

Should the International Court of Justice (ICJ) reject outright Tanzania's media line territorial claim to a share of Lake Malawi/ Nyasa? – Daniel Gilbert, 2014

Chapter 1: Context

Lake Malawi (Malawian name)/ Nyasa (Tanzanian name) is located in east Africa, its territory legally shared between Malawi and, in the south-east, Mozambique. “It is important to note at the outset that the claimant was, and is, the Tanzanian Government” (Mayall, 1973); Tanzania has, variously and not consistently, claimed the lake territory to the median line calculated between its (north-)eastern and Malawi's western shorelines, shorelines that are “subject to sizeable seasonal and annual variations in water level” and hence, exact location (US State Department, 1964, p. 4). Malawi consistently rejects Tanzania's claim, arguing for the *status quo*, or more.

Tanzania's median-line claims are grounded in many arguments, implicit and explicit, official and unofficial, confirmed and merely reported, variously made since the 1960s and including appeals to: customary international law, particularly the equity principle; the lake's extant Tanzanian fishing economy; the principles and multilateral conventions of international water law; the 1982 United Nations (UN) Convention on the Law of the Sea (UNCLOS); the principle of permanent national sovereignty; historical claims; and the “local correction” Article contained within the key, bilateral, territorial treaty: the 1890 Treaty of Heligoland (hereafter, Heligoland). At other times, Tanzania has unambiguously accepted the current border.

The (in)validity of the post-colonial African territorial settlement is central to the dispute; in the period immediately leading up to, and after, Tanzanian independence in 1963, Tanzania challenged this settlement, but recanted choosing conformity with its fellow, newly independent, African nations who collectively declared, e.g. at Organisation of African Unity (OAU) summits, their commitment to respect for each others' borders, and hence a pro-stability agenda. This shift limited the force of Tanzania's claims by closing off an important avenue for challenging Heligoland.

Malawi's powerful array of arguments include: confirmation of the border as per Heligoland, utilising treaty law as the applicable law of the dispute, as articulated by the 1969 Vienna Convention on the Law of Treaties; historical claims; the principles of *uti possidetis* and effective control; OAU (and other) state parties' joint declarations mutually recognising boundaries; Malawian state practice, acting in presumption of ownership (e.g. in issuing oil licenses); and the dubious vigour of many of Tanzania's arguments.

Efforts at mediating this dispute are longstanding and ongoing, but the incentive for Malawi, in possession and confident of its legal case, to make concessions is unclear. The situation would be unchanged in case of mediation being superseded by other forms of non-binding interventions, e.g. third party conciliation.

“Compared to other dispute resolution techniques, adjudication has a number of advantages. It makes a final disposition of the dispute” (Bilder, 1997). Malawi is bound to the compulsory jurisdiction of the International Court of Justice (ICJ) and Malawi's current President, Joyce Banda, has confirmed it as Malawi's preferred forum. This paper agrees with Banda's assertions that the ICJ offers the only realistic prospect for final resolution, and that Tanzania's claims therein should be rejected outright too.

Chapter 2: Establishing ICJ Jurisdiction

2.1 Alternatives to ICJ Jurisdiction

Malawian/ Tanzanian dialogue, direct or third-party facilitated, is an alternative to ICJ dispute adjudication. Shortly after the independence of both states, in 1967 the government of Tanzania wrote 'to inform the Government of Malawi that Tanzania has no claim over the waters of Lake Nyasa beyond the line running through the median of the Lake' (Mayall, 1973, p. 617); within the month (1973, p. 618) Malawi confirmed to Tanzania that it would consider and respond to its claim. Active, quiescent and non-dispute phases followed, but without final resolution. In April 2013 Banda, despairing of the latest inconclusivemediation work of the Africa Forum of Former African Heads of State and Government (Forum), concluded that “we should not waste time on this (mediation)... our view is that we should eventually go to court.. It is better to go to the ICJ as we will be happy to respect the ruling of the court” (Mining in Malawi, 2013a). Tanzania's Foreign Affairs and International Cooperation Minister Bernard Membe responded thus: “they have opted to pull out of mediation .. (but) should know that Tanzania has not yet ratified the ICJ protocol (accepting its compulsory

jurisdiction) ...the best thing is for them to come back to the negotiating table to see what we can do next after the failed mediation” (2013a), a mediation costing more than \$1.5m to the parties even as Malawi remained “determined to take the dispute to the ICJ” (Mining in Malawi, 2013b).

