

# Where Politics Borders Law: The Malawi-Tanzania Boundary Dispute

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## I INTRODUCTION

The dispute between The Republic of Malawi (“Malawi”) and The United Republic of Tanzania (“Tanzania”) concerns the location of the border between the two States on, or at the perimeter of Lake Nyasa/Malawi (“the Lake”). The Lake is the third largest in Africa, sitting at the bottom of the Great African Rift Valley and covering approximately 29,600 square kilometers. The Lake’s shoreline runs around western Mozambique, eastern Malawi, and southern Tanzania. The contestation relates to whether the boundary demarcating sovereign territory (or territorial waters) runs along the middle of the Lake, or along the Lake’s eastern shoreline of the territory of Tanzania. The dispute, therefore, relates to whether Tanzania or Malawi exercises sovereignty over the eastern half of the northern part of the Lake separating Tanzania and Malawi.

The border dispute escalated in 2011 when Malawi awarded oil exploration licenses covering the disputed part of the Lake to Surestream Petroleum. The aggravation of Malawi’s distribution of exploration rights based upon unilateral assertion of sovereignty elevates the respective interests by signaling potentially lucrative sources of government revenue. Possible resource extraction also signals potential threats to commercial, cultural and environmental interests. Further, failure of the parties to resolve the dispute via peaceful means may also lead to local and potentially regional insecurity, further harming the aforementioned interests.

The dispute is complicated by historical shifts in the positions of the parties and the former colonial powers. Tanzania was a German colony until 1919 when it was awarded to Britain under the Treaty of Versailles. Thus Tanzania, alongside Malawi (then Nyasaland), became a British territory. While the British colonial view of the boundary may have been inconsistent, the German and British authorities had formally agreed under the 1890 Heligoland Treaty (“the Treaty”) that the border ran along the Lake’s eastern shore-line.

This paper begins by tracing the history of the boundary, before examining the interests of the respective parties and the utility and applicability of the available dispute resolution processes, including the International Court of Justice (“ICJ”). An evaluation of the legal merits of the claims is then carried out before concluding with an analysis of key elements instructing negotiations. While the paper provides a thorough consideration of how the law applies to the dispute, the authors also acknowledge the real-politic of the power differentials at play, and the non-legal instruments the respective parties wield to affect negotiations.

## II THE HISTORY OF THE BOUNDARY

The border between Malawi and Tanzania was first demarcated by Great Britain and Germany via the Heligoland Treaty of 1890. The Treaty demarcated several boundaries, including that between Tanganyika and Nyasaland (the predecessors of Tanzania and Malawi). At that time Tanganyika was a German colony and Nyasaland, a protectorate of Great Britain. Article 2 of paragraph 1 of the Treaty provided that the boundary between Nyasaland and Tanganyika ran along the eastern, western

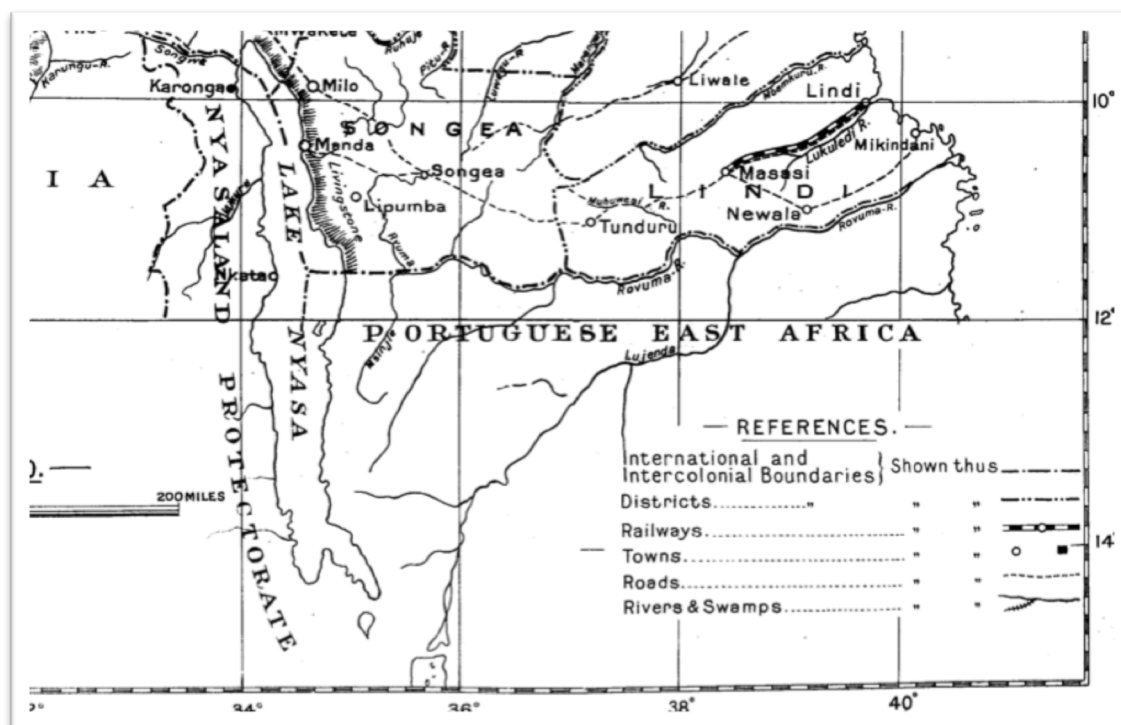
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and northern shores of the Lake until it reached the northern bank of the mouth of the Songwe River. It then continued up that river to its intersection point with the 33rd degree of east longitude. Hence the whole of the Lake was part of Nyasaland. Following WW1 Great Britain was given a class B League of Nations mandate over Tanganyika. In the present dispute over the Lake, this may be crucial to Tanzania's argument. As Britain controlled territory on both sides of the Lake from 1919, Tanzania may argue that various governmental maps and reports are sufficient to redraw an international boundary given that negotiation and formal agreement would not have been necessary. This will be discussed further in the legal analysis section of this paper. The British "Annual Reports on Tanganyika" from 1924 to 1932 refer to a centre line as the Lake boundary.<sup>2</sup> In 1924 the British government issued a State Department report, which includes a geographical and historical note regarding colonization and territory in the area. The report describes the Western limit of previously German territory as the median line of the Lake:

*"[...] Thence it follows the boundary of Rhodesia to the northern end of Lake Nyasa and continues along the centre line of Lake Nyasa to a point due west of the Rovuma River whence the boundary runs east and joins the Rovuma River, whose course it follows to the sea [emphasis added]."*<sup>3</sup>

The text was accompanied by a map (shown below) drawing the boundary between current-day Malawi and Tanzania as a median line through the section of the Lake that divides them. Below in Portuguese East Africa, there is a partial line splitting the Lake between Mozambique and Malawi. The failure of the line to continue after the word Nyasa may indicate an absence of express intent to re-draft the boundary. However, the text, accompanying the boundary line down the middle of the lake, signals British intent at the time that the border ran through the middle of the lake and not around the periphery.



*Map of Lake Nyasa (British Colonial Office 1924)*<sup>4</sup>

<sup>2</sup> James Mayall, 'The Malawi Tanzania Border Dispute', *Journal of Modern African Studies* Vol. 11 No. 4 (Dec 1973), page 624.

<sup>3</sup> Great Britain Colonial Office, *Report by His Britannic Majesty's government on the administration under mandate of Tanganyika Territory for the year 1924*, Genève : Société des nations; League of Nations, 1925.

<sup>4</sup> Ibid.

