the origins of the village or settlement began and where the locations of the many places mentioned above actually were. Natural causes (war, drought, landslides, earthquakes, infestation by locusts, wild life etc.) may cause a settlement to shift around in such a way that it becomes difficult if not impossible to determine the pattern of spread of a straddling settlement.

It is for this reason that the oral history of the particular people and their wishes as may be determined by consultation and plebiscites are crucial factors to be taken into consideration by demarcators. It is also for this reason that African international courts are perhaps more suited to hearing these sorts of cases. A court that is without close knowledge of the people and places involved or has not received extensive evidence on a straddling community and/or the workings of an African village must hesitate to prescribe a delimitation that definitively splits the community. It is the position of this paper that those that are entrusted with the function of delimitation, in fact have the power if not a duty in the exercise of that function (barring an express and specific limitation by the parties to the contrary) to consider the wishes of the affected people in a straddling settlement and other factors such as the previous history of administration and to vary the line of delimitation in the overall interest of human justice. It hardly needs be mentioned that the exercise of this function in any delimitation exercise must be used within very strict limits. It is not also without contemplation that after consultation the people of a straddling settlement may not be opposed to a strict division along treaty lines especially where the treaties concerned have an unquestionable legitimacy in the estimation of the people. The important consideration however is that diligent consultation with the concerned population ought to be a desirable task of an African delimiting tribunal and a central task of the demarcation team.

It is suggested that the power to vary the delimitation line around straddling settlements in Africa must be exercised very carefully and such exercise of jurisdiction is justifiable upon the existence of certain conditions:

- (a) The exercise of this power is pleaded by one of the states involved and there is a finding that there is indeed a straddling community in existence.
- (b) The exercise of this power is pleaded by the affected people and the request is not opposed by at least one of the states involved and there is a finding that there is a straddling community in existence.
- (c) There has been no express and specific limitation by the parties that this power may not be exercised.
- (d) The exercise of the power is fair, just and equitable in view of the overall circumstances and merits of the case.
- (e) The ownership of the straddling settlement is not judged by the court to be central dispute between the parties.¹⁸²

¹⁸² This differentiation in relation to the Cameroon-Nigeria dispute is perhaps discernible in the way the dispute unfolded before the court. On 29 March 1994 Cameroon filed the suit against Nigeria and defined it as “relat[ing] essentially to the question of sovereignty over the Bakassi” (para 1 and 25 (a)). Later on the 6th of June 1994 Cameroon filed in the Registry of the Court an additional application “for the purpose of extending the subject of the dispute to a further dispute” described in that Additional Application as “relat[ing] essentially to the question of sovereignty over a part of the territory of Cameroon in the area of Lake Chad” (para 3). Cameroon then also requested the Court, in its Additional Application, “to specify definitively” the frontier between the two States from Lake Chad to the sea, and asked it to join the two Applications. It is arguable that a pecking order may be established as to the crucial areas in dispute.

Relevant factors that will determine the extent to which such discretion may be exercised include the relative size of the states facing the boundary dispute. In the case of relatively large states such as Cameroon and Nigeria, the varying of a line of delimitation by a few dozen meters is good policy if it can keep settlements together where the people and at least one of the states involved are desirous of that result. Justification for this position exists in the annals of jurisprudential thinking and practice.

The fifth condition mentioned above perhaps deserves further explanation. It refers to the need to make a distinction between a settlement that forms part of the central dispute between the litigating states and those which are only to be dealt with as a consequence of the general task put before a court or tribunal. Thus, disputes over territories such as Bakassi Peninsula (Cameroon-Nigeria dispute) and Badme (Eritrea-Ethiopia dispute) would not necessarily fall within the scope of the argument presented here. In reality the entire frontier between two states may be drawn into issue whereas only specific places are crucial to the dispute between the two states. While the Court must apply all due diligence in its work of delimiting the boundaries between the two states it is clear that varying the line with respect to small straddling villages in the interest of human justice especially in those areas outside Lake Chad and Bakassi Peninsula was arguably a desirable consequence of its work especially in situations where both states stood to potentially gain from this approach. Courts of law should be held to a higher requirement and standard of justice which go beyond the demands of the litigating states. An institution that arbitrates or adjudicates matters between sovereign states is first and foremost an international temple of justice and is no way obliged to maintain a positivist approach in the execution of its tasks in the face of possibility of putting in jeopardy human and generational rights of indigenous peoples.¹⁸³

14. VARYING DEMARCATION IN THE INTEREST OF JUSTICE AND ACCOMMODATING LOSERS INTERESTS

The process of implementation of a delimitation judgment/award is certain to be momentous and indeed painful to persons on both sides of the boundary. Sentiments and feelings are aroused on a very personal level even up to the very echelons of power in both countries. It is, for instance, a fact which has been repeated on many occasions by my counterpart on the Cameroonian side of the ongoing negotiations, the present Minister of Justice and Keeper of the Seals of the Republic of Cameroon, Mr Amadou Ali, that he has extensive Nigerian antecedents and that many of his living relatives are now confirmed to be

¹⁸³ It is notable that the ICJ approach in this matter is in no way different to the general attitude of other international courts. The refusal of international courts and international law practitioners to adopt a more flexible approach to the resolution of disputes noted by older authorities like Han Morgenthau (in relation to the Permanent Court of International Justice (PCIJ)) remains unchanged till date. Morgenthau regretted the predominance of “time-honoured pseudo-logical method of traditional positivism which prevailed in the jurisdiction of the domestic supreme courts at the turn of the (19th) century” (parenthesis added). He wrote “...resistance to change is uppermost in the history of international law. All the schemes and devices by which great humanitarians and shrewd politicians endeavored to reorganize the relations between states on the basis of law, have not stood the trial of history. Instead of asking whether the devices were adequate to the problems which they were supposed to solve, it was the attitude to the problems which they were supposed to solve, it was the general attitude of the internationalists to take the appropriateness of the devices for granted and to blame the facts for the failure”. Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 *American Journal of International Law* (Apr., 1940), 260, 263. See also generally, P.S. Wild, “What Is the Trouble with International Law?” Vol. XXCII *Am. Pol. Sci. Rev.* (1938).

Nigerian as a direct result of the Judgment. The current Cameroonian Prime Minister, Ephraim Inoni, also has close relatives in Nigeria. The former Nigerian Vice-President, Atiku Abubakar, at one of the joint sessions of the CNMC also related his closeness to the boundary issue by virtue of the proximity of his own village to the international border.

There can be very few defensible arguments against the finality of international judgments and awards and such arguments will succeed in the most limited circumstances. This is indeed why resolution of boundary disputes through the route of negotiations and opportune use of mediation and good services are perhaps preferable to the adjudicative or arbitral routes. The Court on previous occasions has also stated that in its task of delimitation, it will not consider as of direct legal significance a claim that is “based on historic titles (or) is also based on reason of crucial human necessity”.¹⁸⁴ Inequality of natural resources or consequential injustices as would occur where a family is separated from its farms have also been summarily dismissed as irrelevant for the determination of a land frontier which came into existence after independence.¹⁸⁵ Yet it is clear that although African States do have a very good record of compliance with the decision of the World court in boundary disputes is generally impressive the rigidity of judgments does pose a danger of perpetuating perceived injustice and gets in the way of agreement. This characteristic is in itself dangerous to international peace and stability. The quagmire surrounding the ongoing Eritrea-Ethiopia process since 13 April 2002 *Eritrea-Ethiopia award*¹⁸⁶ is indicative of the problem.