For UNCLOS to provide this dispute’s applicable law it would need to be shown it applies to lakes and not just sea; if so, there would be alternative(s) to ICJ legal forum jurisdiction. Both Tanzania and Malawi are legal parties to UNCLOS (United Nations, 2013a), and Tanzania’s declaration (United Nations, 2013b) under UNCLOS Article 287 selects the International Tribunal for the Law of the Sea (ITLOS) as its preferred route for UNCLOS adjudication, not the ICJ which adjudicated all UNCLOS territorial cases until the 2012, ITLOS, Myanmar/ Bangladesh maritime dispute (Churchill, 2012). As Malawi has made no equivalent declaration, Article VII *ad hoc* UNCLOS arbitration proceedings would apply. Alternatively, Malawi could match Malawi’s ITLOS-selection declaration. There are calls (Massawe, 2013) for, and reports of (Vula, 2013, p. 2), Tanzania invoking UNCLOS to support its median line claim.

However, “internal waters are not subject to UNCLOS and from the standpoint of international law, internal waters, including lakes, have the same legal characteristics as land boundaries... historically determined through bilateral/multilateral treaties” (Olsen, 2012); moreover, unlike the Caspian Sea, likewise analysed, Lake Malawi is not connected by “narrow passages” (*viz.* canals) to the oceans, allowing UNCLOS to potentially apply. Recent Tanzanian draft constitution controversies (Mapunda, 2013) demonstrate a recognition of this seas/ internal waters legal distinction: the statement that “the area of the United Republic is all areas including the area of the sea and all the area of Zanzibar including its area of sea” has been criticised as excluding internal waters, including Lake Malawi (Banthu Times, 2013). The conclusion is that ITLOS cannot be the forum for this dispute as UNCLOS cannot provide its applicable law. The combination of the ICJ as legal forum, and treaty law as applicable law, is the sole realistic option for this dispute’s resolution.

2.2 ICJ Jurisdiction

Malawi formally declared its acceptance of the ICJ’s “compulsory jurisdiction” as per ICJ Statute Article 36(2) on 12th December 1966; Tanzania and 122 further ICJ state parties have not made this declaration (ICJ, 2011). Nor are the two countries subject to a multilateral or bilateral treaty including a “compromissory clause” explicitly providing for such jurisdiction, representing a further obstacle to its establishment herein. ICJ jurisdiction is not assured *ab initio* but instead needs to be established, in this case with the agreement of Tanzania; once done so, it is binding, and the below analysis considers how this may be achieved.

The “overwhelming majority of” ICJ territorial cases been “initiated through unilateral invocation by (the minority of) applicant states of compulsory jurisdiction” (Llamzon, 2005, pp. 817, 818), such as Malawi, leading to a growing ICJ docket (not limited to territorial cases), up from “one or two cases” in the 1970s, to about ten by 1997 and increasing to “20 or more.. since then” (United Nations, 2005, p. 2). Malawi’s options include challenging Tanzania to make an Article 36(2) declaration and submitting the case anyway, challenging Tanzania to accept ICJ prorogated jurisdiction in the case, or negotiating a Special Agreement with Tanzania, a relatively rare solution (2005 p. 818), with Tanzania allowing ICJ jurisdiction between the parties solely with respect to the Lake Malawi.

In the Bakassi peninsula dispute, adjudicated by the ICJ in 1996 utilizing treaty law as its applicable law, Cameroon surprised Nigeria by likewise making an Article 36(2) declaration and, just sixteen days later, bringing a territorial case to the ICJ, which it won and subsequently gained possession of from Nigeria (Max Planck Institute, 1998). This case could offer encouragement to Tanzania with respect to the ICJ forum route, but not because due to its treaty law reliance.