In 1925, the annual colonial report for Nyasaland stated that:

*“This strip falls naturally into two divisions: (1) consisting of the western shore of Lake Nyasa, with the high tablelands separating it from the basin of the Luangwa river in Northern Rhodesia, and (2) the region lying between the watershed of the Zambesi river and Shire river on the west, and the Lakes Chiuta and Chilwa and the river Ruw, an affluent of the Shire, on the east, including the mountain systems of the Shire Highlands and Mlanje, and a small portion, also mountainous, of the south-eastern coast of Lake Nyasa.”*<sup>5</sup>

In the same year Great Britain advised the Council of the League of Nations that the boundary between Tanganyika and Nyasaland ran along the centre line of the Lake.<sup>6</sup> A map showing the boundary running through the middle of the lake was submitted along with the report.<sup>7</sup> The text of the 1933 and 1934 Annual Reports on Tanganyika continue to refer to the median line as the boundary, however they include maps showing a shoreline boundary.<sup>8</sup> In reports from 1935 to 1938 both text and map indicate a boundary along the shore,<sup>9</sup> as do Annual Colonial Reports on Nyasaland from 1948 to 1953.<sup>10</sup>

In 1959 the British Government advised the Government of Tanganyika that its legal advisers considered that no part of the Lake was within the boundaries of Tanganyika.<sup>11</sup> In May of that year, the Minister for Lands and Mineral Resources stated in the Tanganyika Legislative Council that the borders of Tanganyika remained as they were demarcated by the 1890 Treaty.<sup>12</sup>

On 30 November 1961 Tanganyika declared that it would honour bilateral treaties for two years and would then regard as terminated all treaties “which could not by the application of the rules of customary international law be regarded as otherwise surviving.”<sup>13</sup> This statement signalled Tanganyika’s intent not to accept the boundary as running along the Lake’s periphery. In a speech to the National Assembly on 11 June 1962 following Tanzania’s independence, Prime Minister Rashidi Kawawa stated that no part of Lake Nyasa lay within the borders of Tanzania.<sup>14</sup> Further, Prime Minister Kawawa stated that the earlier statement of 30 November 1961 statement did not affect this issue.<sup>15</sup>

Nyasaland similarly gained independence and became Malawi on 6 July 1964. At this point Malawi produced a booklet stating that Tanzania’s frontier included a quarter of the Lake. However mere publication of a booklet is insufficient to alter a boundary.<sup>16</sup> Further, as Tanzania was already an independent state by this time, Malawi did not enjoy the legal discretion to unilaterally alter the border. Were Malawi to have secured independence prior to Tanzania, it may have been possible for a Malawian government to alter the boundary.

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<sup>5</sup> ‘Nyasaland annual general report for the year 1925’, in *Colonial Reports – Annual 1296*, p. 2, viewed on 5 January 2014, [http://www.libsysdigi.library.illinois.edu/ilharvest/Africana/Books2011-05/469188/469188\\_1925/469188\\_1925\\_opt.pdf](http://www.libsysdigi.library.illinois.edu/ilharvest/Africana/Books2011-05/469188/469188_1925/469188_1925_opt.pdf).

<sup>6</sup> A Che-Mponda, *The Malawi-Tanzania border and territorial dispute, 1968: A case study of boundary and territorial imperatives in the new Africa*, PhD Thesis, Howard University, 1972, p. 109.

<sup>7</sup> *Ibid.*, p.136.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> Mayall, p.625.

<sup>11</sup> Che-Mponda, p. 163.

<sup>12</sup> Mayall, p. 613.

<sup>13</sup> *Ibid.*, p. 616.

<sup>14</sup> Che Mponda, p. 142.

<sup>15</sup> Mayall, p. 616.

<sup>16</sup> Che Mponda, p. 110.

Both Malawi and Tanzania were members of the Organisation of African Unity (OAU) on 21 June 1964. On that date the OAU passed a resolution providing that;

*“[...] all member states pledge themselves to respect the frontiers existing on their achievement of national independence.”<sup>17</sup>*

Tanzanian and Malawian assent to the resolution obligates them, under customary international law, to adhere to the border at the time of independence. In January 1967 Tanzania officially notified Malawi it considered the boundary to run through the middle of the Lake.<sup>18</sup> On 24 January 1967 the Government of Malawi informed Tanzania it would consider the issue and a further reply would follow.<sup>19</sup> On 31 May 1967 the Tanzanian President, in a letter to his Malawian counterpart, advised that Tanzania rejected the shoreline boundary.<sup>20</sup> Although Malawi's President publicly rejected Tanzania's claim as having no justification, Malawi did not issue a written response asserting its position other than a 1968 acknowledgement of Tanzania's position.<sup>21</sup> In an indication of Malawian intent, however, Malawi deployed patrol boats on the Lake in 1968.<sup>22</sup> From 1968 to the present day, no event of legal significance for the disputed border has occurred.

### III RESOURCES, POLITICS AND DISPUTE MECHANISMS

#### Resources

Following the independence of the respective parties to the dispute, tensions relating to the delimitation of the Lake boundary dispute were exaggerated by contrasting attitudes and political policies.<sup>23</sup> These tensions have been further elevated by Malawi's recent decision to explore potential exploitation of the Lake's resources.

Authorities state that about 1.5 million Malawians and 600,000 Tanzanians depend on the Lake for food, transportation and other daily needs.<sup>24</sup> Many local environmentalists fear that drilling in the Lake will damage eco-tourism and the marine environment affecting Tanzania's northern fishing region. Reports cite lakeshore communities greater concern as to the threat of oil exploration than the rights of the respective parties. The communities' livelihood revolves around the approximately 1000 fish species inhabiting the Lake.<sup>25</sup> Fish, which constitute nearly 75% of animal protein consumed in Malawi, are essential to the national diet.<sup>26</sup>

As at 1995, The World Bank and the Food and Agriculture Organisation recognised three categories of fisherman on Lake Malawi: artisanal, semi-commercial and commercial. The artisanal and traditional sector comprised small-scale fishermen who relied principally on non-motorised canoes and plank boats. The semi-commercial sector comprised pair-trawl operators who are assigned designated fishing territories. The commercial sector was solely made up of the Malawi Development Corporation (Maldeco). Press Foods Ltd, a subsidiary of Press Corporation Ltd, owns Maldeco. Most

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<sup>17</sup> Ibid, p. 81.

<sup>18</sup> Ibid, p. 161.

<sup>19</sup> Mayall, p. 619.

<sup>20</sup> Che Mponda, p. 175.

<sup>21</sup> Che Mponda, p. 162.

<sup>22</sup> Ibid, 240.

<sup>23</sup> Mayall, p. 611.

<sup>24</sup> M Banda, 'Two Million People Hold their Breath Over Lake Malawi Mediation', in *Inter Press Service News Agency*, 3 March 2013, viewed on 10 December 2013, <http://www.ipsnews.net/2013/03/two-million-people-hold-their-breath-over-lake-malawi-mediation/>.

<sup>25</sup> 'The Malawi-Tanzania Border Dispute, Voices from the frontiers' in *Nation on Sunday*, 14 April 2013, viewed on 18 January 2014 <http://www.scribd.com/doc/135817434/The-Malawi-Tanzania-Border-Dispute-Voices-from-the-frontiers>.