The Eritrea-Ethiopia implementation has suffered more prevarication and increasing reluctance of the parties to co-operate with the commission in the demarcation phase of its work. A view has it that this is mainly as a result of Ethiopian dissatisfaction with the loss of parts of its territory.¹⁸⁷ Similar to the Nigerian situation, the delimitation attained by the demarcators of the EEBC produced a situation whereby large numbers of people were cut off from their rivers, farms and other means of livelihood.¹⁸⁸ Despite this fact, the EEBC stated in

¹⁸⁴ 17 See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)* ICJ Reports, 1992, 396, para.58.

¹⁸⁵ See *Continental Shelf, Tunisia/Libyan Arab Jamahiriya*, ICJ Reports (1982), 77, para.107. For a critique of this rigid approach to justice and a critical reappraisal of the *uti possidetis* principle by which many colonial boundaries remain sacrosanct, see Gbenga Oduntan, (2005) above n.92, 3, 14–16, 23. See further Judge Bola Ajibola’s separate opinion in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* in which he appeared to argue that it appeared as if territorial issues relating to Africa are constantly being judged from Eurocentric eyes.

¹⁸⁶ 20 The Commission’s *Eritrea/Ethiopia Boundary (Merits)*, Decision on Delimitation, 13 April 2002 was followed by demarcation arrangements, paralleled by the *Eritrea/Ethiopia Boundary (Interpretation)* Decision of 24 June 2002, which dismissed Ethiopia’s Request for Interpretation of the former Decision, as well as by the *Eritrea/ Ethiopia (Interim Measures)* and *Eritrea/Ethiopia (Demarcation)* Orders of 17 July 2002, and the *Eritrea/ Ethiopia (Determinations)* Decision of 7 November 2002. Copies of all of the Commission’s Decisions were deposited with the Secretaries-General of the African Union (formerly the OAU) and the United Nations. For the texts and related UN Statements, see the websites of the PCA (www.pca-cpa.org) and of the United Nations (www.un.org/NewLinks/eebc Arbitration). See also UN doc. S/RES/1398 of 15 March 2002, which extended the UNMEE until 15 September 2002, with a view to facilitating the implementation of the *Eritrea/Ethiopia Boundary Decision*; UN docs A/57/1, 2002, para.39; S/2002/744; S/RES/1430 and A/ RES/1434 of 14 August and 6 September 2002, which further extended the UNMEE until 15 March 2003; and S/2002/977. See also Jon Abbink, op.cit. pp 1-2.

¹⁸⁷ John Donaldson and Martin Pratt, “International Boundary Developments International Boundary Developments in 2003” 9 *Geopolitics* (2004) pp. 501-503; “Ethiopian, Eritrean Border Conflict Resolution Deadlocked”, *The Guardian* (Nigeria) available at <http://community.nigeria.com/newsroom.html> accessed 12 September 2007.

¹⁸⁸ The controversy surrounding the Decision is reflected in a letter written to the EEBC arbitrators to mark the first anniversary of the verdict. It reads, inter alia: “On April 13, 2001, when the governments

paragraph 14A of the Commission's Demarcation Directions of 8 July 2002 that with respect to the division of towns and villages:

The Commission has no authority to vary the boundary line. If it runs through and divides a town or village, the line may be varied only on the basis of an express request agreed between and made by both Parties.¹⁸⁹

The written comments submitted by Ethiopia on the draft of this provision had expressed the hope that it could be made more flexible so that demarcations could be more practical and mitigate hardships. The Commission, however, rejected this suggestion based largely on the expectation that aggrieved States must respect the finality, which the parties had agreed to attach to the Delimitation Decision. This is, however, difficult to reconcile with the Commission's view that:

A demarcator must demarcate the boundary as it has been laid down in the delimitation instrument, but with a limited margin of appreciation enabling it to take account of any flexibility in the terms of the delimitation itself or of the scale and accuracy of maps used in the delimitation process, and to avoid establishing a boundary which is manifestly impracticable.¹⁹⁰

Despite this and perhaps with the full realization that getting the parties to jointly request that a line should be varied in the interest of protecting the citizens of either party would be very unlikely to say the least in a dispute with such a difficult and long gestation period, the Commission seems to have determined a priori that there would be no need for it to be flexible in its work because it is "not of the view that there is to be derived from that practice a settled rule of customary international law to the effect that demarcators not so expressly empowered nonetheless possess such power".¹⁹¹ In other words, it is reasonable to expect that the ongoing demarcation would suffer from the same rigidity and commitment to formalism that typified the delimitation stage and has exposed the Commission's work to the

of Ethiopia and Eritrea announced their victory regarding their common border, thousands of Irobs woke up to find their history and their heritage suddenly altered by five judges that had never set foot in the boundary region. They were initially confused by the Commission's decision because the decision placed the term 'Irob' entirely in Ethiopia, yet numerous Irob villages and hamlets were now placed in Eritrea. They were confused as to why Ethiopia declared absolute victory because Eritrean radio stations in the Washington D.C. area and apparently in Eritrea were bragging that they won one third of Irobland. Slowly, our fears became true. It became clear that despite the many pleas made by the people of Irob, the Eritrea–Ethiopia Boundary Commission had shockingly sacrificed the people of Irob for the sake of political compromise." See Tesfamariam Baraki, *Beyond the Badme Debate: The Forgotten Case of Irobland*, 10 March 2003 (www.unitedethiopia.org/BeyondtheBadmeDebate.html).

¹⁸⁹ Eritrea–Ethiopia Boundary Commission, *Observations*, 21 March 2003, published as an addendum to the Progress Report of the Secretary-General on Ethiopia and Eritrea, UN doc. S/2003/257 of 6 March 2003 (www.pca-cpa.org/PDF/Obs.EEBC.pdf).

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*, pp. 2–3. In classic and unrelenting fashion symptomatic of the conservative jurisprudence of the main international courts and tribunals, it is stated that "the Commission is, as already noted, constrained by the terms of the December 2000 Agreement. The Commission is unable to read into that treaty language, either taken by itself or read in the light of the context provided by other associated agreements concluded between the Parties, any authority for it to add to or subtract from the terms of the colonial treaties or to include within the applicable international law elements of flexibility which it does not already contain." This is very difficult to reconcile with paras 1 and 2 of Eritrea/Ethiopia Boundary (Determinations), *supra* note 131.

strongest criticism by all sides to the dispute and by other commentators. It is suggested that the Commission's work would have better chances of success had it adopted the more holistic view of the entire exercise as a process.