Apparently, but unconvincingly, the two states (Lunn, 2013, p. 2) “agreed to take the dispute to the ICJ if the Forum proves unable to come up with a mutually acceptable solution.” Regardless, Tanzania may eventually succumb to one of the above options for lack of a practical alternative.

Chapter 3: Merits of an ICJ Case

The responses of both countries to the Forum questions remain confidential, and the respective cases of the two countries presented at an ICJ case unknown ahead of the event. The below analysis is therefore based on known arguments made by, or in support of, each state’s territorial claims.

3.1 Evaluation of Malawi's case

In the widely reported, e.g. see Nyasa Times report (Nyasa Times, 2013), but unconfirmed, legal opinion of Professor Rosalyn Higgins QC, a former head of the ICJ, should an ICJ case be heard then it would result in confirmation of, not change to, the current boundary; that is, a Malawian victory. The rationale for her reasoning is not hard to find, notably in the Treaty of Heligoland.

An “analysis of the (ICJ)’s Territorial Dispute Jurisprudence” finds that “the existence of a prior boundary treaty or other documentation reflecting interstate agreement as to boundaries (or provisions for their delimitation) is generally dispositive for the court” (Sumner, 2004, p. 1804). In justification, Sumner states “To question the substance of the treaty would be tantamount to questioning the parties’ expressed preferences and thwarting the parties’ and other states’ reliance on the agreed terms of the treaty” (2004, p. 1804) and is grounded in the brocard: “*pacta sunt servanda*”. Article 38 of the ICJ Statute states that the court “shall apply.. international custom as evidence of a general practice accepted as law” (ICJ, 1946); and an analysis of the ICJ’s operation has found that “time and again the ICJ found that (such) customary rules on the law of treaties corresponded in substance to those stated in the Vienna Convention of 1969” (Corten & Klein, 2011, p. 955), which has *jus cogens* status. Furthermore, “this rule often holds even when an agreement is unclear or incomplete” (2004, p. 1804).

As noted above, the definitive boundary treaty here is that of Heligoland, which delimits the lake shore border as it remains extant, and represents the linchpin of Malawi’s territorial claim. Heligoland, “the original (Lake Malawi) agreement between Britain and Germany” (Mayall, 1973, p. 621), “Article I (2) described the German sphere (of interest) to the south as bounded by the northern limit of Mozambique to the point where that limit touched Lake Nyasa '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” (1973, p. 622) an extant description of (now) Tanzania’s border that “does not appear to be in doubt” (1973, p. 622).

Whereas previous ICJ cases cannot establish legal precedents, as such, they can be invoked in later cases to illustrate the persuasive force of previous arguments presented and outcomes achieved; in this case, both treaty law (see above), and two facets of possession, namely effective control and *uti possidetis* (see below). All of these considerations weigh heavily in Malawi’s favour.

“Many scholars believe that under international law, effective control is the shibboleth—indeed, the sine qua non—of a strong territorial claim” (Sumner, 2004, p. 1787); in this regard Malawian state practice in clearly and consistently acting as if the border delimitation was not in doubt, for example in the issuing of petroleum exploration licenses (Surestream Petroleum, 2011).

Strongly aligned in African practice with effective control, “the next most dispositive basis for a judgment is *uti possidetis*, if applicable” (2004, p. 1804), namely.. “a doctrine under which newly independent states inherit the pre-independence administrative boundaries set by the former colonial power” (2004, p. 1790). The lake-side border is unchanged since these nations’ independence, and dates to Heligoland, i.e 1890, made by the two nations’ colonial occupiers.