<sup>26</sup> Ibid.

development assistance is currently being allocated to the commercial and semi-commercial sectors despite the fact they account for just 10-15% of the total catch from Lake Malawi.<sup>27</sup>

Mining, along with commercial agriculture, tourism, and energy is prioritised as for “quick wins” according to the Economic Recovery Plan (ERP) introduced by Joyce Banda’s Cabinet in 2012.<sup>28</sup> The Malawian government has granted oil and gas exploration licences on Lake Malawi under the Petroleum and Exploration Act 1983. The government has currently awarded four companies exclusive prospecting licenses for six blocks on the Lake:

- *Block 1: SacOil (awarded in 2012, 12,265 square kilometres, north-western block bordering Tanzania and Zambia, all environmental work expected to be complete by Q3 2014)*
- *Blocks 2 & 3: Surestream Petroleum (awarded in 2011, 20,000 square kilometres, north and central blocks on Lake Nyasa/Malawi)*
- *Blocks 4 & 5: RAKGAS (awarded in 2013)*
- *Block 6: Pacific Oil & Gas (awarded in 2013)*<sup>29</sup>

Surestream Petroleum, the company holding the largest licence on the Lake, is an independent United Kingdom-based oil exploration company founded in 2004.<sup>30</sup> The Wall Street Journal, in November 2013, placed both Surestream Petroleum and SacOil Holdings Ltd among a list of “global wildcatters” that deploy risky strategies looking for oil in politically or geographically fraught lands after cutting deals with governments that claim the lands, even if those lands are in dispute.<sup>31</sup> In January 2014 Malawi’s Environmental Affairs Department held public hearings on the Environmental and Social Impact Assessment presented by Surestream Petroleum on seismic operations for the exploration of oil in the lake.<sup>32</sup> Public hearings on environmental impact assessments are a legal requirement stipulated in the Environment Management Act 1996.<sup>33</sup> The Malawi Government emphasised that the public hearings were not an appropriate place to discuss the border dispute since the hearings were organised by the Environmental Affairs Department which does not take a “political angle.”<sup>34</sup>

At the public hearings the Government, the RPS Group and Surestream Petroleum asserted that there is no drilling at this stage of exploration. The Environmental and Social Impact Assessment (ESIA) refers to an initial stage in oil exploration that involves surveying. In order to proceed to exploratory oil drilling, Surestream Petroleum would require another ESIA.<sup>35</sup>

<sup>27</sup> B. Derman, A. Ferguson, ‘Human Rights, Environment, and Development: The Dispossession of Fishing Communities on Lake Malawi.’ *Human Ecology*, vol. 23, no. 2, June 1995, pp. 125-142, 131.

<sup>28</sup> ‘Mining in Malawi’s Economic Recovery Plan’, *Mining in Malawi*. 20 November 2013, viewed on December 12 2013 <http://mininginmalawi.com/2012/11/20/mining-in-malawis-economic-recovery-plan/>.

<sup>29</sup> ‘Two Additional Companies Awarded with Exploration Rights by Malawi Amid Unresolved Lake Dispute’, *Mining in Malawi* 15 November 2013 viewed on 12 December 2013 <http://mininginmalawi.com/2013/11/15/two-additional-companies-awarded-with-exploration-rights-amid-unresolved-lake-dispute/>

<sup>30</sup> ‘Surestream Petroleum awarded exploration licences in Malawi’, *Surestream Petroleum*. 22 September 2011, viewed on 10 January 2014 <http://www.surestream-petroleum.com/news.aspx>.

<sup>31</sup> J Scheck, ‘Former BP Chief’s New Quest: Wildcatting on the Edge of Danger’, in *The Wall Street Journal*. 12 November 2013, viewed on 18 January 2014 <http://online.wsj.com/news/articles/SB20001424052702303615304579157593033516258>.

<sup>32</sup> ‘Public hearings for Surestream Petroleum Seismic Operations for oil exploration in Lake Malawi’, *Mining in Malawi*. 17 January 2014, viewed on 20 January 2014 <http://mininginmalawi.com/2014/01/17/public-hearing-for-surestream-petroleum-seismic-operations-for-oil-exploration-in-lake-malawi/>.

<sup>33</sup> ‘Public hearings held across Malawi on Surestream Petroleum’s proposed surveying activities of Lake Malawi for oil’, *Mining in Malawi*. 28 January 2014, viewed on April 14 2014 <http://mininginmalawi.com/2014/01/28/public-hearings-held-across-malawi-on-surestream-petroleum-proposed-surveying-activities-of-lake-malawi-for-oil/>.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

The status of the Lake as a UNESCO World Heritage site elevates concerns over the granting of licences for oil exploration. In the decision adopted on 3 May 2013:

*“The World Heritage committee expresses its concerns about oil exploration activities in Lake Malawi, and considers that oil drilling poses a potentially severe risk to the integrity of the entire lake ecosystem, including the aquatic zone and shoreline of the property and reiterates that mining, oil and gas exploration and exploitation are incompatible with World Heritage status.*

*The Committee further requests the State Party of Malawi to submit to the World Heritage Centre, by 1 February 2014, a report on the state of conservation of the property, including the requested information on the oil exploration activities, for examination by the World Heritage Committee at its 38th session in 2014.*”<sup>36</sup>

## Political Context

Despite her election as Vice-President in 2010, Joyce Banda’s deteriorating relationship with President Bingu wa Mutharika led to Banda’s increasing marginalisation from the business of government and exclusion from Cabinet in 2011. Despite her political isolation, Banda, in compliance with Malawi’s constitution, became Southern Africa’s first woman head of state following President Mutharika’s death in 2012.

President Banda faces immense political pressure to stabilise the political system and troubled Malawian economy. The IMF’s recent statement identifies some positive improvements:

*“The policy reforms initiated in May 2012 have produced positive results where capacity utilisation has risen sharply contributing to a broad-based expansion in economic activity.”*<sup>37</sup>

*“[...] Given the recent revelations that substantial amounts of public funds have been misappropriated through fraudulent transactions using the government’s financial management system, considerable uncertainty to the economic outlook is apparent. The main purpose of the current mission was therefore to reassess the assumptions underlying the program and to address the governance weaknesses revealed by the massive fraud and also to reverse the fiscal slippage. The mission viewed the action plan recently adopted by government and the Extraordinary Performance Assessment Framework as appropriate vehicles to initiate the process of normalising relations between government and development partners.”*<sup>38</sup>

In 2014 President Banda faces presidential elections where she will seek a new mandate for a full five-year presidential term.<sup>39</sup> The election increases pressure on President Banda to avoid public perceptions that Tanzania is taking advantage of weak leadership.<sup>40</sup>

<sup>36</sup> UNESCO ‘Convention Concerning the Protection of the World Cultural and Natural Heritage’, 2013, WHC-13/37.COM/7B, May 3 Paris, viewed on 12 December 2013 <http://whc.unesco.org/archive/2013/whc13-37com-7B-en.pdf>.

<sup>37</sup> International Monetary Fund ‘Statement At the Conclusion of an IMF Mission to Malawi’, Press Release No. 13/458, 20 November 2013, viewed on 15 December 2013 <http://www.imf.org/external/np/sec/pr/2013/pr13458.htm>.

<sup>38</sup> Ibid.

<sup>39</sup> C H Scott, ‘Moving Towards a Post-2015 Development Framework – Lessons from Malawi: An Interview with Her Excellency Madam Joyce Banda, President of Malawi’ in *IDS Bulletin*, vol 44, 5-6 viewed on 8 January 2014 [http://mobile.opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/2919/IDSB44%205-6\\_Scott\\_Banda\\_submitted.pdf?sequence=1](http://mobile.opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/2919/IDSB44%205-6_Scott_Banda_submitted.pdf?sequence=1).

<sup>40</sup> ‘Mutharika says Lake Malawi ownership non-negotiable: ‘Tanzania taking advantage of weak leadership’’, in *Nyasa Times*, 3 August 2013, viewed on 8 January 2014 <http://www.nyasatimes.com/2013/08/03/mutharika-says-lake-malawi-ownership-non-negotiable-tanzania-taking-advantage-of-weak-leadership/>.

