

# MANUFACTURING TERRITORIAL INTEGRITY WITH THE INTERNATIONAL COURT OF JUSTICE: THE SOMALILAND-PUNTLAND DISPUTE AND *UTI POSSIDETIS*

## INTRODUCTION

“[T]he bias [in] existing law is towards stability, the *status quo*, and the present effective possession; the tendency of international courts is to let sleeping dogs lie. This is right, for the stability of territorial boundaries must always be the ultimate aim.”<sup>1</sup> This sentiment asserted by Professor Jennings is certainly valid regarding internationally recognized nation-states.<sup>2</sup> In other cases, however, international courts must “devise a legal regime” to solve border disputes among unrecognized territories,<sup>3</sup> commonly referred to as “*de facto* states” or “quasi-states.”<sup>4</sup> Yet, quasi-states are currently unable to procure declarative judgments from the institution that traditionally governs border disputes, the International Court of Justice (“ICJ”).<sup>5</sup>

Somaliland, being a quasi-state, is therefore unable to petition the ICJ for a resolution to its border dispute with Puntland.<sup>6</sup> The international community, however, has a demonstrated interest in resolving this quarrel,<sup>7</sup> as Somaliland and Puntland are fairly stable burgeoning

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1. R. Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 70 (1963).

2. “[I]n a properly ordered society, territorial boundaries will be among the most stable of all institutions.” *Id.*

3. “It is in [disputed frontiers] that international law needs to extend its influence and sway, and in order to do that it will be necessary to devise legal regimes sufficiently flexible to permit of the adjustments to shifting patterns of international power that may be needed for a long time to come.” *Id.*

4. *See infra* notes 57–62 and accompanying text.

5. *See infra* notes 63–68 and accompanying text.

6. *See infra* notes 129–33.

7. The United States has recently increased aid to Somaliland and Puntland for employment, development, and infrastructure. Hussein Yusuf, *America looks to Puntland and Somaliland*, THE DAILY STAR (Oct. 14, 2010), <http://www.dailystar.com.lb/Opinion/Commentary/Oct/14/America-looks-to-Puntland-and-Somaliland.ashx#axzz2GHA1BrFp> (“[T]his policy change allows the United States . . . to provide a foundation for long-lasting change through . . . infrastructure, economic development and security.”). The Somaliland president has also been invited to visit the United States in order to strengthen international relations between the two governments. *US Government Officially Invites Somaliland President*, SOMALILAND PRESS (Dec. 28, 2010), <http://somalilandpress.com/us-government-officially-invites-somaliland-president-19609> (“The President [of Somalia] has accepted the invitation from the US government and that the visit will be fixed at jointly agreed date.”). Finally, Somaliland, Ethiopia and China have recently negotiated several economic agreements to facilitate oil and gas trading between the nations. *Somaliland, Ethiopia and China to Sign Trilateral Deals*, SOMALILAND PRESS (Aug. 14, 2011), <http://somalilandpress.com/somaliland-ethiopia-and->

democracies, while their “parent state,” Somalia, exists in utter disarray.<sup>8</sup> Somalia’s internal government has been consistently marred with severe corruption,<sup>9</sup> resulting in an austere lack of international credibility<sup>10</sup> and pervasive bouts of civil violence.<sup>11</sup> This Note argues that the most logical resolution to the clashes between Somaliland and Puntland can be found in the ICJ’s legal mechanisms for solving international border disputes, most notably *uti possidetis*.<sup>12</sup> The Court’s jurisprudence can be applied to render a temporary ruling on the location of Somaliland’s frontier, with the prospect of stabilizing the disputed territory until a permanent solution is developed for co-existence with a federalized Somalia.

Part I of this Note will begin by exploring the territorial history of Somalia. Part II will introduce quasi-states and their treatment within the international community. Part III will detail the legal regime used by the ICJ to solve border disputes, specifically the doctrine of *uti possidetis*. Finally, Part IV will apply the ICJ’s border-resolving mechanisms to the Somaliland-Puntland dispute.

china-to-sign-trilateral-deals-23306 (“[S]omaliland, Ethiopia and China are expected to sign trilateral agreements on gas, oil and logistic deals in the days ahead.”); *see also infra* note 10.

8. The Assistant Secretary of State for African Affairs stated: “We think that [Somaliland and Puntland] have been zones of relative political and civil stability, and we think they will, in fact, be a bulwark against extremism and radicalism that might emerge from [southern Somalia].” *SOMALIA: Somaliland and Puntland to Cooperate on Security*, INTEGRATED REG’L INFO. NETWORK (Sept. 28, 2010), <http://www.irinnews.org/Report.aspx?ReportID=90607>.

Due to military conflict in the Sool region of Somalia, “Somaliland and Puntland risk the loss of their most important asset—their relative peacefulness in comparison with the situation in the south of Somalia, particularly in Mogadishu.” Markus V. Hoehne, *Puntland and Somaliland Clashing in Northern Somalia: Who Cuts the Gordian Knot?*, SOC. SCI. RESEARCH COUNCIL 1 (Nov. 7, 2007), <http://homofafrica.ssrc.org/Hoehne>.

9. Maro Silva, *Somalia: State Failure, Piracy, and the Challenge to International Law*, 50 VA. J. INT’L L. 553, 558 (2010) (“[T]he only defining characteristics of the Somali government are corruption and criminality.”).

10. Most recently, on February 3, 2011, Somalia’s parliament voted to extend its self-imposed mandate to run Somalia. This unilateral decision has spurred international dissent from the United Nations, United States, and the United Kingdom. *See* Alex Thurston, *Somalia Transitional Parliament Extends Term Three Years, Prompting Criticism*, CHRISTIAN SCI. MONITOR (Feb. 7, 2011), <http://www.csmonitor.com/World/Africa/Africa-Monitor/2011/0207/Somalia-transitional-parliament-extends-term-three-years-prompting-criticism>; *see also* *Statement by the EU High Representative Catherine Ashton on the decision of Somalia Parliament*, GAROWE ONLINE (Feb. 4th, 2011), [http://www.garoweonline.com/artman2/publish/Press\\_Releases\\_32/Statement\\_by\\_the\\_EU\\_High\\_Repr\\_esentative\\_Catherine\\_Ashton\\_on\\_the\\_decision\\_of\\_Somali\\_Parliament.shtml](http://www.garoweonline.com/artman2/publish/Press_Releases_32/Statement_by_the_EU_High_Repr_esentative_Catherine_Ashton_on_the_decision_of_Somali_Parliament.shtml) (“The decision [to extend the mandate] was taken hurriedly without appropriate consultations on the way forward.”).

11. “The lack of central governance has also facilitated the formation of small fiefdoms. Inherently unstable, the fiefdoms often experience rapid transitions in leadership. For example, in the capital city of Mogadishu, multiple groups compete and have competed politically and militarily for neighborhoods and even particular streets.” Silva, *supra* note 9, at 558.

12. *See infra* notes 70–87 and accompanying text.