Critically, African states, including Malawi and Tanzania, have chosen to strengthen the principle of *Uti possidetis* through their own volition. Hence, in “the Frontier Dispute (Burkina Faso/ Republic of Mali)” (ICJ, 1986), paragraph 19 lists the “rules applicable to the case”, in particular (and listed first): “the principle of the intangibility of frontiers inherited from colonization”, as specified in the case’s Special Agreement; and followed by (paras. 20-26) “the principle of *uti possidetis juri* .. (which) if (it) has kept its place among the most important legal principles, this is by a deliberate choice on the part of African States.” In this context, the ICJ (1986) “recalls the principle expressly stated in resolution AGH/Res. 16 (I) adopted in Cairo in July 1964 at the first summit conference following the creation of the OAU, whereby all member States “solemnly . . . pledge themselves to respect the frontiers existing on their achievement of national independence”; these states included both Tanzania and Malawi. This founding resolution was one of “the many solemn affirmations of the intangibility of frontiers, made by African statesmen or by organs of the OAU (consistent with) the “essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields has induced African States to consent to the maintenance of colonial boundaries or

frontiers, and to take account of this when interpreting the principle of self-determination of peoples” (1986). Thirty-six years later, Article 3, "Objectives", of the African Union (AU) Constitutive Act, 2000, again signed by both Malawi and Tanzania, confirms the signatories commitment to "defend the sovereignty, territorial integrity and independence of its Member States" (AU, 2000).

Lastly, but less critically in comparison with the above, Malawi can ground its territorial claim in pre-Heligoland, historical right. Malawian President Hastings Banda stated in 1967 that “I should like to say here and now that we will never recognize or accept (Tanzania’s) claim... The Lake has always belonged to Malawi” prior to outlining Malawi’s inactive historical claim to much wider territory “based on the territory of the ancient Maravi Kingdom .. including Mbeya and Ruangwa (currently in Tanzania) as well as parts of Mozambique” (Mayall, 1973, p. 618). President Hastings Banda confirmed that this claim was inactive: he was “not laying any claim to any part of land in any of the neighbouring countries (but) simply stating the facts of geography, history, ethnology, language or linguistics in that part of Africa” by stating that if, out of Malawi and all her neighbours “any country has any just cause for territorial claim on any other country, that country is Malawi” (1973, p. 618). Historical right can be recognised in international territorial arbitrations, e.g. the Helmand River Case of 1872 between Afghanistan and Persia relating to the province of Sistan, accepted by both governments in 1873, an appointed British commissioner arbitrator “delivered an award that formulated a boundary line based on ancient right and present possession” (Permanent Court of International Justice, 1905).

3.2 Evaluation of Tanzania’s case

Tanzania’s case has been made inconsistently, or even not at all; the latter resulting in a 1964 US study concluding that "there are no known disputes about the boundary at the present time” (US State Department, 1964, p. 5). Indeed, “the Government in Dar es Salaam accepted, both before and immediately after independence, that no part of the Lake fell within its jurisdiction” (Mayall, 1973, p. 612). In 1960, one year before becoming President (1961 – 1985) of his pre- and then post-independent country, Julius Nyerere stated in the Tanganyika Legislative Council (TLC): “I must emphasise again ... there is now no doubt at all about this boundary. We know that not a drop of the water of Lake Nyasa belongs to Tanganyika under the terms of the agreement, so that in actual fact we would be asking a neighbouring Government. . . to change the boundary in favour of Tanganyika” (1973, p. 615), and was successful in defeating calls by that Council for a territorial claim to be made.

Post-2011, the issuing of oil exploration licenses has been cited (Lunn, 2013, p. 2) as the catalyst for this dispute becoming active once again, a view consistent with Tanzania's Foreign Affairs and International Cooperation Minister Bernard Membe’s 2012 request that exploration be put on hold “to pave the way for the ongoing discussions to resolve the crisis” (Masina, 2012, p. 92), a request that Malawi has observed (Consultancy Africa Intelligence, 2013, p. 74). Tanzania could pursue a policy that sought to successfully work around the territorial dispute with a view to both nations benefitting from the petroleum reserves suspected to be the lake, potentially “limit(ing) friction between the two countries” (2013, p. 74), for example by establishing a petroleum Joint Development Zone with Malawi to jointly extract and mutually benefit from the resource, and without prejudice to the territory’s rightful ownership/ delimitation. This would be in line with customary international law norms of co-operation, and OAU/ AU norms of African solidarity and mutually-supportive, economic development. However, there is no evidence of Tanzania making such an approach, in contrast to the current, active, pursuit of its territorial claim, despite the prompting (Chikoko, 2013) of the last of the Forum questions put in September 2013 to both state parties: “4. Are there examples of cooperation between the parties in relation to the use of the Lake?”