On the other hand, Tanzanian President Jakaya Kikwete has won much international praise for his management of Tanzania's economy. Having previously served for ten years as Tanzania's Foreign Minister, he has pursued political continuity that built on the achievements of Mwinyi and Benjamin Mkapa. There has been a gradual increase in political pluralism in Tanzania but President Kikwete's Chama Cha Mapinduzi (CCM) party remains dominant in government and parliament.<sup>41</sup> However, his political power base was significantly undercut in 2010 when CCM parliamentary majority was cut to 61 per cent of the vote via low voter turnout of 42 per cent.<sup>42</sup>

The more recent decline in popularity intensifies pressure on President Kikwete to ensure the border dispute does not infringe the interests of the 600,000 Tanzanians dependent upon the Lake. To this end, President Kikwete has asserted that the 1890 agreement cannot deny communities living along the Lake their natural rights over the Lake and its endowments.<sup>43</sup> If a median boundary line is unattainable, President Kikwete will face pressure to increase subsistence and usage rights for Tanzanians. President Kikwete appears to be under less economic pressure than his Malawian counterpart. The IMF recently noted that the economy has continued to perform well, and is expected to continue to grow at 7 per cent through the middle of 2014.<sup>44</sup>

The benefits produced from oil drilling in the Lake could provide significant relief to the economies in both Malawi and Tanzania. Leaders from either country face domestic pressure not to concede their respective national interests. The current state of the Malawian economy places President Banda in a more vulnerable position than that of President Kikwete. Precarious financial forecasting affected by recent fraud allegations and upcoming elections severely constrain the political parameters within which President Banda can negotiate, particularly given the stakes of "very high potential in the order of billions of dollars of recoverable oil."<sup>45</sup> President Banda's recent decision to commission patrol boats for the Lake is particularly alarming given the inability of the respective parties to absorb the economic and social costs of military confrontation.<sup>46</sup>

### **Southern African Development Community**

The Southern African Development (SADC) Tribunal, established during SADC's 2000 Ordinary Summit, enjoys express powers to adjudicate inter-state disputes.<sup>47</sup> SADC was the target of international frustration after it endorsed a 'credible' and 'peaceful' yet patently unfair election in Zimbabwe, leading to the tribunal's de facto 2010 suspension.<sup>48</sup> In the tribunal's absence, a SADC mediation process has been instituted through the Forum for Former African Heads of State and

<sup>41</sup> T Dagne, 'Tanzania: Background and Current Conditions' in *Congressional Research Service*. 31 August 2011, viewed on 19 January 2014 <http://www.fas.org/sgp/crs/row/RS22781.pdf>.

<sup>42</sup> Ibid, p. 2.

<sup>43</sup> 'The Malawi-Tanzania Border Dispute, Voices from the frontiers', in *Nation on Sunday*, 14 April 2013, viewed on 18 January 2014 <http://www.scribd.com/doc/135817434/The-Malawi-Tanzania-Border-Dispute-Voices-from-the-frontiers>, p. 4.

<sup>44</sup> International Monetary Fund 'Statement At the Conclusion of an IMF Mission to Tanzania' Press Release No. 13/458. 20 November 2013, viewed on 15 December 2013, <http://www.imf.org/external/np/sec/pr/2013/pr13458.htm> <http://www.imf.org/external/np/sec/pr/2013/pr13428.htm>.

<sup>45</sup> R Curnow, V Eastwood, 'Troubled Water: Oil search fuels tension over Lake Malawi', in *CNN Marketplace Africa*. 14 November 2013, viewed on 19 January 2014 <http://edition.cnn.com/2012/11/14/business/lake-malawi-oil/>.

<sup>46</sup> A Laing, 'Arms firm link to charity that paid PR costs of Malawi president's interview', in *The Telegraph*. 28 November 2013, viewed on 19 January 2014 <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/malawi/10482301/Arms-firm-link-to-charity-that-paid-PR-costs-of-Malawi-presidents-interview.html>.

<sup>47</sup> 'SADC Tribunal' in *Southern African Development Community*. Viewed on 19 January 2014 <http://www.sadc.int/about-sadc/sadc-institutions/tribunal/>.

<sup>48</sup> Ibid.

Government headed by Joaquim Chissano of Mozambique.<sup>49</sup> Since its institution the process has been beset by delays and controversy concluding with Malawi's April 2013 withdrawal from the process, citing the bias of a Tanzanian SADC official, John Tesha.<sup>50</sup> Although the parties returned to mediation in May 2013, following Tesha's recall by Tanzania, scepticism as to process politicisation remains.<sup>51</sup>

Malawi's reluctant acquiescence to SADC mediation may indicate a preference for referral to the ICJ. Despite Malawi's strengthened position within SADC via President Banda's August 2013 election as SADC chairperson, President Banda appears reluctant to reinvigorate the SADC tribunal.<sup>52</sup> Malawi's position hints at its confidence in a favourable outcome were law to be independently applied to the Lake dispute.

The domestic political pressures accompanying the parties allowed for the November 2013 submission of respective position papers, despite the passing of President Banda's September 2013 deadline for resolution.<sup>53</sup> The likelihood of bilateral agreement diminishes as Malawi's election draws closer. The parties, prospective mediators, and regional actors should now be attempting to establish a post-election dispute-resolution framework that maximises enhanced Malawian capacity to reconcile its interests those of Tanzania.

Tanzania has stated "we will exhaust all diplomatic channels but if need be, we are ready to defend our sovereignty at any cost."<sup>54</sup> The Tanzanian position signals the gravity of the security stakes involved in resolving the dispute. Malawi's annual military expenditure constitutes only 13.8 per cent of that of Tanzania rendering Malawi the quantitatively weaker of the two parties militarily.<sup>55</sup> Malawi's comparative military weakness lends little weight to assertions that they (Malawi) would not hesitate to use military force to defend 'their lake'.<sup>56</sup> Tanzania has stated it would not hesitate to respond to any military provocation.<sup>57</sup>

## Dispute Mechanisms

Conflict resolution mechanisms differ in the amount of decision control participants may preserve.<sup>58</sup> States preferences of one mechanism over another is often determined by the state's confidence in its legal position and in its capacity to achieve a favourable outcome via alternative means – states increase the chance of an unfavorable outcome when an arbitral panel or a court is delegated

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> A Lalbahadur 'Malawi vs Tanzania vs SADC: Regional dispute resolution bites the dust', in *Southern African Institute of International Affairs*. 13 August 2013, viewed on 17 January 2014 <http://www.saiia.org.za/opinion-analysis/malawi-vs-tanzania-vs-sadc-regional-dispute-resolution-bites-the-dust>.

<sup>53</sup> 'Malawian and Tanzanian Ministers submit responses to position papers on lake dispute', in *Mining in Malawi*. 23 November 2013, viewed on 17 January 2014 <http://mininginmalawi.com/2013/11/28/malawian-and-tanzanian-ministers-submit-responses-to-position-papers-on-lake-dispute/>.

<sup>54</sup> Finnigan wa Simbeye, Tanzania: 'Armed Forces Ready for Action', *Tanzania Daily News*, 8 August 2012 viewed on 16 January 2014. <http://allafrica.com/stories/201208080118.html>

<sup>55</sup> Tanzania's annual military spend is US\$950 million. Malawi's annual military spend is US\$131 million (2012). See CIA World Factbook viewed on 13 October 2013. <https://www.cia.gov/library/publications/the-world-factbook>

<sup>56</sup> Mangengesa Mdimi, Tanzania: Malawi-Tanzania Border Dispute an Eye-Sore in 2013, *Tanzania Daily News*, 25 December 2013, viewed on 10 January 2014. <http://allafrica.com/stories/201312250011.html?page=3>

<sup>57</sup> Ibid.

<sup>58</sup> Stephen E. Gent and Megan Shannon "Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind" (2011) *Journal of Conflict Resolution* 55(5) at 74.



jurisdiction over a dispute.<sup>59</sup> States have increasingly appeared willing to delegate jurisdiction over territorial disputes to neutral, international judicial or quasi-judicial bodies.<sup>60</sup>

States, therefore, weigh a wide range of factors in weighing the benefit of a resolution with the opportunity cost of more costly, but potentially controlled dispute resolution. These factors include, among others domestic political stability, military capability and economic capacity.