## I. A BRIEF TERRITORIAL HISTORY OF SOMALIA

### A. Colonial Somalia

In order to adequately examine Somalia's history of territory and politics, one must become familiar with its clan system.<sup>13</sup> There are five major clan families dispersed throughout several overlapping ethnic and administrative regions in Somalia.<sup>14</sup> The clans especially pertinent to this Note are the Isaq<sup>15</sup> and the Harti.<sup>16</sup> The territorial dissemination of these clan families inevitably resulted in their initial citizenship among the European powers that began colonizing African lands in the late nineteenth century through both peaceful and violent means.<sup>17</sup>

Following the battle of Adowa in 1896,<sup>18</sup> Britain,<sup>19</sup> France,<sup>20</sup> Italy,<sup>21</sup> and Ethiopia<sup>22</sup> demarcated colonial borders in Somalia.<sup>23</sup> These borders

13. For a detailed diagram of the Somali Clan Structure, see MARIA H. BRONS, *SOCIETY, SECURITY, SOVEREIGNTY AND THE STATE IN SOMALIA: FROM STATELESSNESS TO STATELESSNESS?* 18–19 (2001). Membership in Somali clans ultimately determines social and political relationships and has been instrumental in shaping the separate identities of Somaliland, Puntland, and the remainder of Somalia. *Id.* at 98. The southern clans initially derived from the Sab lineage and are characterized as a “settled farming” community. *Id.* at 99. The northern clans (where present-day Somaliland and Puntland are located) derived from the Samale and practiced “nomadic pastoralism.” *Id.* The northern clans traveled throughout the region with their animal herds to the most fertile areas, generally depending on rain patterns. *Id.* at 79. Because of the resulting territorial separation, the two sects developed different languages. *Id.* at 99. These distinctions, present far before European colonialism, were early factors that contributed to the Somali civil war. See I.M. LEWIS, *A PASTORAL DEMOCRACY: A STUDY OF PASTORALISM AND POLITICS AMONG THE NORTHERN SOMALI OF THE HORN OF AFRICA* (1961).

14. The five clan families are Dir, Isaq (or Isaaq), Darod (or Darood), Hawiye, and Rewin. BRONS, *supra* note 13, at 101–03. The population was roughly distributed as such: 35% Darod, 23% Hawiye, 23% Isaaq, 7% Dir, and 11% Rewin. DEON GELDENHUYS, *CONTESTED STATES IN WORLD POLITICS* 129 (2009); see also *infra* Maps 1(A)–1(B), pp. 840–41 (territorial clan distribution in comparison to modern-day Somaliland and Puntland locations), printed in BRONS, *supra* note 13, at 15, 17.

15. The Isaq are located in Northwest Somalia, which is present-day Somaliland. BRONS, *supra* note 13, at 103.

16. The Harti are a sub-clan of the widely dispersed Darod family and are located in Northeast Somalia, which is present-day Puntland. *Id.* at 102. The Harti family is broken down into several sub-clans comprised of the Majertain in the northeast and the Dulbahante and Warsangeli located further west. *Id.* Certain western portions of Dulbahante and Warsangeli territory adjoin Isaq territory. *Id.*

17. See MALCOLM SHAW, *TITLE TO TERRITORY IN AFRICA: INTERNATIONAL LEGAL ISSUES* 27–58 (1986) (detailing modes of European territorial acquisition in Africa).

18. British forces and their Italian allies were seeking to push French and Russian forces out of Somalia, primarily in order to maintain access to the Nile. IOAN LEWIS, *UNDERSTANDING SOMALIA AND SOMALILAND: CULTURE, HISTORY, SOCIETY* 28–29 (2008). The competing powers had initially sought to take control of Ethiopia, which borders Somalia to the west, by providing the Ethiopians with weapons. *Id.* Ethiopian forces, however, independently joined the battle of Adowa and successfully defeated Italian forces, thus installing Ethiopia as a “local superpower” within Africa. *Id.* With newfound power, Italy, France, and Great Britain approached Ethiopia individually with territorial peace offerings. S. PIERRE PETRIDES, *THE BOUNDARY QUESTION BETWEEN ETHIOPIA &*

would essentially remain intact<sup>24</sup> until the conclusion of World War II.<sup>25</sup> Following the United Nations' post-war negotiations with Ethiopia, Great Britain, and Italy, it was agreed that Great Britain would retain its original territory in the Northwest as a separate entity<sup>26</sup> while Italy would control the remainder of its former colony in the East.<sup>27</sup> This demarcation and the

SOMALIA: A LEGAL AND DIPLOMATIC SURVEY WITH 20 MAPS 16 (1983); *see also* PAOLO TRIPODI, *THE COLONIAL LEGACY IN SOMALIA* 22–25 (1999) (discussing in depth Italy's dealings with Ethiopia before and after the battle of Adowa).

19. Great Britain had previously established the "Protectorate of British Somaliland" in July 1887 after negotiating with several Somali families and clans, including the Isaq. BRONS, *supra* note 13, at 131–32. During negotiations following the battle, Britain was required to cede a portion of this protectorate to Ethiopia. *Id.* at 135. The resulting Anglo-Ethiopian Treaty was successfully implemented in 1898 and demarcated British Somaliland from Ethiopia's newly acquired territory. PETRIDES, *supra* note 18, at 26; *see also infra* Map 2(A), p. 842 (British Somaliland boundary agreements), printed in *Id.* at 26–27. Based on the agreement, Britain transferred a segment of its southwestern territory that had originally been subject to the 1894 Anglo-Italian Protocol to Ethiopia. *Id.* (text and accompanying map).

20. The French were left with territory to the west of British Somaliland and established the Republic of Djibouti. SCOTT PEGG, *INTERNATIONAL SOCIETY AND THE DE FACTO STATE* 87 (1998). In order to appease Ethiopia, France signed the Treaty of Friendship and Trade which adjusted France's western border and allowed Ethiopia "unrestricted and untaxed import and transit of arms and ammunitions as well as goods of every kind through Djibouti." PETRIDES, *supra* note 18, at 18 (text and accompanying map).

21. Italy was provided with a majority of the southern coast. PEGG, *supra* note 20, at 87; *see also infra* Map 2(B), p. 842 (Italian Ministry of Foreign Affairs, Rossetti's Map of 1910), printed in PETRIDES, *supra* note 18, at 78–79.

22. The Ethiopians, in total, gained the central Ogaden region of Somalia (south of the British and west of the Italians). PEGG, *supra* note 20, at 87.

23. LEWIS, *supra* note 18, at 29.

24. The word "essentially" is used because Italy and Ethiopia were unable to come to an official agreement on the border demarcation question during the aforementioned negotiations in the late 1800s. PETRIDES, *supra* note 18, at 29–39. Temporary resolution was achieved following a brief skirmish between Italian and Ethiopian forces in December 1907, after which the two powers signed the 1908 Italo-Ethiopian Boundary Convention. *Id.* at 44. The resulting border demarcation required by the convention, however, was never fully implemented. BRONS, *supra* note 13, at 136 ("[T]he actual demarcation of the border began, but was interrupted and then never continued—a failing for which different schools of thought blame either the Ethiopians . . . or the Italians . . .").