It is for this reason that African demarcation must wear a human face. The jurisprudence of the African Court of Justice and other International Arbitral institutions based in Africa should be progressive. It behoves of African lawyers and statesmen to move beyond bare geographic legalism in the resolution of delimitation and demarcation problems and to adopt a specifically Afrocentric jurisprudence based less on 'a winner takes it all' logic and more on people centred approach and the precepts of generational justice. A possible direction to explore in this respect is whether leases and long term servitudes should be encouraged in African practice to perhaps reduce the shock of territorial loss. In this way property rights (to territory, chattel, real property, and farmland) and the economic benefits therefrom may be retained or transferred by negotiated agreement while preserving the sentimentalities of peoples and groups. It may for instance be that agreement over the Bakassi Peninsula would have been easily secured if it had been open to Nigeria to lease the territory from Cameroon.

A good pre-emptive strategy which ought to be explored by the AU immediately and to accompany the initial stages of the African Boundary Programme is to encourage the 53 African member states to ratify where they have not done so already the major international, African and regional human and peoples rights conventions and treaties. If and when a state loses territory during demarcation to another state the existence of multifarious treaties and conventions that prevent the arbitrariness of power against minority groups and all persons would prove invaluable to those nationals and their erstwhile states. It would also prove useful to governments to be able to assure an emotive national population that a neighbouring state will be bound to respect the rights and privileges of the affected population. It is worthy of note that there are numerous international instruments to which both Cameroon and Nigeria are parties and which are definitive of their obligations towards the affected population and have been informing their common approach to the overall implementation task. These include (a) at least one pertinent bilateral treaty; (b) 9 leading multilateral treaties to which both states are parties. These instruments can also be relied upon in the protection of the individual and group rights of the affected population. It may also be noted that the constitutions of both States contain specific provisions guaranteeing the protection of human rights and freedoms. In addition to this, both Nigeria¹⁹² and Cameroon¹⁹³ have within their domestic spheres an

¹⁹² Land Use Act, Cap.202, Vol. XI; Legal Aid Act, Cap.205, Vol. XI (Legal Aid Council); Immigration Act, Cap.171, Vol. X; Penal Code, Cap.345, Vol. XIX; Criminal Code Act, Cap.77, Vol. V; Criminal Code Act, Cap.80, Vol. V; Criminal Procedure Act, Cap.80, Vol. V; Women and Children's Rights Act, 2003; Constitution of the Federal Republic of Nigeria, 1999, Chapter II Fundamental Objectives and Directives and Directive Principles of State Policy; Chapter IV Citizenship; Fundamental Rights; Fundamental Rights (Enforcement Procedure) Rules; Fifth Schedule, Pt I: Code of Conduct for Public Officers, s.9: Abuse of Powers; Code of Conduct for Public Officers, s.9: Abuse of Powers; Code of Conduct for Public Officers, s. 9: Abuse of Powers; Code of Conduct Bureau, s.15; Code of Conduct Tribunal, s.17.

¹⁹³ Act No.97/012 of 10 January on the Conditions for Entry into, Residence in and Departure from Cameroonian Territory, and Decree No.2000/286 of 12 October specifying the Conditions for the Entry, Residence and Departure of Foreign nationals; Act No.90/ 052 of 19 December 1990 on Freedom of Social Interaction; Act No.90/053 of 19 December 1990 on Freedom of Association; Act No.90/054 of 19 December 1990 on the Maintenance of Public Order; Act No.90/055 of 19 December 1990 on Governing Public Events and Meetings; Act No.90/058 of 19 December 1990 modifying Act No.89/019 of 29 December 1989 on the Organisation of the Judicial System; Act No.90/060 of 19 December 1990 on the Establishment and Organisation of the Court of National Security; Act No.90/060 of 19 December 1990 on the Establishment and Organisation of the Court of National Security; Act No.90/061 of 19 December 1990 modifying certain provisions of the Penal Code; Act No.97/009

extensive body of legislation that is directly related or relevant to the protection of human rights. Both States are also proud participants in international law and international relations.¹⁹⁴ It is, thus, necessary to conclude that there is adequate protection of the interests of individuals and groups within the scope of the applicable law relating to both states. Indeed both states have on a number of occasions openly expressed a firm commitment to ensure that no action taken in the implementation of the decision of the ICJ judgment would put them in a position to abuse or violate the rights of the population that may have been affected by this judgment.

15. STRADDLING RESOURCES AND HYDROCARBON FIELDS

The potentials of straddling resources to continue acting as flash points on the African continent is a clear and present danger. The phenomenon deserves closer scrutiny than it gets in legal and political literature. It certainly does deserve closer study under the AUBP and as received mention but it is not clear exactly how the states parties to the process are expected to engage with the legal issue. The problem as accurately described by the African Union is as follows:

Since African countries gained independence, the borders – which were drawn during the colonial period in a context of rivalries between European countries and their scramble for territories in Africa – have been a recurrent source of conflicts and disputes in the continent. Most of the borders are poorly defined. *The location of strategic natural resources in cross-border areas poses additional challenges* (emphasis added).¹⁹⁵

The very concept of joint and cooperative development rests on the factual geophysical nature of hydrocarbons in their natural states as fluid substances that subsist

modifying and supplementing certain provisions of the Penal Code and penalizing torture; Act No.90/031 of 10 August 1990 on Commercial Activities in Cameroon; Act No.90/063 of 19 December 1990 modifying and supplementing certain provisions of Acts No.69/LF 18 of 10 November 1969 and No.84/001 of 4 July 1984 establishing a system covering insurance, old-age pensions, disability and death; Order-in-council No.90/1459 of 8 November 1990 establishing the Commission Nationale des Droits de L'Homme et des Liberties (CNDL)/National Human Rights and Freedoms Commissions; Order in Council No.91/287 of 21 June 1991 establishing the Conseil National de la Communication (CNC)/National Communication Council.

¹⁹⁴ International organisations in which Cameroon participates include ABEDA, ACCT, ACP, AfDB, AU, BDEAC, C, CEMAC, FAO, FZ, G-77, IAEA, IBRD, ICAO, ICC, ICt (signatory), ICFTU, ICRM, IDA, IDB, IFAD, IFC, IFRCs, ILO, IMF, IMO, Interpol, IOC, ITU, MIGA, MONUC, NAM, OIC, OPCW, PCA, UN, UNCTAD, UNESCO, UNIDO, UNMIK, UPU, WCL, WCO, WFTU, WHO, WIPO, WMO, WTO, WTOO, WTO. Information available at <http://www.cia.gov/cia/publications/factbook/geos/cm.html#People>. International organisations in which Nigeria participates include: ACP, AfDB, AU, C, ECOWAS, FAO, G-15, G-24, G-77, IAEA, IBRD, ICAO, ICC, ICt, ICFTU, ICRM, IDA, IFAD, IFC, IFRCs, IHO, ILO, IMF, IMO, Interpol, IOC, IOM, ISO, ITU, MIGA, MINURSO, MONUC, NAM, OAS (observer), OIC, ONUB, OPCW, OPEC, PCA, UN, UNAMSIL, UNCTAD, UNESCO, UNHCR, UNIDO, UNITAR, UNMEE, UNMIL, UNMIS, UNMOVIC, UNOCI, UPU, WCO, WFTU, WHO, WIPO, WMO, WTOO, WTO. Information available at <http://www.cia.gov/cia/publications/factbook/geos/ni.html>.