### *Mediation*

The methods of mediation and good offices introduce a third party to assist in dispute settlement and negotiation. Good offices infers a third party's capacity to bring disputants together and initiate negotiations on the basis of a mediator's proposal. The April 2013 disagreement between Malawi and Tanzania over mediator identity signals the two parties' hesitance to delegate adjudicatory powers and the difficulty in identifying a mediator both parties perceive to be of 'strict neutrality.'<sup>61</sup>

The 'voluntariness' of mediation masks the fact that mediated solutions offer imbalanced gains that generally benefit stronger parties. For a weaker party, a "voluntarily" accepted solution risks comparison to diplomatic brutalization by a powerful neighbour.<sup>62</sup>

### *Arbitration*

International arbitration, much like adjudication, refers to a process where a third party ('arbitrators') the disputing states select reach a binding decision on the basis of law.<sup>63</sup>

Both Malawi and Tanzania have ratified the Vienna Convention's 1961 Optional Protocol concerning the compulsory settlement of disputes ("Protocol").<sup>64</sup> Article II of the Protocol suggests arbitral procedures be explored rather than contestation before the ICJ.<sup>65</sup> It reads:

*"Parties may agree within a period of two months after one party has notified its opinion...that a dispute exists, to resort not to the ICJ but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application."*<sup>66</sup>

<sup>59</sup> Gent and Shannon, above n 1, at 74.

<sup>60</sup> Beth Simmons "Capacity, Commitment, and Compliance: International Institutions and Territorial Disputes" (2002) *Journal of Conflict Resolution* 46(6) at 830.

<sup>61</sup> Aditi Lalbahadur "Malawi vs Tanzania vs SADC: Regional dispute resolution bites the dust" (13 August 2013) South African Institute of International Affairs [www.saiia.org.za](http://www.saiia.org.za); Lea Brilmayer "America: the World's Mediator?" in Mary O'Connell (ed) *International Dispute Resolution: Cases and Materials* (Carolina Academic Press, Durham, 2006) 57 at 63.

<sup>62</sup> Brilmayer, above n 5, at 63.

<sup>63</sup> Report of the International Law Commission, Officials Records of the General Assembly, Eighth Session, Supp. No. 9, para. 16, cited in J.L Simpson & Hazel Fox, *International Arbitration, Law and Practice* 1 (1959).

<sup>64</sup> 'Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes' in *United Nations Treaty Collection*. 30 December 2013, viewed on 12 January 2014, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-5&chapter=3&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-5&chapter=3&lang=en).

<sup>65</sup> M Kohen, 'Interaction between Diplomatic and Judicial Means at the Initiation of Proceedings', in *Diplomatic and Judicial Means of Dispute Settlement*, L Boisson de Chazournes, M Kohen & J Vinuales (eds), Koninklijke Brill NV, Leiden, 2013, p.19.

<sup>66</sup> 'Optional Protocol Concerning the Compulsory Settlement of Disputes 1961', in *United Nations Legal*. 2005, viewed on 5 January 2014, [http://www/legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961\\_disputes.pdf](http://www/legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961_disputes.pdf).

While Malawi and Tanzania are signatories to the Protocol, getting to arbitration is made more difficult by the requirement that they agree procedural rules as neither are member states of the Permanent Court of Arbitration, which provides procedural rules.<sup>67</sup>

### *Adjudication*

Malawi and Tanzania are parties to the ICJ Statute by virtue of their UN Charter ratification. Article 36 of the Statute of the ICJ and the Vienna Convention allows states, without exhausting diplomatic negotiations, to refer cases involving treaty interpretation to the Court.<sup>68</sup> However, the Statute also requires parties to accept the jurisdiction of the Court “in relation to any other state accepting the same obligation”. As such, the jurisdiction of the court is not automatic. This is problematic in this circumstance, as Tanzania has not filed an Article 36(2) declaration accepting jurisdiction. For the reasons set out below, Tanzania appears unlikely to resile from this stance.

In the event of such declaration, three ICJ options are available to disputing states. The first is ordinary ICJ adjudication. The second is the referral of a dispute to a Court Chamber for arbitration, while still benefitting from ‘unrivaled’ ICJ authority.<sup>69</sup> Finally, the third option is to open proceedings to all states party to the Statute.

Adjudication and arbitration both concentrate on the merits of the case in law, reaching a *legal* position through judicial or quasi-judicial means, unless the parties grant the Court or tribunal the possibility to decide the case *ex aequo et bono*. That is, to dispense with the consideration of legal principles and to adjudicate based solely on what they consider to be fair and equitable in the case at hand.

Adjudication ordinarily consumes a number of years, which may delay proposed oil exploration (and other activities) on the lake. Mediation, on the other hand, allows greatest decision-making control, flexibility in issue and strategy, as well as the power to determine the mediator’s identity. In contrast, arbitration and adjudication involve the binding determination of legal issues before a court or tribunal.

Furthermore, mediation represents a less intrusive method of dispute resolution, allowing for an “African solution” to an “African problem”. The shortfall of mediation lies in its reliance on each party to come to an agreement. Since actors often perceive important territorial negotiations in zero-sum terms, hard-line bargaining positions may be anticipated.<sup>70</sup> Disagreement over mediators, failure to adhere to time constraints, and Malawian reluctance to actively engage signal anticipated mediation obstacles, particularly within the political context described in this paper.<sup>71</sup>

As arbitration and adjudication differ from mediation and negotiation in that they require disputants to sacrifice decision control to a third party, it is necessary to explore the conditions in which a state would do so. States are endeared by binding conflict management such as adjudication and arbitration because it provides political cover, can be more efficient, and placates domestic opposition to

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<sup>67</sup> ‘Member States’, in *Permanent Court of Arbitration*. 2009, viewed on 5 January 2014, <http://www.pca-cpa.org>.

<sup>68</sup> ‘Optional Protocol Concerning the Compulsory Settlement of Disputes 1961’, in *United Nations Legal*. 2005, viewed on 5 January 2014, [http://www/legal.un.org/ilc/texts/instruments/english/conventions/9\\_1\\_1961\\_disputes.pdf](http://www/legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961_disputes.pdf); *Land and maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Preliminary Objections, Judgment [1998] I.C.J. Reports 303 at 56 cited in Kohen, above n 9 at 21.

<sup>69</sup> Kohen, p. 21.

<sup>70</sup> K Beardsley, D Quinn, B Biswas & J Wilkenfeld, ‘Mediation Style and Crisis Outcomes.’ *Journal of Conflict Resolution*, vol. 50(1), p. 59.

<sup>71</sup> A Lalbahadur, ‘Malawi vs Tanzania vs SADC: Regional dispute resolution bites the dust’, in *South African Institute of International Affairs*. 13 August 2013, viewed on 12 January 2014, <http://www.saiia.org.za>.

mediated outcomes.<sup>72</sup> The scale of revenue and foreign investment stakes provide motivation for an authoritative third-party ruling for the party more confident in its legal position – i.e. Malawi.<sup>73</sup>

While leaders might be interested in efficient resolutions for territorial disputes in order to gain access to the natural resources, such a view neglects the fact that binding conflict management requires the assent of both parties.<sup>74</sup> Malawi, the state that holds de-facto control over the resources, could be unwilling to risk the loss by giving up decision control. On the other hand, Tanzania could be unwilling to forfeit its opportunity to gain some of those resources by submitting to a binding process. How the parties view their respective likely outcomes, as well as their respective power comparative to one another, may instruct their enthusiasm for controlled or uncontrolled processes. President Banda has made clear on a number of occasions Malawi's willingness to take the case to the ICJ due to her confidence in successful outcome.

Malawi's current SADC chairmanship allows it to reinvigorate the SADC Tribunal, a more cost-efficient process.<sup>75</sup> A negotiated settlement may also best bind the parties to the shared interest in protecting the more than two-million people dependent on the lake for food, shelter, water and income. A resource management solution that protects livelihood and sustainability for communities advances not only the parties, but the wider region.<sup>76</sup> Achieving that outcome requires negotiation in good faith and concession from both parties. Failure of the parties to reach agreement may push the parties towards adjudication or various levels of armed antagonisms.