25. The inadequacy of border stability between Italy and Ethiopia allowed fascist Italian forces to move into Ethiopian territory and attack Wal-Wal in 1935, leading to the founding of "Somalia Italiana." BRONS, *supra* note 13, at 144–45. After the Italians invaded Ethiopia, they shifted their efforts towards removing the British presence in Northern Somalia and temporarily succeeded, thereby creating a total hegemony. *Id.* The British regained the territory from Italy in 1941, however, following several battles in the Horn of Africa. *Id.*; *see also* LEWIS, *supra* note 18, at 31.

26. For details on the social and economic circumstances of the British Protectorate of Somaliland, *see* GREAT BRITAIN COLONIAL OFFICE, *SOMALILAND PROTECTORATE: REPORT FOR THE YEARS 1956 AND 1957* (1959) [hereinafter *SOMALILAND PROTECTORATE REPORT FOR 1956*]; GREAT BRITAIN COLONIAL OFFICE, *SOMALILAND PROTECTORATE: REPORT FOR THE YEARS 1958 AND 1959* (1960) [hereinafter *SOMALILAND PROTECTORATE REPORT FOR 1958*].

27. In 1949, the United Nations General Assembly voted on a "[r]esolution 'recommending' that Somalia should be an independent and sovereign state after a period of 10 years of United Nations Trusteeship, with Italy as administrative authority." PETRIDES, *supra* note 18, at 56. It was passed in 1950 with the caveat that "the boundaries of the future independent state of Somalia would be 'those

subsequent colonial administrations<sup>28</sup> contributed greatly to the major conflicts between Somaliland and Puntland.

### *B. Temporary Independence, Civil War, and a New Somaliland*

As the United Nations agreement required,<sup>29</sup> decolonization in Somaliland and Somalia was set to commence in 1960.<sup>30</sup> Due to administrative differences, the British Somaliland Protectorate was granted independence from Great Britain on June 26, 1960,<sup>31</sup> while the Somalia Trusteeship became independent from Italy on July 1, 1960.<sup>32</sup> For those five days, Somaliland and Somalia existed as separate entities. The two states then effectively merged and became known simply as Somalia. There is contention over the legality of this process, especially among the Somaliland population. In fact, half of northern Somali citizens (formerly of British Somaliland) voted in a provisional referendum against the new constitution that purported to unite the former colonies.<sup>33</sup>

already fixed by international agreement” and that “[t]he portion of its boundaries with Ethiopia, not already delimited . . . be delimited.” *Id.* Great Britain ultimately retained the “British Somaliland Protectorate,” while the majority of Ogaden territory west of Italy’s Trusteeship was returned to Ethiopia. LEWIS, *supra* note 18, at 32.

28. For a map detailing the British and Italian territories of Somalia, see BRONS, *supra* note 13, at 13. Britain also took control of the former French territory of Djibouti, northwest of the original British Protectorate. *Id.*

29. *See supra* note 27.

30. PEGG, *supra* note 20, at 87. Italy, eager to divest itself of its commitments in the tumultuous Somali society, sought earlier decolonization in November 1959. Over the next six months, Somali politicians began drafting a constitution and preparing for independence in response to the request. TRIPODI, *supra* note 18, at 99.

31. GREAT BRITAIN COLONIAL OFFICE, REPORT ON THE SOMALILAND PROTECTORATE CONSTITUTIONAL CONFERENCE II (1960).

32. Great Britain was under the impression that southern Somalia would become independent when Italy’s Trusteeship agreement ran out in December 1960 and saw “justification for proceeding with constitutional development in the Protectorate at a faster pace than they believe[d] to be suitable or advantageous in more normal circumstances elsewhere.” *Id.* at 13. British authorities thus planned for Somaliland to develop independently and then, if desired, it could “determine the terms and conditions on which a closer association of the two territories might be achieved.” *Id.* at 14. The United Nations, however, subsequently moved Somalia’s independence date up five months from its original date of December 2, 1960. PEGG, *supra* note 20, at 87.

33. MARK BRADBURY, AFRICAN ISSUES: BECOMING SOMALILAND 33 (2008). Somaliland passed “the Union of Somaliland and Somalia Law” on June 27, 1960. *Id.* at 33 n.13. Somalia did not ratify this specific law, however, and instead passed its own “Act of Union.” PEGG, *supra* note 20, at 87. One year later, these two competing laws were repealed and a new “Act of Union” was ratified with retroactive effect. *Id.* The new Act has since been challenged by northern Somaliland citizens, especially those of the Isaq clan who lost much of their political power after the unification. BRADBURY, *supra*, at 33; *see also* LEWIS, *supra* note 18, at 35 (discussing the June 20, 1961 referendum).

Following the Somali unification, former Somaliland citizens were not adequately represented<sup>34</sup> in the almost uniformly biased central government,<sup>35</sup> with northern political alienation intensifying after Major-General Mohamed Siyad Barre led a successful military coup in 1969.<sup>36</sup> In response, members of the Isaq clan in northern regions<sup>37</sup> formed a resistance party known as the Somali National Movement (“SNM”).<sup>38</sup> Clashes between government security forces and the SNM led to a Somali civil war that eventually drove Barre out of the country in 1991.<sup>39</sup> A rival faction quickly installed itself as the *de facto* Somali government, however, angering the Isaq clan and ultimately influencing the SNM’s decision to secede.<sup>40</sup> The SNM and a collective of northern clans met in Berbera to discuss the idea of an independent Somaliland<sup>41</sup> and formally declared independence<sup>42</sup> in May 1991 at the Burco “Grand Conference of

34. “[Somali] political parties fell into three basic categories: the party that provided the majority throughout the first decade of independence and was dominated by Southern clans; the minority opposition parties based on clan affiliation from the North . . . and thirdly a number of *ad hoc* parties . . . . [T]he multi-party democratic state structure deteriorated into a *de facto* one-party state.” BRONS, *supra* note 13, at 162.

35. There was, however, a brief respite in northern political alienation “in June 1967 under the premiership of Mohamed Haji Ibrahim Egal [of the Isaq clan], a northerner from the former British Protectorate.” LEWIS, *supra* note 18, at 37.

36. BRADBURY, *supra* note 33, at 35–36. “Barre systematically favored loyal southern clans while severely discriminating against the majority clan-family in the north, the Isaaq.” MARC WELLER & KATHERINE NOBBS, *ASYMMETRIC AUTONOMY AND THE SETTLEMENT OF ETHNIC CONFLICTS* 281 (2010). Government forces under Barre’s leadership also perpetrated human rights abuses, including “executions, rape, and [destruction of access to food and water].” BRONS, *supra* note 13, at 186 (citing AFRICA WATCH, SOMALIA. A GOVERNMENT AT WAR WITH ITS OWN PEOPLE. TESTIMONIES ABOUT THE KILLINGS AND THE CONFLICT IN THE NORTH 8 (1990)). These violations became worse once Barre declared a state of emergency, which effectively gave “[military and security forces] unlimited power over the lives of civilians and led to violent excesses as a matter of policy.” *Id.* at 187.

37. After 1975, the government split Somalia into several administrative regions. For a detailed map of these regions, see BRONS, *supra* note 13, at 16.