¹⁹⁵ African Union, "Report of the Commission on the Implementation of the African Union Border Programme" Executive Council Fourteenth Ordinary Session 29 - 30 January 2009 op.cit., p. 1.

underground without any respect whatsoever for man made political geography based on the territorial sovereignty and jurisdiction that exists above ground. The irreverent nature of hydrocarbon deposits is further compounded by the reality that whenever a single owner extracts hydrocarbons from a point presumably within its own jurisdictional claims the potential share of the other claimant(s) is damaged. Resorting to free for all exploitation will in most cases irresponsibly reduce the viability and vitality of the deposit(s) beyond repair. In such circumstances and for these reasons cooperative crossborder upstream management is not only reasonable but resort to this device is fast crystallising into customary international law.¹⁹⁶

Agreement on joint development is often a product of the tortuous process of agreement on delimitation and demarcation. Before concluding the agreement on their maritime boundary in 1997, Thailand and Vietnam had also discussed the possibility of joint development for their overlapping claims area.¹⁹⁷ Fortunately there is ample evidence of cooperation in the sharing of cross boundary resources in the maritime sector among African states. It may still be recommended that state practice in this direction may have to be studied in a closer fashion to discover any Afrocentric trends and strategies that may be developed further. It may indeed be predicted that much of the practice in the immediate future will be in Africa in view of developments such as the Gulf of Guinea cooperation.¹⁹⁸

A specific instance has resulted out of the ICJ judgment and the agreed maritime boundary formally demarcated by Cameroon and Nigeria recently. It became evident that some oil fields/blocks belonging to Nigeria have been affected by the new maritime boundary. It, therefore, became imperative upon the parties to determine how to manage these straddling oil fields. From very early in its work the Maritime Working Group had expressed agreement

¹⁹⁶ Writers that agree with the customary rule argument include: Onorato, WT "Apportionment of an International Common Petroleum Deposit" 17 *ICLQ* 1968 101; Onorato, WT, A case Study in Joint Development: The Saudi Arabia-Kuwait Partitioned Neutral Zone" in Valencia (ed.) Workshop II 1985; Shihata, I.F.I and Onorato, W.T. Joint development of International Petroleum Resources in Undefined and Disputed Areas" Paper presented at the International Conference of the LAWASIA Energy Section, Kuala Lumpur (October 18-22, 1992) pp. 3-4. Writers that disagree with the customary rule argument include: Miyoshi see Masahiro Miyoshi, "The Joint Development of off shore Oil and gas in relation to Maritime Boundary Delimitation" Vol. 2 *Maritime Briefing* No. 5 Durham: IBRU 1999 p. 4. Note also the conclusion of a group of experts at the British Institute of International and Comparative Law as at 1989 that "...in contradiction to agreed boundary areas where a known field straddles the boundary, there is at present as regards disputed areas no clear rule of customary law which requires a State to inform and consult other interested parties". H. Fox et. al., "Joint Development of Offshore Oil and Gas, Vol. II London: BIICL, *Joint Development I*" 1989 quoted in Miyoshi op. cit., p. 4.

¹⁹⁷ See Protocol of the first meeting of the Thai-Vietnamese Joint Committee on Culture, Economic, Science and Technical Cooperation in October 1991. Note the eventual Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Viet Nam on the delimitation of the maritime boundary between the two countries in the Gulf of Thailand, 9 August 1997 Delimitation Treaties Infobase (accessed on 18/03/2008) Available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/THA-VNM1997MB.PDF>

¹⁹⁸ The development of a joint development zone (JDZ) or unitisation in the maritime sector is a time consuming and potentially politically hazardous process. The scientific determination of the extent of the oil fields alone may take years to appreciate. More and more interlocking fields may be discovered than are presently envisaged. Furthermore there is lurking in the background the fact that most scholars on the topic are of the opinion that there is no rule of customary international law that states that joint development of hydrocarbons must be embarked on even in the most apparent cases of straddling resources. See Thao, Nguyen Joint Development in the Gulf of Thailand in 7, *Boundary and Security Bulletin* No. 3 (1999) p. 85. Miyoshi op.cit., p.

on the need to study the extent to which the existing hydro-carbon resources that overlap could feasibly be regulated within a sharing regime for straddling resources.¹⁹⁹

Joint development or what we prefer to call Cooperative Crossborder Upstream Exploitation has been ably described as “an inter-governmental arrangement of a provisional nature, designed for functional purposes of joint exploration for and/or exploitation of hydrocarbon resources of the seabed beyond the territorial sea”.²⁰⁰ R. Lagoni and Churchill offer perhaps more elaborate descriptions which may deserve separate consideration and enrich our understanding of the subject area. For Lagoni it refers to:

The cooperation between States with regards to the exploration for and exploitation of certain deposits, fields or accumulations of non-living resources which either extend across a boundary or lie in an area of overlapping claims”.²⁰¹

This definition encompasses the Cameroon-Nigeria situation to the extent that the resources lie across an agreed boundary. The definition, therefore, appears to be more technically sound in that it avoids the fallacy in Churchill’s conception which implicitly presupposes that two states can ordinarily possess sovereignty at the same time in a specific area. Churchill wrote:

“JDZ will be considered as being an area where two or more states, have under international law, sovereign rights to explore and exploit the natural resources of the area and where the states concerned have agreed to engage in such exploration and exploitation under some form of common or joint arrangement”.²⁰²

The idea that joint sovereignty will be exercised in the cross border cooperative between Cameroon and Nigeria would be ignoring several legal and political realities including the decades of boundary bickering between the two states and the existence of a valid ICJ judgment on their maritime dispute.

16. STRADDLING FISHERIES

In relation to fisheries the recognition of common artisanal fishing rights is clearly a favoured option for African states. The jurisprudence of the ICJ in relation to fishing rights of indigenous population reveals that the court is indeed sensitive to the duty upon it to preserve the livelihood and interests of indigenous populations affected by its judgments. In relation to

¹⁹⁹ It is important to note that the parties have, however, not yet achieved the significant task of determining the form of cooperation suitable for their purpose (unitisation or Joint Production Zone) nor have they decided upon an exact sharing formula.

²⁰⁰ Miyoshi *op.cit.*, p. 3. Admittedly this definition does not cover those instances as when a government and a private multinational or consortium goes into joint ventures in the exploration of hydrocarbons. Ngueyen also points out that “...the definition of joint development is not uniform in conventional international law and jurists have many explanations”. Ngueyen p. 85.

²⁰¹ R. Lagoni, Report on Joint Development of Non –Living Resources in the Exclusive Economic Zone, (Warsaw Conference of the International Committee on the Exclusive Economic Zone, International Law Association , 1988) p. 2.

²⁰² Churchill quoted in Hazel Fox, *Joint Development of offshore Oil and Gas*, vol. II, The British Institute of International and Comparative Law, 1990, p. 55.

maritime disputes the court strictly construes its delimitation tasks but has always strongly expressed in its jurisprudence that a regime of jointly exercised fishing rights. It is this sort of specificity that ought to be introduced to the language of the African Court of Justice and those arbitrators and negotiators called upon to decide upon straddling fisheries stocks and the fate of straddling villages.