As witnessed in similar border disputes between Sudan and South Sudan, and Ethiopia and Eritrea, the outcome of any intervention by either a regional or an international body would not necessarily be self-implementing or self-enforcing. Regional and global political will to compel good faith engagement from the parties remains a critical component, particularly at a time in which at least one party to the conflict enjoys sparse political space in which to move.<sup>77</sup>

#### IV LEGAL ANALYSIS

This section identifies the Heligoland Treaty of 1890, as the authoritative demarcating document, constituting the starting point in determining the Lake's sovereignty. This position is supported by the legal principle that at independence, nations maintain their colonial boundaries.

Since the Treaty is explicit as to the shoreline boundary, giving sovereignty of the entire Lake to Malawi, Tanzania bears the burden to displace this. Whilst Tanzania may rely on various post-1890 maps indicating a median line boundary, it is unlikely to demonstrate the requisite intent for the maps to constitute a valid demarcation. The documents accompanying the maps are inadequately descriptive of the boundary or the colonial power's intent. Critically, there is a distinct lack of any explanatory text addressing a boundary change. The absence of explicit intent to change the boundary makes it particularly difficult for Tanzania to substantiate a claim of historical consolidation of title.

##### Primacy of the Heligoland Treaty

The Heligoland Treaty of 1 July 1890 first established the shoreline boundary. The Treaty was an agreement between Britain and Germany that defined spheres of interest in East Africa. Article I (2)

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<sup>72</sup> Gent and Shannon, p. 73.

<sup>73</sup> Gent and Shannon, p. 74.

<sup>74</sup> Gent and Shannon, p. 78.

<sup>75</sup> A Lalbahadur, 'Malawi vs Tanzania vs SADC: Regional dispute resolution bites the dust', in *South African Institute of International Affairs*. 13 August 2013, viewed on 12 January 2014, <http://www.saiia.org.za>

<sup>76</sup> Ibid.

<sup>77</sup> G Dzinesa, 'Concern over Malawi's decision on arbitration', in *Business Day*. 11 April 2013, viewed on 10 January 2014, <http://www.bdlive.co.za/africa/africanews/2013/04/11/concern-over-malawis-decision-on-arbitration>.

described the southern limit of the German sphere as bounded by the northern limit of Mozambique to the point where that limit touched Lake Nyasa/Malawi, “thence striking northward it follows the Eastern, Northern and Western shores of the Lake to the Northern bank of the mouth of the River Songwe.” The frontier of the lake was subject to minor modification in an agreement of 23 February 1891 but in essence remained unchanged.

Malawi accepts the Treaty as providing the lawful boundary. President Banda maintains that that “Lake Malawi belongs to Malawians”.<sup>78</sup> Tanzania has also accepted the Treaty’s demarcation at various points; both before and immediately after its independence the Government in Dar es Salaam accepted that no part of the Lake fell within its jurisdiction.<sup>79</sup> Currently, however, Tanzania does not recognise the Treaty and asserts a median-line boundary through the Lake.<sup>80</sup>

As a matter of customary international law, it is likely that the Heligoland Treaty constitutes the authoritative document defining the frontier between the two States. It is the most formal instrument demarcating the boundary and there is no issue as to its interpretation. This assessment is supported by a number of relevant legal principles. First, it is consistent with the principles adopted by the Organization of African Unity (OAU) in July 1964 that newly independent States would respect the borders inherited from their former colonial rulers as they existed at the time of national independence.<sup>81</sup> Tanzania (formerly the separate states of Zanzibar and Tanganyika) was an original signatory to the OAU on 25 May 1963, and Malawi became a signatory on 13 July 1964.<sup>82</sup> Thus both states accept this principle.

Second, the assessment is consistent with the principle of *uti possidetis juris*. This is a principle of customary international law providing that old administrative boundaries become international boundaries when a political subdivision achieves independence. In 1986 the ICJ confirmed this principle in the case of *Burkina Faso v Republic of Mali*.<sup>83</sup>

### Maps as subsidiary evidence

With respect to relevant evidence, the case law makes it clear that textual instruments constitute the primary source for international boundaries’ interpretation.<sup>84</sup> This may include formal treaties or agreements between States or heads of State, colonial decrees establishing or amending colonies, orders by heads of colonies, and even letters exchanged between heads or deputies of colonies.<sup>85</sup> Maps and cartographical instruments only constitute ancillary or corroborative sources of evidence.<sup>86</sup>

The *Burkina Faso v Mali* decision makes clear that maps cannot of themselves constitute a territorial title with intrinsic legal force. The mere existence of a map, without explanatory text, is therefore not, in and of itself, constitutive of legal title. The Court in that decision also stated that maps may acquire legal force when they become physical expressions of the will of the State or States concerned.<sup>87</sup> The

<sup>78</sup> ‘President Banda insists Lake Malawi is for Malawi not Tanzania’, *Nyasa Times*, 25 November 2012, viewed on 15 January 2014, <http://www.nyasatimes.com/2012/11/25/president-banda-insists-lake-malawi-is-for-malawi-not-tanzania/>.

<sup>79</sup> Mayall, p. 612.

<sup>80</sup> A Lalbahadur, ‘Malawi vs Tanzania vs SADC: Regional dispute resolution bites the dust’, in *South African Institute of International Affairs*, 13 August 2013, viewed on 12 January 2014, <http://www.saiia.org.za>.

<sup>81</sup> Organization of African Unity, Assembly of Heads of State and Government, First Ordinary Session, 17-21 July 1964, Cairo, Egypt, AHG/Res. 16(1).

<sup>82</sup> ‘List of countries which have signed, ratified/acceded to the Constitutive Act of the African Union’, in *African Union*. Viewed on 9 January 2014, <http://www.africa-union.org/rppt/au/documents/treaties/treaties.htm>.

<sup>83</sup> *Burkina Faso v Republic of Mali*, Frontier Dispute, Judgment, ICJ Reports 1986, p. 554.

<sup>84</sup> *Ibid*, pp. 582-583.

<sup>85</sup> *Ibid*, pp. 582-583.

<sup>86</sup> *Ibid*, pp. 580-581.

<sup>87</sup> *Burkina Faso v Republic of Mali*, pp. 580-581.

<sup>88</sup> *Ibid*.

example given was when a map is annexed to an official text of which it forms an integral part. However, even in those cases, the Court stated, “maps can have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps”.<sup>88</sup>

Related to these issues is the question of intention. In order for a map, an official statement or a text to constitute a demarcation (or re-demarcation) of an international frontier, it must be shown that the parties intended to be legally bound by the amendment. The ICJ in *Burkina Faso v Mali*, citing the *Nuclear Tests* cases, stated that declarations “concerning legal or factual situations” may “have the effect of creating legal obligations.”<sup>89</sup> However, the Court made it clear that this is only the case ‘when it is the intention of the State making the declaration that it should become bound according to its terms’ that “that intention confers on the declaration the character of a legal undertaking.”<sup>90</sup>

In the present case, therefore, it must be established that the maps and accompanying texts depicting a boundary other than that in the Heligoland Treaty represented an intention on the part of both Malawi and Tanzania to be legally bound by the change. Any unilateral intention is therefore insufficient. Colonial law may to some degree be relevant to the question of intention. Although domestic colonial law cannot be applied to interpret a question of international law, it is relevant insofar as the law of the day may influence lawmakers’ intent.<sup>91</sup> Both Malawi and Tanzania, for example, may have experienced common law presumption that delimitations of bodies of water should be drawn down the center of the Lake body. This reasoning may have influenced colonial officials, politicians and cartographers at the time, and may constitute an explanation for the numerous discrepancies between maps in the colonial period. However, the usefulness of this line of reasoning must not be pressed too far, particularly in circumstances where a default and contradictory interpretation exists and there is little evidence to support intent to re-demarcate.