38. PEGG, *supra* note 20, at 88.

39. WELLER, *supra* note 36, at 281.

40. The SNM had been fighting alongside the Somali Patriotic Movement (“SPM”) (composed of citizens from the Ogaden region), the Somali Salvation Democratic Front (“SSDF”) (composed of Darod clan members), and the United Somali Congress (“USC”) (composed of Hawiye clan members). GELDENHUYS, *supra* note 14, at 130–31. Immediately after driving Barre out of Villa Somalia, the USC declared itself the interim Somali government, with Ali Mahdi Mohamed as its president. BRONS, *supra* note 13, at 213. While the SNM initially wanted to remain in a unified Somalia, the USC’s unilateral decision changed their position. *Id.* at 246. Secessionist intentions had perhaps been present even before political usurpation by the USC, because “in view of the magnitude of atrocities committed by a regime that many identified with the postcolonial state of Somalia as such, many Isaaq started to believe that the true aim of the [Somali civil war] was independence.” WELLER, *supra* note 36, at 281.

41. BRONS, *supra* note 13, at 246. The original purpose of the conference was relatively compliant, as “no mention was made in Berbera of secession, although talk of revising the 1960 act of union may have alluded to a future federal constitution.” BRADBURY, *supra* note 33, at 80.

42. The Conference named the newly formed State the “Republic of Somaliland.” *Id.* at 82.

the Northern Peoples,”<sup>43</sup> with a resolution<sup>44</sup> that based its territory on the original colonial borders inherited from the British.<sup>45</sup> The conference predicated the new territorial borders on the notion that the Act of Union was not properly passed, and thus, post-colonial British Somaliland and Italian Somalia were never truly a unified state, which provided a legal basis for their resolution.<sup>46</sup> Subsequent negotiations between the two states have since been futile.<sup>47</sup>

### C. *The Puntland State of Somalia*

In 1997, the remaining factions in Somalia met to formulate a new Somali state structure.<sup>48</sup> The northeast territory, primarily composed of the Harti clan and the Somali Salvation Democratic Front (“SSDF”), was provisionally known as Puntland.<sup>49</sup> After observing the administrative disorganization in the southern Somali territories,<sup>50</sup> Puntland representatives instead sought to establish the territory as an autonomous regional state, though they did not seek independence or international recognition.<sup>51</sup> In slight contrast to the SNM in Somaliland, the SSDF was

43. Those in attendance included “the senior elders of the Isaaq, Harti, and Dir clans and the leadership of the SNM . . .” *Id.* at 80.

44. “Resolutions of [the] Burco Grand Conference of the Northern Peoples [included]: [1] Reconciliation of the warring parties to the conflict . . . [2] Declaration of the creation of the Republic of Somaliland . . . [3] The establishment of an SNM government for two years and the accommodation of the non-Isaaq communities in the government . . . [4] Initiation of a separate reconciliation process for [the] Sanaag Region.” *Id.* at 82.

45. BRONS, *supra* note 13, at 257.

46. “The Somaliland authorities have asserted that the decision in Burco was not an act of secession *per se*, but a ‘voluntary dissolution between sovereign states’ based on the perception by one of the parties that the union had failed.” BRADBURY, *supra* note 33, at 83; *see also* LEWIS, *supra* note 18, at 75.

47. Mohamed Hassan, Somaliland’s ambassador to Ethiopia stated: “We don’t know who to talk to now in Somalia . . . There is no central government. They are so fragmented. They have been killing and killing and killing and oppressing. The people of Somaliland have enjoyed peace, security and democracy, and they’re confident they can continue.” Jason McLure, *The Troubled Horn of Africa: Can the War-torn Region Be Stabilised?*, 3 CQ GLOBAL RESEARCHER 149, 158 (2009).

48. The “Sodere initiative” urged for Somalia to be split up into five federal regions. Somaliland was not involved in the negotiations, however, as the South realized it “should first come to peace and stability and bring its own house in order before it could approach the North [Somaliland] for a possible confederation.” BRONS, *supra* note 13, at 268–69.

49. The Puntland territory also contained “Warsangeli and Dulbahante territories which [then belonged] to Somaliland.” BRONS, *supra* note 13, at 269.

50. *See supra* notes 8–11. Puntland authorities sought to insulate themselves from these problems, though not permanently, as “[Article] 1(4) of the [Charter of Puntland State of Somalia] committed Puntland to recreate Somalia as a federal state.” WELLER, *supra* note 36, at 283.

51. BRONS, *supra* note 13, at 269–72. Puntland did not opt for secessionist independence or international recognition like Somaliland. Instead, it became a self-enforcing region of Somalia with

unable to cohesively install itself as Puntland's interim government, and as such, the State primarily relied on clan leadership.<sup>52</sup> Because "ethnic" clan borders do not coincide with territorial or administrative borders, the true extent of Puntland's western territory remains unsettled.<sup>53</sup> Finally, while Puntland vows to rejoin Somalia upon federalization,<sup>54</sup> its government quickly renounced the recent unilateral extension of Somalia's current parliament,<sup>55</sup> further weakening regional ties between the two polities.<sup>56</sup>

In summary, disparate territorial clan membership and relics of European imperialism have resulted in divergent identities among Somaliland, Puntland, and southern Somalia. These ethnic and regional differences grew to become the seeds of conflict that contributed to both the outbreak of the Somali civil war and the subsequent break-up of Somalia into three distinct political entities: a dysfunctional nation-state, a semi-autonomous regional state, and an independently governed quasi-state.

its own government and legal system. *Id.*; see also BRADBURY, *supra* note 33, at 129 ("[T]he Puntland Charter affirms the unity of Somalia."); WELLER, *supra* note 36, at 283–84.

52. Darod clan members, rather than the SSDF, formally adopted the Puntland Charter. WELLER, *supra* note 36, at 283. As such, clan identity is far more distinctive than party affiliation in Puntland. Markus V. Hoehne, *Mimesis and Mimicry in Dynamics of State and Identity Formation in Northern Somalia*, 79 J. INT'L AFR. INST. 252, 265 (2009) ("[P]eople in the north-east usually refer to themselves as Harti, if they wish to stress any political allegiance.").

53. See BRONS, *supra* note 13, at 275 ("To apply the criteria of Harti clan affiliation for a delimitation of Puntland is rather problematic, as the territories inhabited by the Warsangeli and Dulbahante stretch into the Sool and Sanaag regions that are an integral part of Somaliland."); BRADBURY, *supra* note 33, at 197–98 ("The dispute over [Puntland], where the political affiliations of the Harti clans are divided three ways between Somaliland, Puntland and Somalia, has been described as 'one of the deepest fault lines in contemporary Somali politics.'"); see also *infra* notes 129–33 and accompanying text.

54. Puntland has competing policy considerations inherent in maintaining regional autonomy and preparing for future absorption into a federalized Somali State. The government has enumerated these three basic policy objectives:

- (1) [T]o save Puntland territory and waters from the hostilities created by the absence of central government and confrontations of political factions serving negative interests
- (2) to be part of the pursuit to restore a Somali central authority based on a federal system, the only system that would prevent totalitarianism and dismemberment and
- (3) to cooperate with the international community to find a solution to the Somali crisis in general and to support the reconstruction and development in Puntland in particular.

Mohamoud Muse Hersi, *Puntland Government Policy Statement*, SOMALITALK (Mar. 22, 2008), available at <http://www.somalitalk.com/oil/plpolicy.html> (quoted in WELLER, *supra* note 36, at 286–87).