It is also notable that there are important obligations under Articles 61-65 of the UN Convention on the Law of the Sea (UNCLOS)²⁰³ that mandate states to cooperate on a global, regional or sub-regional basis. This includes in its purview instances such as the Cameroon - Nigeria situation where there are ample stocks shared by the two states along their internal boundary rivers as well as the conservation of stocks that straddle the high seas and the EEZ of the two states. These obligations also create the imperative to protect and preserve the marine environment.²⁰⁴

Areas of cooperation to be worked on both as a result of the judgment as well in accordance with prior regional and international commitment include: exchange of fisheries data creating bilateral/regional patrols of fisheries including the use of surveillance aircraft. Now that Nigeria has launched a series of indigenous satellites the possibility of satellite tracking and monitoring of large fishing vessels is not remote and ought to be explored.²⁰⁵

One of the central issues to determine from the start by the parties to the Cameroon-Nigeria process, therefore, is whether the regime of maritime cooperation should be all encompassing and include both hydrocarbon and fisheries resources. Examples of such inclusive regime, which covers oil and gas as well as living marine resources, include the Guinea-Bissau - Senegal Agreement of 14 October 1993,²⁰⁶ which is a joint development agreement, based on a previous maritime boundary agreement between the parties' respective colonial powers signed in 1960. There will be instances where it will make perfect sense to simultaneously deal with the hydrocarbon and fisheries regime in a single legislation and there will be instances where it will be wiser to have different regimes.

17. SHOULD THERE BE AN AFRICAN CUSTOMARY RULE IN FAVOUR OF SHARING STRADDLING RESOURCES?

In many cases the world over the discovery of valuable resources is what catapults sleepy frontier lands into the scene of intense territorial and boundary conflict. This realisation is one which ought to be instructive to the jurisprudence that must accompany the AU boundary programme.²⁰⁷ When a reservoir straddles the boundary between two sovereign

²⁰³ Convention on the Law of the Sea (21 ILM (1982) 1261; Misc 11 (1983), 8941; 1833 UNTS 3 (1994); Brownlie, *Basic Documents in International Affairs*, 3rd edn 129).

²⁰⁴ Article 197 of the LOSC. See generally Gbenga Oduntan, "Maritime Pyrrhic Victories: Evaluation of the de facto Regime of Common Fishing Rights in the Land and Maritime Boundary Case (Cameroon v Nigeria)", 37 *Journal of Maritime Law and Commerce*, (1) (2002).

²⁰⁵ Many fishing vessels can now be equipped with GPS, and the requirement to have the means of accurately fixing a vessel's position can be built into the fishery regulations of both states or into a bilateral treaty. Roberts op.cit., p. 112. For similar arrangements already being utilised among the EU states see generally Oduntan, G., "The Evidentiary Issues Arising From The Proposed Use Of The Satellite Based Vehicle Monitoring System And Electronic Logbooks In The Fishcam Project Within The European Union" Vol. 12 *International Journal Of Law And Information Technology*, Issue 1 Spring 2004, pp. 74-100.

²⁰⁶ See text of the Exchange of Notes in Charney and Alexander (1993: 873-874).

²⁰⁷ If press reports are anything to go by the 'oil rich' nature of the Bakassi Peninsula is the *fons origo* of the Cameroonian crises and many years of litigation at the Hague. The Nigerian government has however been at pains to deny this idea on many occasions.

states, the common nature of petroleum resources dictate that the ideal strategy to undertake their development from a legal, technical conservationist and environmental perspective is either unitisation in the case of delimited and demarcated land boundaries or joint production zones in the case of undelimited/undemarcated maritime boundaries.²⁰⁸ The writers who have argued that joint development could constitute a rule of customary international law, base their conviction upon three main points. They are: First that no state may unilaterally exploit the common international petroleum deposit over the timely objection of another interested state; second, the method of exploitation of such a deposit must be agreed upon by the states concerned and third, that concerned states must enter into good faith agreements at least of a provisional nature until full and final agreement is reached.²⁰⁹ Similarly Zhiguo Gao relying upon sections of the ICJ judgment in the *Libyan Continental Shelf* case, state practice and the general principles of soft law argued that joint development has become a binding rule of international law.²¹⁰

It suffice to say that irrespective of which school of thought eventually wins the argument on the bindingness of joint development of straddling resources the fact is that among African states there is no evidence of *opinio juris sive necessitatis* that will create a customary principle of law on this issue. That, however, does not mean that it is not indeed necessary to examine whether Cameroon and Nigeria are bound to adopt cooperative cross border upstream hydrocarbon exploitation in this instance. The first important query to solve this riddle is whether the statements and acts of the parties during the ongoing negotiations of the Mixed Commission and particularly in the Maritime Working group may be enough to *estoppe* any of the parties from refusing to conclude a joint development agreement.²¹¹ Certainly there is enough in the records of the process in recent times as discussed above to show that the parties are seriously considering Cooperative Cross Border Upstream Hydrocarbon Exploitation but does this mean they are bound under international law to conclude and successfully implement a JDZ or unitisation?

The answer to this question is debateable and the distinction on this issue made by a research team at the BIICL between situations where there is an agreed boundary and those where there is none is helpful but the better view from our perspective is that the parties to the present process are not bound to do so as they may indeed not come to an agreement for varied

²⁰⁸ A.E. Bastida, Ifesi-Okoye, Salim Mahmud, James Ross and Tjthomas Walde, "Cross-Border Unitization and Joint Development Agreements: An International Law Perspective" Vol. 29 *Houston Journal of International Law* no. 2 (2007) p. 357.

²⁰⁹ See T. Onorato, "Apportionment of an International Common Petroleum Deposit: A Reprise" 26 *ICLQ* 1977, p. 324.

²¹⁰ Zhiguo Gao, *The Legal Concept and aspects of Joint Development in International Law* Vol 13 *Ocean Yearbook*, 1998 p. 123.

²¹¹ The principle of Estoppel developed principally as a rule of common law. Up till the late 1920s it was observed to have garnered little attention in the field of public international law but as MacGibbon puts it as at 1958 "the marked increase since then in international judicial and arbitral activity has provided substantial grounds for the modern tendency to consider estoppel as one of the 'general principles of law recognised by civilised nations' " The main justification and basis upon which estoppel survives in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation. See I. C. MacGibbon, "Estoppel In International Law" The Vol. 7 *International and Comparative Law Quarterly* No. 3 (1958) pp. *et seq.* Note also the early recognition given to this principle by Professor Bin Cheng. Bin Cheng, *General Principles of Law Recognised by International Courts and Tribunals* (Cambridge: Cambridge University Press London, Stevens, 1953) at pp 137 *et seq.*

reasons.²¹² It is impossible to come to the conclusion that there may be no valid reasons why states may not be able to conclude a joint development agreement. If mutual distrust is so high between states as to make it too difficult to agree on joint development or prevent them from successfully concluding negotiations then either wastage due to non exploitation or wastage due to inefficient exploitation method whilst regrettable is a likely if not legitimate outcome. The intensity of previous rivalries and conflicting interests should not be so readily discountenanced without caution.²¹³ It is for instance not to be forgotten that traditional perceptions of the immediate neighbours of Nigeria are that the country poses a deep concern because of its competitive capacity to appropriate valuable resources particularly hydrocarbons and fisheries which abound in the maritime boundary areas. In other words even in the case of agreed boundaries between two states, joint development may be customary practice based on what Miyoshi calls “correct and scrupulous logic” but it has not and may not concretise into a customary rule of international law.