The customary international law principle of equity is the specific focus of a second of these three Forum questions that were posed to both state parties, namely: “what is the legal implication of the acceptance by either party of the importance of the Lake to the local population along the shoreline and their use of the Lake?”, and it is a principle that bolsters Tanzania’s case in this dispute since Tanzania currently has none of the lake, an inequitable result. As Jakaya Kikwete, President of Tanzania, stated in his monthly national address of September 2012: “If the residents of Mbamba Bay.. and other towns .. along the lake are told that the water body is no longer theirs they won’t understand because for generations, they have used the Lake.” This recent statement echoes that of 1960 when TLC member Chief Mhaiki, argued “for the revision of the boundary on functional (equitable) grounds: he claimed that with approximately 600,000 people living along the Tanganyikan shore, and dependent on the Lake for cooking and drinking water and for food, it was

anomalous that the Government should have no rights over the Lake”, (ref Mayall p614). Unfortunately for Tanzania, equity has not been a primary focus for the ICJ in determining territorial disputes; instead (Sumner, 2004, p. 1906) “the court has also demonstrated a preference for effective control justification over equity *infra legem*. (For example) in Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia).”

The remaining Forum mediation question posed to both parties indicates a further Tanzanian argument: non-ratification of Heligoland, i.e. a challenge to the linchpin of the Malawian case. The question posed is thus: “what is the legal implication of the absence of ratification on the delimitation in Article 1(2) of the 1980 Treaty in relation to the Lake?”, (Chikoko, 2013). Heligoland’s Article XII is sole Article mentioning ratification, but solely regarding the North Sea island of Heligoland: “pending approval by the British parliament, Her British Majesty shall grant sovereignty over the Island of Heligoland and all its facilities to His Majesty the German Kaiser” (Leipzig State Archive, 1891, p. 151); this led UK Prime Minister William Gladstone to a retort “assert(ing) that the invitation to Parliament to share the constitutional prerogative of the Crown was contrary to ‘our long, uniform, and unbroken practice’” (New York Times, n.d.); ratification was not sought, therefore. However, the above would appear to have no bearing on the rest of the treaty, nor the Lake Malawi territorial dispute.

A further argument advanced is based on the ambiguity of Heligoland: firstly, in referring to the “River Messing” as the northern start of the shore-side border, a river that no longer appears on modern maps (Munyaga, 2012). Nevertheless, this lake coastal point relates to “the northern border of Mozambique Province”, now Mozambique, and potentially pertinent to a territorial claim by Tanzania against that state, not Malawi. A second challenge of Heligoland ambiguity is based on the finding that: “it is evident, from the inconsistency of the maps used in both territories during the mandate, that there was, from the start, some confusion as to exactly where it lay” (Mayall, 1973, p. 612) and, indeed, the British colonial “Minister for Lands, Surveys and Water, however, conceded that his Department was responsible for the publication of maps showing a ‘median’ line, the result, he said, of a mistaken impression that this was the correct and natural boundary in all inland waters” (1973, p. 614). This admission is both consistent with the hypothesis that ambiguities were the result of innocent mistakes by colonial occupiers rather than any attempt to obfuscate or disinherit a future Tanzanian state of its lawful territory. Regardless, the shoreline Lake Malawi boundary extant and at the time of these two nations’ independence in the mid-1960s was as clearly stated in the 1890 treaty; these arguments are likely to carry little force in an ICJ adjudication, therefore.