55. See *supra* note 10; *infra* note 56.

56. Puntland's Cabinet of Ministers issued a decision stating that "[t]he Puntland Government will not accept any decision adopted by the TFG [Transitional Federal Government] Parliament [of Somalia] . . . . Therefore, the Puntland Government condemns and opposes the unreasonable term-extension by the TFG Parliament, which leads to a new political disorder in Somalia." *Somalia: Puntland Government Denounces Unilateral Term-Extension of TFG Parliament*, GAROWE ONLINE (Feb. 7, 2011), available at <http://somalitalk.com/2011/02/08/pl-2/>.



## II. QUASI-STATES IN THE INTERNATIONAL COMMUNITY

Quasi-states<sup>57</sup> are states that are “not accepted by the international community as legitimate [because they have] seceded from a recognized state that does not accept this loss of territory.”<sup>58</sup> The Montevideo Convention on the Rights and Duties of States sets forth four requirements for statehood: “a permanent population, a defined territory, a government, and a capacity to enter into relations with other states.”<sup>59</sup> While quasi-states do generally have a fixed population and in many instances may have a functioning government,<sup>60</sup> their territorial boundaries are disputed as illegal,<sup>61</sup> and recognized states refuse to engage in normal international relations with them.<sup>62</sup> Because quasi-states are unable to engage in such diplomatic discourse with recognized states, including their parent states, they are unable to pass treaties that define and stabilize their boundaries.

According to the ICJ’s governing statute, “only *states* may be parties in cases before the Court.”<sup>63</sup> Because quasi-states are not considered proper “states,” they are unable to participate as a legal party in the Court system.<sup>64</sup> As such, quasi-states are denied both contractual (i.e. treaty-based) and judicial remedies concerning border resolution. Recognized states, however, are able to petition the Court for an advisory opinion on *any* matter, and could therefore request an opinion regarding a quasi-state that has attempted to secede from its parent state.<sup>65</sup> If the Court accepted such an advisory opinion request, it could gather evidence through

57. “These political entities are referred to by various names: ‘de facto states’, ‘unrecognized states’, ‘para-states’, [and] ‘pseudo-states.’” Pal Kolsto, *The Sustainability and Future of Unrecognized Quasi-States*, 43 J. PEACE RESEARCH 723, 723 (2006). They can also be referred to as “contested states.” GELDENHUYS, *supra* note 14, at 23.

58. Kolsto, *supra* note 57, at 724. Kolsto discusses further criteria for classification as a quasi-state: “Its leadership must be in control of (most of) the territory it lays claim to, and it must have sought but not achieved international recognition as an independent state.” *Id.* at 725–26.

59. Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19, available at [http://avalon.law.yale.edu/20th\\_century/intam03.asp](http://avalon.law.yale.edu/20th_century/intam03.asp).

60. See GELDENHUYS, *supra* note 14, at 23.

61. “Since [a quasi-state’s] right of existence as separate, independent states is challenged, their borders are not internationally recognized as legal and legitimate frontiers separating them from other states. Instead, the territories in contention are widely regarded as integral parts of existing states.” *Id.*

62. *Id.* at 24.

63. Statute of the International Court of Justice art. 34, para. 1, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> (emphasis added).

64. See *id.*

65. “The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.” *Id.* art. 65, para. 1. The statute does not limit the subject of an advisory opinion to those involving recognized states, as it merely requires “any legal question.” *Id.*

communication with political members of the quasi-state,<sup>66</sup> and in some cases, it could eventually rule on both the sovereignty of a newly formed *de facto* state and the integrity of its borders.<sup>67</sup>

### III. BORDER-RESOLVING MECHANISMS IN THE INTERNATIONAL COURT OF JUSTICE

According to the ICJ Statute, the Court will analyze disputes based on several broad principles. The most important of these principles are treaties, and to a lesser extent, international custom.<sup>68</sup> No legally effective treaties recognized by international actors, however, pertain to quasi-states. Therefore, quasi-states must rely on other theories, namely *uti possidetis* and effective control.<sup>69</sup>

#### A. *The Evolution of Uti Possidetis*

The modern doctrine of *uti possidetis* derives from the ancient Roman law of *jus civile*, in which it was termed “*uti possidetis ita possidetis*,”

66. *Id.* art. 66, para. 2. “The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or International organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question . . . .” One scholar noted that “[t]he ICJ has ‘embraced a functional reading of [the above provision] that regulates the participation of states and international organizations in advisory proceedings, so as to encompass within it the category of quasi-states.’” Yuval Shany, *In Defence of Functional Interpretation of Article 12(3) of the Rome Statute: A Response to Yael Ronen*, 8 J. INT’L CRIMINAL JUSTICE 329, 335 (2010).

67. The ICJ was recently petitioned to render an advisory opinion on Kosovo’s declaration of independence. In its opinion, the Court stated that “[g]eneral international law contains no applicable prohibition of declarations of independence —Declaration of independence of 17 February 2008 did not violate general international law.” Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, at 3 (July 22), available at <http://www.icj-cij.org/docket/files/141/15987.pdf>.

68. Statute of the International Court of Justice art. 38, para. 1 (“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; [and] b. international custom, as evidence of a general practice accepted as law . . . .”).

69. This Note will employ a mode of analysis similar to that of Professor Shaw where he posits four types of claims for legal ownership of territory: historical, ethnic, geographic, and economic. SHAW, *supra* note 17, at 192–96. While Shaw discounts the weight of geographic claims generally, in the case of Somalia, geography is inexorably intertwined with ethnic considerations due to territorial clan distribution. *See id.* at 195 (“The fact that [geographic claims have not been used to a large extent in Africa] . . . reinforces the acceptance of colonial borders.”). I will therefore discuss “ethnic” and “geographic” claims under the concept of effective control and “historical” claims under the doctrine of *uti possidetis*. Effective control may also be referred to as “*effectivités*.” *See infra* note 111 and accompanying text.

meaning “as you possess, so you possess.”<sup>70</sup> Although the widespread utilization of the doctrine for border demarcation matters began with Latin American Creole independence from Spanish rule,<sup>71</sup> the doctrine had been articulated as early as 1810.<sup>72</sup> Once independent, the Creole sought to occupy the lands that they currently inhabited<sup>73</sup> to prevent them from being classified as *terra nullius*.<sup>74</sup> In order to administer the division of territory efficiently, the Creole decided to adopt the borders of the European colonies that preceded them.<sup>75</sup> Thus, the newly independent Creole states effectively “had achieved the status of being recognizable international entities.”<sup>76</sup> There were several disputes, however, between the newly formed states regarding border demarcation. Specifically, it was disputed whether exercising jurisdiction beyond a state’s colonial borders prior to independence should result in post-colonial absorption of that territory.<sup>77</sup> Those who thought that “administrative possession” of an area warranted absorption into the state regardless of colonial boundaries used the term *uti possidetis de facto*. Those who restricted territory to legally-

70. Joshua Castellino, *Territorial Integrity and the “Right” to Self-Determination: An Examination of the Conceptual Tools*, 33 BROOK. J. INT’L L. 503, 508 (2008). “[T]he object of the interdict was to recognize the status quo in any given dispute involving immovable property, and was therefore designed to protect existing arrangements of possession without regard to the merits of the dispute.” *Id.* at 508. For a detailed history of the Roman law *jus civile* in relation to *uti possidetis*, see JOSHUA CASTELLINO & STEVE ALLEN, *TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS* 29–56 (2003).