It is in this light that African states need to establish a consistent policy and practice. The onus to develop this presumption that joint production and sharing of hydrocarbon and fisheries resources is the African legal practice will largely fall on African arbitrators and judges. The African Court of justice will also have to develop jurisprudence in this area for in it arguably lays perhaps the solution to many hotly contested resource disputes which may threaten international peace. This argument is made here not without consideration of the fact that economic resources are the reason of great obstinacy by national governments. The fact, however, remains that there is something of a fascination for the communal as opposed to the allodial nature of land and in its resources in most African traditional cultures. Rivers and water resources are shared without rancour across the length and breadth of boundary lines and sometimes watering holes and infrastructure based in a neighbouring country are used by the citizens of the neighbouring state. Although there is the possibility of individualised ownership and ‘propertisation’ of land and resources, the central thrust of much of African understanding is that of common ownership through allocation by the sovereign or Chief.²¹⁴ Thus a principle of law that allows the governing authority to share resources without

²¹² The experts concluded: “...it would seem that international law only entails an obligation to consult and negotiate where States have broadly agreed on the delimitation of their maritime boundaries. There would seem to be no body of State practice upon which to underpin such a general obligation in the case where no boundary has been drawn in a disputed area ...It would seem in these circumstances that a disputant State may carry out unilateral prospecting in the disputed area. Our conclusion, therefore, is that in contradiction to agreed boundary areas where a known field straddles the boundary, there is at present as regards disputed areas no clear rule of customary law which requires a State to inform and consult other interested parties”. Fox (1989) op.cit, p. 35.

²¹³ Note may be taken of the fact that the fear of the loss of Nigeria’s vital offshore oil installations was one of the reasons why General Murtala Muhammad a Nigerian Head of State condemned the Maroua Accord, which was one of the treaties relied upon by the Court in coming to its decision. It remains true however that the suspicions are mutual and Cameroon perhaps like some other neighbouring states of Nigeria is fearful of Nigerian paternalism. With a vibrant and fast improving economic base and a population that is at least three times the size of the five states it shares boundaries Nigeria certainly evokes in the national memory of its neighbouring governments what an author describes as “the potentialities of a sub-imperial state...masking an innate covetousness and potential threat to their territorial integrity”. Bassey E. Ate, “Introduction: Issues in Nigeria’s Security Relations with its Immediate Neighbours”, *Nigeria and Its Immediate Neighbours: Constraints and Prospects Of Sub Regional Security in the 1990s* Bassey E. Ate and Bola A. Akinterinwa eds. (Lagos: Nigerian Institute of International Affairs) 1992 pp. 2 and 6.

²¹⁴ Olawale Elias,. *The Nigerian Legal System*. (London: Routledge, 1963); Olawale Elias, *Nigerian Land Law and Custom* (London: Routledge & Kegan Paul, 1962); Bonny Ibhawoh, *Imperialism and Human Rights* (State University of New York Press, 2007) pp. 89-90.

alienating same is arguably well within the 'proto-culture' of African states and societies. This presumption towards the unitisation and/or JPZ would arguably immunise African states to the deleterious activities of divisive multinational companies who may want to exploit international divisions between weaker states.

It is possible and indeed hoped that State parties may frequently avail themselves of the mechanism of the Court of Justice of the AU²¹⁵ which is the principal judicial organ of the African Union.²¹⁶ Of particular significance are the provisions of the Protocol on Eligibility to Submit cases (Article 18), Competence/Jurisdiction (Article 19), Sources of Law (Article 20); Summary Procedure (Article 55) and Special Chambers (Article 56).²¹⁷ Where the dispute in question is between the state parties there is no difficulty in locating the eligibility of the parties in accordance with Article 18. Where, however, the dispute involves a multinational corporation or other corporate body and a state party or state parties, Article 18 would arguably also be useful to the extent that it also recognises the right of 'third parties' to submit cases to the Court of Justice under conditions to be determined by the AU Assembly and with the consent of the State Party concerned (Article 18 (d)).²¹⁸

18. PRESCRIPTIVE CONCLUSIONS

There is no doubt that because of the importance of the issues at stake to the survival of the economic and even security fortunes of Africa as a continent it is crucial that the law, policy and practice of African boundary delimitation and demarcation must develop fast if the noble aims of the AU Border Programme are to be achieved. There is a balance to be struck between implementing a very detailed legal and political process and the invitation to chaos by inadvertent reawakening of irredentism and inordinate territorial and boundary claims across the continent. The danger is particularly true of the maritime boundaries and zones –areas that

²¹⁵ Hereinafter referred to as Court of Justice

²¹⁶ Hereinafter referred to as the Protocol. The Court was established in consonance with the Constitutive Act of the Court of Justice of the African Union. See Protocol of the Court of Justice of the African Union in Vol. 13 *African Journal of International and Comparative Law* Part 1 2005 115-128.

²¹⁷ It is perhaps necessary to mention that virtually all the state parties to the Gulf of Guinea commission are all member states to the African Union and therefore parties to the Protocol.

²¹⁸ There is much justification for the position that MNCs may in a similar manner be admitted before the Court. It must however, be admitted that an amendment to the existing rules would be necessary to admit MNCs as parties in their own right unless of course use is made of the time honoured concept of *amicus curiae*.²¹⁸ It is notable that this interpretation indeed falls well within the increasing treatment of MNCs as subjects of international law. It is perhaps a shortcoming of the Protocol that it does not expressly spell out the possibility of a concerned State party instituting proceedings against a 'third party' before the court with the latter's consent. However, the fact that the article does not expressly govern this particular situation does not mean it is not possible especially where the jurisdiction is accepted by the respondent State. This interpretation is also in consonance with the intention of the drafters is to increase access to the Court of Justice rather than to restrict it. It must, however, be emphasised that following the logic of subparagraph (d) the consent of the third party would be crucial to the exercise of jurisdiction by the Court. It is notable that the competence/jurisdiction of the Court of Justice includes disputes relating to "the existence of any fact which, if established, would constitute a breach of an obligation owed to a State party to the Union" (Article 19 (f)). Furthermore, the assembly is empowered to confer on the Court of Justice power to assume jurisdiction over any dispute" (Article 19 (2)). Taken on the whole it is the intention of the drafters to make it easier for State parties (to both the Treaty and the Protocol) to institute actions than for a Multinational or non state party to institute claims against state party(ies). In light of previous practice it would, however, be a peculiar scenario indeed whereby a multinational operator would choose an African international court as its preferable institution.²¹⁸ G. Oduntan, *Law and Practice of the International Court of Justice a Critique of the Contentious and Advisory Jurisdictions*, (Enugu, Michigan: Fourth Dimension Publishers, Michigan State University Press 1999).

are usually rich in resources but very expensive and technical to decide upon. This is not to suggest that the demarcation of land boundaries is not fraught with significant difficulties. Even where all the concerned states in the AUBP move expeditiously to resolve the demarcation problems, the difficulties that may be encountered by the parties include the disappearance or obliteration of certain features as mentioned in the applicable treaties; inaccuracy of the initial surveying or mapping effort; the inclusion of sensitive areas of religious,²¹⁹ traditional, ethnic²²⁰ or economic importance in the areas of dispute and the possibility of areas of indeterminate sovereignty (such as Western Sahara).