### **Did Britain have the authority to re-demarcate the boundary?**

It is the case for all the annexed maps that little contemporaneous evidence explaining boundary shifts to the median line, and then back to the Lake’s eastern shore exists. It is believed that the map demonstrating a median boundary first appeared in the 1925 edition of the Nyasaland Government Gazette. However, research has not uncovered any government or diplomatic statements explaining why the map showed a different boundary from the Heligoland Treaty.

One argument Tanzania might advance is that the lack of evidence is unsurprising given Britain’s control over both jurisdictions. In such circumstances, Britain might have considered it unnecessary to make formal declarations with itself in order to re-demarcate the boundary. However, even short of a full treaty altering the boundary, one would expect some acknowledgment at the government level of a conscious boundary amendment.

The 1929 case of British use of formal instruments to demarcate Nile access negates potential Tanzanian claims that overt intent is not required a colonial power exercised sovereignty over the two territories. Control over the Nile river basin was divided by the 1929 Agreement between Egypt and Anglo-Egyptian Sudan. However, given Britain’s authority over both territories, it was in essence an agreement by Britain with itself.

With respect to the question of intention, the lack of textual evidence accompanying the maps makes it difficult to reach conclusions about intent. It is possible to advance different interpretations in attempts to explain the annexed maps. However, the speculative nature of interpretations without evidential basis extinguish their merit in law.

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<sup>88</sup> Ibid, p. 583.

<sup>89</sup> Ibid, citing *Nuclear Tests Case (New Zealand v France)*, Judgment, ICJ Reports 1974 p 1-2, at 267, 472.

<sup>90</sup> Ibid, p. 573.

<sup>91</sup> Ibid, p. 568.

Discrepancies between the maps may represent confusion surrounding the frontier's demarcation. On the basis of confusion, arguments may be advanced in explanation of discrepancies. Tanzania has, for example, argued that the reassertion of the boundary as running along the shore constitutes Malawian "creeping cartographical aggression" directed at unilateral re-demarcation.<sup>92</sup> Alternatively, as suggested by Tanzania's 1960 Minister for Lands, Surveys and Water, the changes might merely be the result of a mistaken impression about the law relating to inland waterways.<sup>93</sup>

Tanzania could also argue that customary international law reduced or removed the need for the maps to be accompanied by textual evidence. Uniform state practice is a key consideration in the identification of rules of customary international law.<sup>94</sup> Before Great Britain issued the maps showing a mid-lake boundary (i.e. prior to World War I), the German East African Government stationed military boats on the Lake. If Tanzania could show that Great Britain issued those maps to change the border because she believed she was legally obligated to do so<sup>95</sup> (i.e. to change the boundary by issuing maps without any accompanying textual evidence), it may be arguable that the issuance of the maps created a new rule under customary international law that reduced or removed the need for textual evidence. Whether there was sufficient uniformity of state practice to create a rule of customary international law, would also need to be considered. However there does not appear to be any evidence that Great Britain had the required belief of legal obligation. This argument therefore seems to have little chance of success.

On balance, it appears that Tanzania is unable to displace the burden of demonstrating that any map depicting a boundary running through the centre of the lake represents an authoritative and legally binding demarcation. Given the lack of textual evidence surrounding the maps, it is difficult to conclude with any certainty that intent existed to officially re-demarcate the boundary. The *Burkina Faso v Mali* decision establishes that confusion alone is insufficient to constitute legal title, particularly where maps alone comprise the evidential basis of a claim. Most significant, is the temporary nature of maps demonstrating a boundary down the middle of the Lake. While certain maps adopted a centre-line boundary during the early colonial period, by 1962 immediately prior to Tanzanian independence, British colonial authorities had reverted to the boundary along the shore-line.<sup>96</sup> When Tanzania gained its independence, this was therefore the boundary it inherited.

In the absence of any map authoritatively depicting an alternative boundary, the legal position remains that the Heligoland Treaty represents the primary instrument of boundary determining.

### **The United Nations Convention on the Law of the Sea 1982**

Both Tanzania and Malawi have ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS), in 1984 and 2010 respectively.<sup>97</sup> Tanzania may cite Article 15 of UNCLOS as providing a presumption that the median line of a body of water forms the international boundary between two nations separated by such:

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<sup>92</sup> Mayall, p. 623

<sup>93</sup> Ibid.

<sup>94</sup> "Formation and evidence of customary international law", *United Nations General Assembly International Law Commission Sixty-Fifth Session*, p. 9.

<sup>95</sup> Ibid pp. 17-19.

<sup>96</sup> Mayall p. 623..

<sup>97</sup> A state does not become bound until it ratifies, and Malawi only ratified UNCLOS in 2010, however becoming a signatory in 1984 does signal an intention to be bound and assumes an informal obligation not to act in a way that defeats the object of the Treaty. 'Treaty Collection' in *United Nations*. 22 January 2014, viewed on 22 January 2014, [https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXI~6&chapter=21&Temp=mtmsg3&lang=en#4](https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtmsg3&lang=en#4).

*Delimitation of the territorial sea between States with opposite or adjacent coasts*

*Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.<sup>98</sup>*

A Tanzanian claim under Article 15 is undermined by explicit UNCLOS application to seas and not internal bodies of water. Any UNCLOS-based argument requires extension of the Article 15 principle to a lake that separating two nations. Even were the ICJ to extend the median line presumption to internal bodies of water, the presumption does not apply where historic title or other special circumstances such as the Heligoland Treaty already delimit the boundary.

**Judge Rosalyn Higgins' reported opinion on the 'spheres of influence' argument**

In 1988, Judge Rosalyn Higgins (now an ICJ Judge) provided an opinion to Mobil Oil Corp who wished to explore the Lake for oil and gas and thus had an interest in any Tanzanian territorial claim.<sup>99</sup> Judge Higgins' opinion is not publicly available. However, commentators have reported the opinion as supportive of Malawi's claim to the entirety of the Lake. Reportedly the opinion states:

*"It can readily be seen on any map that all of Lake Nyasa was excluded from the German sphere of influence and that the sphere boundary was on the eastern side of the Lake down to Chicure, where the line turned directly eastward until it joined with River Rovuma. The land to the north of this east-west line is today what is Tanzania, and to the south is that is today Mozambique."<sup>100</sup>*

The article claims, however, that Judge Higgins finds there was no formal or physical demarcation of the shoreline boundary. This is not necessarily problematic: where a lakeshore forms a boundary such delimitation would likely have seemed unnecessary (and lack of physical demarcation does not deter from the clarity of the Treaty). However, absent physical demarcation may be an issue for Malawi if, as the article reports, the Treaty dealt with spheres of influence and never transitioned to an agreement about the international boundary.<sup>101</sup>

Although there is no dispute regarding the clarity of the 1890 Heligoland Treaty, Tanzanian claims to a median line boundary could be based on the premise that it only delimited "spheres of influence." This argument would likely be based on context surrounding the Treaty. In 1886, Britain and Germany agreed on their respective spheres of influence on the East African Coast. They did not address the Western limit.<sup>102</sup> The Heligoland Treaty resolved this issue by addressing the Lake; Judge Higgins purportedly states that this Treaty also concerned "spheres of influence" rather than actual delimitation.

It is likely that the ICJ would accept the Treaty as setting territorial boundaries as the definition of spheres of influence achieved through establishment of formal territorial limits. Tanzanian acceptance

<sup>98</sup> United Nations Convention on the Law of the Sea 1982, Article 15.

<sup>99</sup> 'UK top judge backed Malawi in lake dispute', in *Mabvutojobani*. 20 July 2013, viewed on 14 January 2014, <http://mabvutojobani.com/2013/07/20/uk-top-judge-backed-malawi-in-lake-dispute/>.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

of the Treaty, at various times, as the determinative demarcating instrument reinforces the perceived role of territorial limits as establishing spheres of influence in 1890.

The reported sections of the opinion conclude in favour of Malawi:

*“While the boundary between Malawi and Tanzania is Lake Nyasa [Malawi and] is a complicated issue, and not without its difficulties, I feel that the legal claims of Malawi to all of Lake Nyasa, and the submerged lands there under, is considerably the better claim.”<sup>103</sup>*

It must be emphasised that Judge Higgins’ opinion has not been publicly released thus these observations, as reported in the media, should be treated with some caution.