71. See Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT’L L. 590, 593 (1996) (“The juxtaposition of *uti possidetis* and self-determination began in Latin America, where the Creoles who wrested independence from their Spanish brethren beginning in the early nineteenth century seized upon the idea as a way of setting boundaries of the new countries.”).

72. SURYA P. SHARMA, *TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW* 120 (1997) (“The doctrine of *uti possidetis* [was] enunciated as early as 1810 . . .”).

73. See Ratner, *supra* note 71, at 593 (“To Creole leadership, adoption of a policy of *uti possidetis* served . . . to ensure that no land in South America remained *terra nullius* upon [Creole] independence . . .”). The Creole wanted to solidify their occupation of land in order to prevent further European hegemony in Latin America. If they did not install a legal system for division of land, the area could legally be permanently colonized by other states. CASTELLINO & ALLEN, *supra* note 70, at 63–64; see also SUZANNE LALONDE, *DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF UTI POSSIDETIS* 24–29 (2002) (discussing territorial disputes between Spain, Portugal, and Brazil).

74. *Terra nullius* is a legal doctrine that “designate[s] territory that was ‘empty’ and therefore free for colonization . . . .” CASTELLINO & ALLEN, *supra* note 70, at 3. However, “it is no longer considered a feasible and reasonable doctrine for all practical purposes.” *Id.*

75. “In the immediate aftermath of independence, the new international actors had merely decided to define their national territory by reference to the particular colonial divisions that the fortunes of war and the power of negotiations had included within their jurisdiction.” LALONDE, *supra* note 73, at 30.

76. CASTELLINO & ALLEN, *supra* note 70, at 65.

77. LALONDE, *supra* note 73, at 31 (“The existence of [the two rival versions of the *uti possidetis* principle] rendered its application problematic . . .”).

titled colonial borders, in contrast, used the term *uti possidetis juris*.<sup>78</sup> It is from this basic history, developed and extended through future implementations, that the modern doctrine of *uti possidetis* is derived, explaining that “states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence.”<sup>79</sup>

The legal mechanism of *uti possidetis* proved to be very useful for African decolonization, though it was hotly contested early on. After establishing the temporary demarcation based on colonial boundaries, several African conferences were held to discuss the administration of territory and borders. In 1958, the All-Africa People’s Conference specifically rejected colonial boundaries in favor of ethnically divided territories with its resolution, “Frontiers, Boundaries, and Federations.”<sup>80</sup> While this seemed to be the initial reaction of most African states, they eventually realized and emphasized in the resolution “the necessity of working within the framework of the territorial integrity of States and of respecting the colonial boundaries.”<sup>81</sup> As such, the Organization of African Unity (“OAU”) finally met in 1964 to discuss the future treatment of border disputes and declared that colonial borders were to effectively remain in perpetuity and would be controlling in any future legal action among African states.<sup>82</sup>

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78. Essentially, the parties were disputing whether territory should be measured by physical possession (*de facto*) or legal title (*juris*). *Id.* This argument came to the forefront in a border dispute between the Spanish republics, who argued for *uti possidetis juris*, and Portuguese Brazil, who argued for *uti possidetis de facto*. *Id.* Because there were no legal treaties in effect to reference, Brazil’s *de facto* form of the principle was administered. *Id.*; see also Ratner, *supra* note 71, at 594 (“[S]tates and scholars seemed to have different views on the meaning of *uti possidetis* as of a particular date, leading to the use of two new terms, *uti possidetis juris* and *uti possidetis facto*.”).

79. Ratner, *supra* note 71, at 590.

80. “The third part of the resolution denounced the artificial frontiers drawn by the imperialist powers, particularly those which cut across ethnic lines and divided peoples of the same stock, and called for the abolition or adjustment of such frontiers at an early date.” SHAW, *supra* note 17, at 183. The Pan-African Congress came to a similar conclusion in 1945, stating “the artificial divisions and territorial boundaries created by the imperialist powers are deliberate steps to obstruct the political unity of the West African peoples.” *Id.* at 183 (quoting HISTORY OF THE PAN-AFRICAN CONGRESS 55 (George Padmore ed., 1963)).

81. SHAW, *supra* note 17, at 184.

82. “Considering that border problems constitute a grave and permanent factor of dissention . . . [and] that the borders of African States, on the day of their independence, constitute a tangible reality . . . [The OAU] solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence.” Organization of African Unity, AHG/Res. 16(D), Resolutions Adopted by the First Ordinary Session of the Assembly of Heads of State and Government Held in Cairo, UAR (July 17–21, 1964), available at <http://www.africa-union.org/root/au/Documents/Decisions/hog/bHoGAssembly1964.pdf>.

Finally, the utilization of *uti possidetis* was significantly broadened beyond decolonization matters following the dissolution of Yugoslavia in the early 1990s. An arbitration commission known as “The Badinter Commission” was tasked with the administration of stabilizing the newly ceded territory.<sup>83</sup> During the EC Conference on Yugoslavia, the Commission concluded that “the former boundaries [must] become frontiers protected by international law.”<sup>84</sup> It then specifically invoked the term “*uti possidetis*” and stated that even though it had historically been used for decolonization,<sup>85</sup> the doctrine “[applied] all the more readily to the Republics,”<sup>86</sup> though many scholars disagree with this contention.<sup>87</sup>

### B. ICJ Jurisprudence and *Uti Possidetis*

The ICJ explained its position on *uti possidetis* most effectively in 1986, when it resolved a border dispute between Burkina Faso and the Republic of Mali.<sup>88</sup> In their petition to the Court, the States themselves invoked the principle of *uti possidetis*, evidencing the doctrine’s acceptance among African States.<sup>89</sup> The dispute was brought to court because the territory in question was of particular importance, as it was “the largest of the temporary watercourses in the region.”<sup>90</sup>

83. See CASTELLINO & ALLEN, *supra* note 70, at 159 (“[T]he Badinter Commission’s original mandate was to draw up a constitution for the Federal Republic of Yugoslavia that would enable the peaceful co-existence within the state of different threatening and threatened national minorities.”). For a detailed analysis of the Commission, see STEVE TERRETT, *THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION: A CONTEXTUAL STUDY OF PEACE-MAKING EFFORTS IN THE POST-COLD WAR WORLD* (2000).

84. Conference on Yugoslavia, Arbitration Commission Opinion No. 3 (Jan. 11, 1992), *reprinted in* 31 I.L.M. 1488, 1500 (1992) [hereinafter Opinion No. 3].

85. *Id.* (“This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali.”); see also TERRETT, *supra* note 83, at 156 (discussing the principle of *uti possidetis* in the *Burkina Faso/Mali Case*).