There is a sense in which the finality of judicial and arbitral awards may have encouraged uncompromising attitudes and frequent resort to military conflicts among African states. It is recommended that there ought to be as a feature of African boundary delimitation and demarcation practice, a presumption that the party that loses a contested territory should have a right if it so chooses to enter into lease agreements with the eventual winner of the territory. While a duty to agree to international leases will be going too far – the duty to at least negotiate on this point ought to be permitted and is good policy. There is a possible argument that the six year long implementation of the Cameroon-Nigeria process would have been halved if the negotiations had included firmly from the beginning the possibility of an international lease of Bakassi by Nigeria from Cameroon. Similarly the very slow progress that has typified the Eritrea-Ethiopia process would have been prevented if the possibility of leases and territorial exchanges was injected into the proceedings.

It is true that the distances across Africa's boundaries are daunting and this must be taken into account in formulating the implementation of the AU borders programme. The time scale that is required for a qualitative delimitation and demarcation process across the continent in all the areas that have not been so delimited and demarcated is significant and clearly beyond the period earmarked under the current programme. It is recommended that a 30 year plan is put into place in which a phased approach will be used to attain the aims and objectives of the African Boundaries Programme. This phased approach preferably based on a sub regional timetable will allow for more qualitative concerted effort required to analyse and formalise the process of delimiting territories in particular regions.

A realistic time frame will allow the member states to cover all aspects of the best practices in boundary work from including recovery, delimitation, demarcation and reaffirmation. It also accords better with the view that boundary work is a continuous phenomenon – a means to an end and not an end in itself. In this way supervision of boundary management according to best practices may eventually fall under the African Union Boundary Programme. This is certainly not to suggest that rigorous demarcation is required

²¹⁹ This case even shows that many years after definitive judgment severe problems may flare up as a result of religious and cultural implications on the affected population. The *Temple of Preah Vihear case* concerned a boundary conflict between Cambodia and Thailand (formerly known as Siam). The disputed area contained an old temple of great archaeological significance. It had been built by the Khmer Peoples, the ancestors of the present Cambodian population, at the high point of their power; since then the Khmer Peoples have been forced back into smaller areas. The considerations the parties wished the Court to pronounce upon included: to which of the two countries' history is the temple more related. Despite the Courts decision in 1962 conflict persist between the parties in relation to the temple (ICJ. Rep. 1962 p. 14). Military conflicts and skirmishes occurred as recent as 2008. See Thomas Bell, "Thailand steps back from Cambodia conflict" *Telegraph* Wednesday 06 January 2010 available at <http://www.telegraph.co.uk/news/worldnews/asia/cambodia/3195213/Thailand-steps-back-from-Cambodia-conflict.html> visited 6 January 2010; Richard Lloyd Parry, "Thailand and Cambodia Teeter on Edge of Conflict at Cliff-top Temple" *Times* July 19, 2008 available at <http://www.timesonline.co.uk/tol/news/world/asia/article4360257.ece> visited 6 Jan 2010.

²²⁰ The Nigerians caught in the Bakassi judgment in the Land and Maritime Judgment.

along every inch. Boundary pillar emplacement programme, for instance, may be unnecessary along previously uncontested boundaries and along inaccessible mountain ranges or other dangerous places. Boundary pillars that are 'intervisible' will however be required along settlements and other border villages for ease of reference and to inform the largely illiterate population that live in the African border areas.

The idea that clear demarcation of a state's boundaries is required only when economic resources are involved is counterintuitive to the prevention of conflicts, and promoting of integration. Yet African border areas ought to be assisted to become areas of opportunity and bridges between peoples rather than peripheral and divisive in all senses. Governments have to be made to realise that boundaries define both a state's rights to the resources of territory, as well as its responsibilities for the administration of populations within that territory. It ought to also be one of the aims of the African Boundary programme to encourage the creation in all member states of a Border Region Agency. These agencies are to have the function of bringing infrastructural, education, health and economic development to the border areas, which in most cases are located in far-flung parts of the States and the capitals.

The popular conception that demarcation pre-empts an end to all cross border interaction/relationships is inherently 'un-African' and all effort must be made to keep things that way. It is hoped that the legacy of the African Boundary Programme would be the advent of greater cooperative management by neighbouring states in the border areas not only because ambiguities causing boundary disputes would have been removed but because an era of genuine cross border cooperation would have been created. Local stakeholders ought to be involved as direct initiators of cross border cooperation under the auspices of states. There is the need for states to understand that they have an interest in facilitating local initiatives.²²¹ Cross border cooperation remains a strong factor of peace, stability and development. Positive examples abound across the continent but these must be multiplied in the course of the AUBP processes and it must be seen as one of the aims of the AU to forge solidarity and good neighbourliness through local and national cross border cooperation.²²² It is necessary that an African Boundary Commission be created to execute the African Union Boundary Programme. The African Boundary Commission as a permanent institution apart from executing the Programme would perform several other functions including: assisting national boundary

²²¹ Conference of African Ministers in Charge of Border Issues, "Declaration On The African Union Border Programme and Its Implementation Modalities Addis Ababa, 7 June 2007" Preparatory Meeting of Experts on The African Union Border Programme Addis Ababa, Ethiopia 4-7 June 2007 BP/MIN/Decl.(II) pp. 2-3; see also Conference of African Ministers in Charge of Border Issues, "Report of the Meeting of Experts on the Border Programme of the African Union, Bamako, Mali 8-9 March, 2007" Preparatory Meeting of Experts on The African Union Border Programme Addis Ababa, Ethiopia 4-7 June 2007, p. 7.

²²² The development of transfrontier parks and transfrontier conservation areas is fast becoming common on the Continent. Examples include the Great Limpopo Transfrontier Park - the largest wildlife park in the world - and the Kgalagadi Transfrontier Park, which comprises the Gemsbok National Park in Botswana and the Kalahari Gemsbok National Park in South Africa.; the Ai-/Ais/Richtersveld Transfrontier Park between South Africa and Namibia (approximately 35 000 km²). These laudable initiatives are backed up by treaties that remove boundaries separating conservation areas and other protected areas in favour of integrated, jointly managed parks. Cameroon and Nigeria are also in talks to establish such a transnational park within certain areas along their newly 200 kilometre common boundary. President Thabo Mbeki was quite forthright in denoting the positive effects of the African initiatives in integrating and unifying its communities towards prosperity. He stated "We are doing this because we have understood very well that all of us are interdependent, that the success of any one of our countries depends on the success of the others" SouthAfrica.info, "SA, Namibia cross-border park" available at <http://www.southafrica.info/about/sustainable/sanamibia-park.htm>. Visited 7 Jan 2010.

commissions in attaining their goals. It should also host a world class academic and/or vocational institution –African Boundary Research Centre. This institution would engage in the provision of world standard training for delegations and professionals from African states in all areas of boundary studies.