### **Historical consolidation of title**

Tanzania may argue that its history of presence and activity on the Lake demonstrates that it holds sovereignty over half of the Lake. Tanzania may further argue that if Malawi tolerated or accepted such presence, it also accepted demarcation of the boundary along the middle line. The issue of historical consolidation was addressed in *Cameroon v Nigeria*, in which the ICJ was asked to determine the boundary between the two nations.<sup>104</sup> The case addressed the main land boundary between Cameroon and Nigeria, sovereignty of land surrounding Lake Chad and sovereignty of the Bakassi Peninsula. With respect to the latter two, Nigeria claimed that its presence in the two areas resulted in historical consolidation of title. Nigeria also argued that Cameroon had accepted this presence and thus acquiesced to a new sovereign.

The ICJ held that:

1. *Nigeria’s claim of historical consolidation through presence in Cameroon’s territory was contentious and could not set aside conventional title;*
2. *Despite Nigeria’s administration of justice, health and education (typically acts of sovereignty), this did not constitute Cameroon’s acquiescence in ceding any of its territory to Nigeria.*

The Court first determined the arrangements made by colonial powers in Nigeria and Cameroon that validly demarcated the boundary between the two nations. The Court found that after the Treaty of Versailles, the 1919 Milner-Simon declaration re-established the boundary between the two nations. As colonial powers, France and Britain signed the declaration in 1929/1930 through exchanges between the two administrations. The Court considered this an international agreement that validly demarcated the boundary. At the point of independence the Lake Chad Boundary Commission accepted the prior delimitation of the frontier line – the tripoint at Lake Chad, while Nigeria made no suggestion to the contrary.

Nigeria argued that its presence in the Lake Chad area, combined with Cameroon’s acquiescence, resulted in legitimately acquired Nigerian historical consolidation of title and sovereignty over the area. The Court found this claim unprecedented and controversial, stating that there was nothing to suggest mere presence sets aside conventional title. Even Nigeria’s administration of justice, health and administration, whilst typically manifestations of sovereignty, did not demonstrate Cameroonian acquiescence in passing title. Nigeria’s position is further undermined by Cameroonian communication protesting the Nigerian government presence.

<sup>103</sup> ‘UK top judge backed Malawi in lake dispute’, in *Mabvutojobani*. 20 July 2013, viewed on 14 January 2014, <http://mabvutojobani.com/2013/07/20/uk-top-judge-backed-malawi-in-lake-dispute/>.

<sup>104</sup> *Cameroon v Nigeria: Equatorial Guinea Intervening*, Land and Maritime Boundary between Cameroon and Nigeria, Judgment, ICJ Reports 2002, p. 303.



With respect to the dispute over the Bakassi Peninsula, Nigeria argued that the 1884 Treaty of Protection, between kings and chiefs of Old Calabar, did not endow Great Britain with control over the Peninsula and therefore, the power to cede it in 1913. However, the Court found that the Treaty did not render the 1913 Agreement defective providing Great Britain power to cede the territory at the relevant time.

In 1919 the Treaty of Versailles divided Cameroon between Britain and France, placing the Peninsula as part of British Cameroon. In 1961 the southern part of British Cameroon became independent and the boundary between the Bakassi peninsula and Nigeria remained, reinforcing the principle that at independence nations inherit colonial boundaries. The recognition of Cameroonian sovereignty over Bakassi in all post-1970 instruments and oil concessions reinforced showed that both nations regarded Bakassi as Cameroon's territory, and that Nigeria had acknowledged that position prior to Nigerian nationals residing on the Peninsula. The Court found the 1913 Agreement valid in its entirety because:

1. *Historical consolidation through occupation did not negate Cameroon's title in any way;*
2. *Presence on the Bakassi Peninsula through administrative activities did not displace title;*
3. *There was no evidence that Cameroon had acquiesced to Nigeria's presence.*

The conflict between Cameroon and Nigeria involved determination of land boundaries, distinguishing it from the dispute between Malawi and Tanzania. Thus, Nigeria attempted to argue presence and administration, where Tanzania would have to rely on presence on, or use of, the Lake should it attempt to argue historical consolidation. The facts supporting Tanzania would most likely rely on claims relating to its history of subsistence fishing on the Lake and the economic multiplier effects of the fishing industry in driving population settlement in surrounding communities. While Tanzanian historical consolidation arguments lend weight to demands that Tanzanian fishing access and cultural rights be protected, the essential primacy of the Heligoland Treaty excludes historical consolidation of title.

## V CONCLUSION

The legality of the Lake dispute clearly supports Malawi. However, the costs of enforcement constitute more difficult questions for the parties' leaders and engaged stakeholders. Failure to navigate the economic, political and security dynamics accompanying dispute resolution, by asserting clarity of law, belies the real-politic of disparate interests and power dynamics. Were insecurity to be caused by political miscalculation, contestation of sovereignty could end up costing the parties more than they might receive from resource exploitation in the disputed part of the Lake.

Both Malawi and Tanzania wield instruments that deter one another from adopting and belligerently pursuing absolutist positions. Tanzania's realist instrument is the threat of force. As the vastly superior military and economic power, it may seek to solicit or manufacture an 'incident' or 'provocation' that justifies a military response. Were insecurity to develop, Tanzania is better placed to engage militarily as well as to absorb the accompanying economic cost of insecurity. Such a military response could be calculated to a scale demonstrative of the punitive consequence of any Malawian resource exploration or extraction in the contested area, or, pursuit of an adjudicated ICJ decision.

Malawi on the other hand wields the support of the law, as demonstrated in the preceding section. The threat of an ICJ decision extinguishing in law any Tanzanian claim provides incentive for Tanzania to seek a negotiated solution protecting local populations' interests and procuring some economic benefit from resource extraction. Similarly, the threat of exploration prior to settlement also incentivizes Tanzanian engagement. However, Malawi may be hesitant to employ these instruments, particularly that of resource exploration due to the potential insecurity Tanzania might drive in response.

Malawi's key political obstacle involves the provision of compensation for resource extraction despite the law imposing no obligation upon Malawi to do so. While provision may be packaged within compensation for disruption to local communities, including to the fishing industry, President Banda's government remains politically unable to negotiate prior to Malawi's May election. President Banda's political freedom is particularly constrained by the commencement of criminal proceedings relating to large-scale theft of government money by Malawian civil servants. The immediate term requires engaged stakeholders to strongly encourage the leadership of both parties to temper antagonistic language and encourage temperate rather than militaristic posturing. A free and fair Malawi election will ensure the victorious candidate enjoys the requisite domestic legitimacy to negotiate in good faith a lasting resolution to this long contested dispute.

In Tanzania, untempered government assertions as to Tanzanian sovereignty over the contested part of the Lake misrepresent the law and diminish political scope for compromise by inflating public expectation. Misrepresentations of the applicability of UNCLOS in the Tanzanian press, for example, applies pressure to Malawian political actors to adopt hostile positions, particularly preceding an election – a period of heightened constituent sensitivity. Antagonistic remarks by both parties prior to the election may diminish the extent to which they are able to compromise once post-election negotiations proceed. Regional, local and global interlocutors can play a role in encouraging both parties to refrain from unhelpful language or action.

Once elections conclude the parties will need to consider the nature of the process to pursue, as well as the nature of the actors they engage. Mediation facilitated by SADC has not yet produced levels of progress that was hoped for. However, greater consultation of the parties as to the SADC-designated mediators could prevent recurrence of previously expressed Malawian dissatisfaction. Accompanying engagement by the broader international community may also provide the requisite pressure to drive compromise between the two parties, while maintaining SADC leadership. It is that compromise that determines whether the Lake and its resources ultimately become a benefit for the region or a curse.

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