86. Opinion No. 3, *supra* note 84, at 1499–1500.

87. See Michla Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice’s Jurisprudence*, 20 MICH J. INT’L L. 31 (1998).

88. See Frontier Dispute (Burk. Faso/Republic of Mali), 1986 I.C.J. 554 (Dec. 22).

89. The two states, “[d]esiring to achieve as rapidly as possible a settlement of the frontier dispute between them, based in particular on respect for the principle of the intangibility of frontiers inherited from colonization, and to effect the definitive delimitation and demarcation of their common frontier . . . .” *Id.* at 557.

90. *Id.* at 562.

The Court laid out its authoritative description of *uti possidetis*, stating:

The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.<sup>91</sup>

The Court then discussed the importance of *uti possidetis*, deeming it “a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs”<sup>92</sup> and one of the Court’s “most important legal principles.”<sup>93</sup> It further explained that the doctrine should be flexibly applied in a variety of circumstances among several types of international territories.<sup>94</sup> The ICJ also specifically dispelled the argument that the ethnic composition of a territory could singularly overrule *uti possidetis juris*.<sup>95</sup>

Because the two states had been part of French West Africa, the Court applied French colonial law<sup>96</sup> and concluded that the evidence provided was not sufficient to establish a strong legal claim on either side.<sup>97</sup> Thus, the Court employed principles of equity and divided the territory equally.<sup>98</sup> The importance of the case lies primarily in the Court’s definition of *uti possidetis* and its dicta proclaiming the doctrine’s prominence in resolving border disputes.

91. *Id.* at 566.

92. *Id.* at 565.

93. *Id.* at 567.

94. *Id.* at 566 (“The territorial boundaries which have to be respected may also derive from international frontiers which previously divided a colony of one State from a colony of another, or indeed a colonial territory from the territory of an independent State, or one which was under protectorate, but had retained its international personality.”).

95. *Id.* at 633 (“Especially in the African context, the obvious deficiencies of many frontiers inherited from colonization, from the ethnic . . . standpoint, cannot support an assertion that the modification of these frontiers is necessary or justifiable on the ground of considerations of equity.”).

96. *Id.* at 568.

97. *Id.* at 587–88 (“[T]he Chamber must emphasize that the present case is a decidedly unusual one as concerns the facts which have to be proven and the evidence which has been, or might have been, produced for this purpose . . . . [T]he rejection of any particular argument on the ground that the factual allegations on which it is based have not been proved is not sufficient to warrant upholding the contrary argument.”).

98. *Id.* at 633.

Another important piece of *uti possidetis* jurisprudence occurred in a 1992 dispute between El Salvador and Honduras.<sup>99</sup> The countries petitioned the Court to determine which territory contained the Gulf of Fonesca and its islands based on Spanish colonial borders.<sup>100</sup> The Court referred to the definition of *uti possidetis* set forth in *Burkina Faso*, calling it *the* authoritative statement of the principle.<sup>101</sup> El Salvador based its arguments on the theory of *uti possidetis de facto* because of its exercise of sovereignty over the territory,<sup>102</sup> while Honduras relied upon the theory of *uti possidetis juris* and its legal administrative boundaries.<sup>103</sup> The Court ruled for El Salvador, seemingly favoring the doctrine of *uti possidetis de facto* over *uti possidetis juris*, though this was primarily because the evidence was insufficient to accurately determine proper legal title.<sup>104</sup>

The Court also analyzed the “critical date” on which to apply *uti possidetis*.<sup>105</sup> It stated that while the date of independence is traditionally applied as the critical date, if the parties later agree on a variation of the original boundaries set at independence, then a new critical date is established.<sup>106</sup> As such, any subsequent border disputes would be analyzed in relation to the previously agreed-upon borders.

99. See *Land, Island and Maritime Frontier Dispute (El Sal./Hond.)*, 1992 I.C.J. 351 (Sept. 11).

100. *Id.* at 362–63.

101. *Id.* at 386–87; see *supra* text accompanying note 88.

102. *Id.* at 563. El Salvador maintains *uti possidetis de facto* ownership based on “effective possession of the islands as the basis of its sovereignty . . .” *Id.* at 558.

103. *Id.* at 558.

104. “[W]hile the *uti possidetis juris* position in 1821 cannot be satisfactorily ascertained on the basis of colonial titles and *effectivités*, the fact that El Salvador . . . [was] in effective possession and control of the island, justifies the conclusion that El Salvador may be regarded as sovereign over the island.” *Id.* at 579.

105. *Id.* at 401. Critical dates are the dates on which borders are to be measured by the Court and can result from many events. L.F.E. Goldie, *The Critical Date*, 12 INT’L & COMP. L.Q. 1251, 1256 (1963) (“A situation may be brought into focus, and a critical date result, from the convergence of a Peace Treaty, the demarcation of a frontier, a general agreement of recognition, a guarantee of frontiers, with the unilateral acts of the claimant State which had, previously, been sufficient only to establish an inchoate title, or to assert a provisional or tentative claim.”). At times, however, there are competing incidents that make determination of the critical date difficult. For instance, during the dissolution of Yugoslavia, the Badinter Commission was required to resolve exactly when the resulting States became legally independent. Conference on Yugoslavia, Commission Opinion No. 11 (July 16, 1993), reprinted in 32 I.L.M. 1587, 1587 (1993). This was a complex issue, as several of the States had seceded, not necessarily legally, prior to the formal dissolution of Yugoslavia. Thus, the Commission was forced to determine distinct individual independence dates for each new State. See TERRETT, *supra* note 83, at 225–28 (discussing *Opinion 11* and its dealings with the dates of succession of several States after the dissolution of Yugoslavia).

106. *El Sal./Hond.*, 1992 I.C.J. at 401 (“The principle of *uti possidetis juris* is sometimes stated in almost absolute terms, suggesting that the position at the date of independence is always determinative . . . . A later critical date clearly may arise, for example, either from adjudication or from a boundary treaty . . . where there is sufficient evidence to show that the parties have in effect clearly accepted a variation, or at least an interpretation, of the *uti possidetis juris* position.”).

The most recent implementation of *uti possidetis* by the ICJ occurred in 2005 between Benin and Niger.<sup>107</sup> The Court, again citing its definition in *Burkina Faso*,<sup>108</sup> was petitioned to determine the proper French colonial boundary<sup>109</sup> with regard to the River Niger.<sup>110</sup> Similar to the *El Salvador/Honduras* case, the Court discussed the applicability of effective control in relation to *uti possidetis juris*.<sup>111</sup> Both administrative boundaries and effective control favored Benin, and the Court situated the boundary such that Benin retained the River and the disputed islands.<sup>112</sup>

### C. Supplementary Arguments: Effective Control (*Effectivités*)

In addition to the ICJ deferring to acts of sovereignty through its acceptance of *uti possidetis de facto* in the *El Salvador/Honduras* case, the Court had previously applied a variation of the doctrine in a dispute between France and the United Kingdom.<sup>113</sup> The two countries petitioned the Court to determine “sovereignty over the islets and rocks . . . of the Minquiers and Ecrehos groups,”<sup>114</sup> which are located between France and the British Island of Jersey.<sup>115</sup> Because the dispute did not involve a newly independent post-colonial state, the Court could not employ *uti possidetis* and instead sought to ascertain which country more effectively exercised sovereign occupation over the territory.<sup>116</sup> The Court implicitly invoked a hierarchical analysis in which treaty evidence was deemed most

107. See Frontier Dispute (Benin v. Niger), 2005 I.C.J. 90 (July 12).

108. *Id.* at 108.