The creation of African Boundary Research Centre may also facilitate the training of high calibre engineers, drilling experts, geologists, geophysists, marine and fisheries experts and even business and management experts to service the demands of the continent. There ought to be an interest in achieving self sufficiency at least in the provision of skilled labour that would the management of African Boundaries and this task cannot in good conscience of present leadership be contracted out again to Europe and North American states only. The benefits of this to all states concerned are innumerable and of course include employment generation. In this way the region may also contribute to the international demand for high skilled expatriate workers in surveys, cartography, boundary ethnologists, and lawyers among others. If there is to be any chance at all of a successful and meaningful completion of the tasks set before the AUBP the competences within the AU itself must be increased drastically. This will at the very least require the injection of added specialist personnel to the Conflict Management Division of the Peace and security Department. Without a largely indigenous army of skilled workers in these key industries there can be no meaningful control of national boundaries and perhaps resource exploitation. Delay in developing these competences may ultimately prove fatal to national purses and even collective security. It is necessary to continue cataloguing existing capacities within the continent and putting such capacities to use. More frequent use should therefore be made of such regional institutions such as the African Organisation of Cartography and Remote Sensing (AOCRS).²²³

The preparation of a practical handbook on delimitation and demarcation in Africa by the end of 2010 is a commendable development but it is not a sufficient condition to bridge the shortage of requisite literature on the law and practice of boundary making and maintenance. African scholars should be encouraged to contribute to scholarly literature in this area. Such contributions would highlight best practices in/guidelines for delimitation, demarcation, maintenance and of African boundaries reaffirmation. There is no reason why African scholars and practitioners may not introduce new lexicon of relevant terms to the continents situations. Other interesting and appropriate suggestions that deserve mention include the promotion of an “African Border Day”, to highlight the importance of the AUBP and encourage further efforts towards its implementation.²²⁴ The importance of synergy and continuous dialogue between border policy makers, scholars and boundary practitioners is irrefutable. The establishment by Member States, as soon as possible, of National Boundary Commissions or similar agencies (where they do not exist), and legal bilateral arrangements to handle boundary

²²³ The African Organization of Cartography and Remote Sensing (AOCRS) is an African intergovernmental organization, established in Addis Ababa in 1988 by the merger of African Association of Cartography (AAC) with the African Remote Sensing Council (ARSC). The AOCRS is the Principal national mapping and remote sensing organizations/agencies representing the governments of 24 African countries: Algeria, Burkina Faso, Cameroon, Central, Africa, Congo, DR Congo, Cote d’Ivoire, Ethiopia, Gabon, Ghana, Guinea, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Niger, Senegal, Sudan, Tanzania, Togo, Tunisia, and Uganda; Visit http://www.agirn.org/documents/AOCRS_leaflet.pdf visited 7 Jan 10. See also Conference of African Ministers in Charge of Border Issues, the Report of the Meeting “Preventing Conflicts, Promoting Integration” Preparatory Meeting of Experts on The African Union Border Programme Addis Ababa, Ethiopia 4-7 June 2007. BP/EXP/RPT(II) pp. 4-5.

²²⁴ AU, “Conclusion of the 2nd International Symposium on Land, River and Lake Boundaries Management” op.cit. pp. 3-4.

matters between them is recommended but the costs of such institutional arrangements will in the nature of things be considerably prohibitive. Within the course of the next decade the value of the important work been done under the AUBP will become transparent. If the historic tasks are well handled by all stakeholders, the work done by the participating states and organisations may emerge as evidence of best practice to be emulated and followed by other regions especially but not limited to states in the global south. The actual and lasting effects may however outrun the next millennia.

APPENDICES

Appendix 1: TERRITORIAL AND BOUNDARY DISPUTES IN CONTENTIOUS CASES INVOLVING AFRICAN COUNTRIES AT THE ICJ

Cases	Issues
Ethiopia v. South Africa, Liberia v. South Africa: (South West Africa) 1960-1966.	Territorial Sovereignty and Independence Mandate
Cameroon v. United Kingdom (Northern Cameroon) 1961-63	Territorial sovereignty and independence
*Tunisia/Libya: (Continental Shelf) 1978-82	Maritime boundary and delimitation
*Libya/Malta: (Continental Shelf) 1982-85	delimitation of the continental shelf; The Libyan "rift zone" argument; test of proportionality; equidistance line
*Burkina Faso/Republic of Mali: (Frontier Dispute) (Case referred to a Chamber) 1983-86	Delineation of frontier line; principles of intangibility of colonial boundaries and <i>uti possidetis</i> ; French colonial law; distinction between village and hamlets
Tunisia v. Libya: (Application for Revisions and Interpretation of the Judgement of 24 February 1982 in the Case concerning the Continental Shelf) 1984-85.	Principles applicable to the delimitation of the areas of continental shelf; interpretation; admissibility; Request for an expert survey.

Guinea-Bissau v. Senegal: (Arbitral Award of 31 July 1989)	Validity of the Arbitral Award of 31 July 1989; Validity of Agreements concerning the delimitation of their maritime areas.
*Libya Arab Jamahiriya/Chad: (Territorial Dispute) 1990-1994	Frontier line; Treaty of Friendship and Good Neighbourliness between France and Libya; establishment of permanent boundaries ; subsequent attitude of the parties
Guinea-Bissau v. Senegal: (maritime Delimitation between Guinea Bissau and Senegal) 1991	Maritime delimitation line; negotiation over maritime territory
Cameroon v. Nigeria (Land and Maritime Boundary between Cameroon and Nigeria) 1994-2002	Sovereignty over Bakassi peninsula, Maritime, river and water delimitation, straddling villages, Lake Chad Basin trespass issues etc.
Request for the Interpretation of the Judgment of 11 June 1998 in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon) (1998-1999).	Admissibility of Nigeria's request; Cost of the proceedings; interpretation of the Courts judgment regarding internationally unlawful acts and frontier incursions
*Botswana/Namibia. (Kasikili/Sedudu Island) 1996-1999	Sovereignty, jurisdiction and control over Island and maritime boundary
Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda) (1991-2001)	Armed Intervention, territorial sovereignty, humanitarian law
Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Rwanda) (1991-2001)	Armed Intervention, territorial sovereignty, humanitarian law
Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Burundi) (1991-2001)	Armed Intervention, territorial sovereignty, humanitarian law
Frontier Dispute (Benin / Niger) 2002	Delimitation; sovereignty over islands, boundaries following rivers
Armed Activities on the Territory of the Congo (New Application: 2002)	Armed Intervention, territorial sovereignty, humanitarian law