A further argument is that of Heligoland “local correction”; Article VI states that (Leipzig State Archive, 1891, p. 150) “every correction of demarcation line described in Article 1 to VI that comes necessary due to the local requirements shall be undertaken by agreement between the two parties. It is understood in particular that commissioner will meet as soon as possible to undertake such a correction with regard to the border.” In 1901 the UK/ Germany did agree, by treaty, amendments to other African borders using Heligoland’s Article VI, hence the argument that (Kheri, 2013, p. 4), “Tanzania can stand on this precedent to have equal share with Malawi at Lake Nyasa”; however this was done by agreement between the parties in 1901 through an international treaty. In the Lake Malawi case there is no such subsequent agreement or treaty, however, and hence this argument too is without legal force.

A further challenge, and a valid one albeit of not generally dispositive in ICJ territorial adjudications (see above), to Heligoland is that it makes a substantial inflation of Malawi’s historical claims, rather than being in accordance with them: its “description of the border technically makes the famous Mbamba Bay, Liuli and Lituhi in Mbinga district, Manda and Lupingu in Ludewa district and Kyela and Itungi Port in Kyela district part of Malawi. There is no record to the effect that part of Tanzania has ever been administered as part of Malawi” or its predecessor states (Munyaga, 2012).

Heligoland’s introduction states (Leipzig State Archive, 1891, p. 149) its drafting was made further “after deliberating on various issues pertaining to the colonial interests of Germany and Great Britain”; underlining the fact that the treaty was negotiated by colonial powers for their own benefit, not the interests of the African peoples of their respective territories.

Tanzania could, and did, indirectly challenge Heligoland as invalid on this basis, but this challenge was made in direct conflict with the principle of *uti possidetis*, subsequently acceded to by Tanzania: prior to

independence and its union with Zanzibar to form Tanzania, Tanganyika gained internal rule from the UK in 1960. Its government, in 1961, formally notified the United Nations (UN) that after a two year independence-period, Tanganyika would not recognise any inherited, UK-signed international treaty, other than those “regarded as otherwise surviving .. by the application of the customary international law” (Munyaga, 2012). This policy is consistent with the subsequent 1978 The Vienna Convention on Succession of States in respect of Treaties, which came into force in 1996, whereby “newly independent states”, i.e. post-colonial states, gain the benefit of (Article 16) the "clean slate" rule, such that they do not inherit the treaty obligations of their former colonial occupiers.

However, the above policy was not confirmed by any Act of an independent Tanzania nor actively pursued as government policy subsequently; effectively, it lapsed. Instead, Tanzania conformed with prevailing African practice by recognising the general validity of the post-colonial African settlement, and hence the treaties that underpinned and defined that settlement. This does not mean that the ICJ would definitely confirm the *status quo* Lake Malawi border: in the 1995 ICJ-adjudicated Libya vs. Chad territorial ICJ case, the stated justification for awarding, to Chad and on the basis of treaty law, the disputed, Libyan held, territory, was “in part, by Libya’s being a party to the treaty (as opposed to the successor in interest to a colonial power)”, (Sumner, 2004, p. 1804); in contradistinction, Tanzania was not directly party to Heligoland, but is a successor to the colonial power of Germany, that was. In the wider context of the above principles, however, this consideration is likely to constitute a comparatively minor factor with respect to the ICJ’s final adjudication decision.

Chapter 4: Conclusion

The ICJ “rules according to international law, that is, relevant treaties and international agreements, customary international law, and generally accepted legal principles,” (Bilder, 1997). As noted above, relevant treaty considerations are often dispositive for the ICJ, and in this instance accord with the *status quo*. This is also true of other legal principles, including *uti possidetis*. Further to OAU and other commitments, the only remaining substantive argument favouring a shift in the border towards Tanzania on the lake is the principle of equity. However, in the final analysis, the ICJ should take the legally correct decision of rejecting out of hand Tanzania’s territorial case, confirming instead the *status quo* situation, in line with treaty law and the delimitation of Heligoland, nearly 125 years ago.

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