109. *Id.*

110. *Id.* at 90.

111. The Court does not invoke the doctrine of “*uti possidetis de facto*” but uses the term “post-colonial *effectivités*,” stating that “both Parties have on occasion sought to confirm the legal title which they claim by relying on acts whereby their authorities allegedly exercised sovereignty over the disputed territories . . .” *Id.* at 109. *Uti possidetis de facto* references effective control over the territory at the time of independence, while *effectivités* is measured after independence is achieved. See Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT’L L. 1, 62–63 (2010).

112. Benin v. Niger, 2005 I.C.J. 90, 161–63 (July 12).

113. Minquiers and Ecrehos (Fr./U.K.), 1953 I.C.J. 47 (Nov. 17).

114. *Id.* at 49.

115. *Id.* at 53.

116. Both Great Britain and France claimed an “ancient or original title” to the territory, and as such, the Court was first required to look to treaties for reconciliation of the two claims. *Id.* at 53. However, “[c]ommon to all these Treaties is the fact that they did not specify which islands were held by the Kings of England and France respectively.” *Id.* at 54. Both parties also contradictorily claimed feudal title to the territory, and as such, the Court decided to examine “not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.” *Id.* at 57.



persuasive.<sup>117</sup> Effective control arguments were only considered when prior treaty (or *uti possidetis*) evidence was inadequate or contradictory.<sup>118</sup>

The United Kingdom provided evidence that they administered judicial proceedings,<sup>119</sup> fishing boat registry,<sup>120</sup> property sales,<sup>121</sup> and also engaged in construction in the territory.<sup>122</sup> Taken together, and in connection with a legislative act that claimed control over the Ecrehos,<sup>123</sup> the Court viewed these acts as continuous acts of sovereignty and gave legal title to the United Kingdom.<sup>124</sup>

More recently, in a dispute between Cameroon and Nigeria,<sup>125</sup> the ICJ accepted evidence of similar acts of sovereignty<sup>126</sup> and also considered ethnic composition of the territory in its ruling for Nigeria.<sup>127</sup> Thus, both

117. The Court began by examining legal title, and when deemed insufficient, examined possessory evidence as a backstop. *See id.* at 53–57; *see also* Land, Island and Maritime Frontier Dispute (El Sal./Hond.), 1992 I.C.J. 351 (Sept. 11) (“The Chamber has no doubt that the starting-point for the determination of sovereignty over the islands must be the *uti possidetis juris* of 1821.”).

118. *Minquiers (Fr./U.K.)*, 1953 I.C.J. at 57; *see also* Matthew M. Ricciardi, *Title to the Aouzou Strip: A Legal and Historical Analysis*, 17 YALE J. INT’L L. 301, 428 (1992) (“In general, *uti possidetis* has succeeded in Africa against claims based on historical, ethnic, geographical, or economic considerations, because the adjustment of boundaries based on these other principles threatens to destabilize governments.”); Mahmud, *supra* note 111, at 63 (“*Uti possidetis [sic]* combined with critical date as a legal concept trumps conflicting post-colonial assertion and exercise of effective authority as grounds for sovereign title under the doctrine of *effectivites*. Post-colonial *effectivites* has significance only if colonial practice fails to furnish definitive demarcation and thus trigger application of *uti possidetis [sic]*.”). As such, if there are no treaties in effect for *uti possidetis juris* or evidence of pre-independence administrative control for *uti possidetis de facto*, effective control and *effectivités* will be referenced.

119. “Jersey courts have exercised criminal jurisdiction in respect of the Ecrehos during nearly a hundred years.” *Minquiers (Fr./U.K.)*, 1953 I.C.J. at 65. The territory also “required the holding of an inquest on corpses found within the Bailiwick where it was not clear that death was due to natural causes.” *Id.*

120. “[A]n official of [Jersey] Island visited occasionally the Ecrehos for the purpose of endorsing the license of that boat.” *Id.* The Court accepts this evidence as a contributory factor to effective control of the area, even though the boating registration was only for one boat owned by one man. *Id.*

121. *Id.* at 65–66.

122. *Id.* at 66.

123. The British Treasury Warrant of 1875 included the “Ecrehou Rocks” within Jersey’s (and thereby Britain’s) limits prior to their dispute with France. *Id.*

124. *Id.* at 66 (“These various facts show that Jersey authorities have in several ways exercised ordinary local administration in respect of the Ecrehos during a long period of time.”). At the time, Jersey was a port of the Channel Islands and as such was under British rule. *Id.* Thus, the Court found the territory to be “an integral part of the fief of the Channel Islands which were held by the English King . . . [and] that British authorities during the greater part of the nineteenth century and in the twentieth century have exercised State functions in respect of the group.” *Id.* at 67.

125. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), 2002 I.C.J. 303 (Oct. 10).

126. *Id.* at 486 (“[S]overeign acts, such as tax collection, census-taking, the provision of education and public health services.”).

127. *Id.* (“[T]his long-established Nigerian administration of the territory, the permanent population, the significant affiliations of a Nigerian character, do substantiate a claim . . .”).

ethnic affiliation and administration of State functions in the territory can in some cases imply legal sovereignty and title over land,<sup>128</sup> an argument that is inexorably linked to post-colonial African nations.

#### IV. FRAMING THE SOMALILAND-PUNTLAND DISPUTE THROUGH THE LENS OF THE INTERNATIONAL COURT OF JUSTICE

The “SSC region,” comprised of Sool, Sanaag and Cayn,<sup>129</sup> “has been described as ‘one of the deepest fault lines in contemporary Somali politics.’”<sup>130</sup> The region is located between Somaliland (to the West) and Puntland (to the East), with both “States” laying claim to it. The most recent bouts of violence were in part due to the recent Somaliland presidential election, when troops from Somaliland, Puntland, and Ethiopia clashed in Sool.<sup>131</sup> Just one day prior, a judicial official was assassinated in the same region.<sup>132</sup> To stabilize the region by minimizing skirmishes over territorial ownership, it is necessary to determine whether SSC inhabitants are located within the boundaries of Somaliland or Puntland.<sup>133</sup>

Utilizing the doctrine of *uti possidetis juris*, the boundary between Somaliland and Puntland should be adopted from its previous colonial boundaries, i.e., between British Somaliland and Italian Somalia. Because the two colonies were originally granted independence separately, the border between the two can be easily ascertained from historical maps.<sup>134</sup> And because Puntland is technically an autonomous region of Somalia, its

128. *But see supra* note 118 and accompanying text.

129. *See infra* Map 3, p. 843, printed in *Perry-Castaneda Library Map Collection, Somalia (Political) 2002*, UNIV. OF TEXAS LIBRARIES, available at [http://www.lib.utexas.edu/maps/africa/somaliland\\_pol\\_2002.pdf](http://www.lib.utexas.edu/maps/africa/somaliland_pol_2002.pdf).

130. BRADBURY, *supra* note 33, at 197 (citing SOMALILAND: DEMOCRATISATION AND ITS DISCONTENTS, ICG AFRICA REPORT N°66, at 30 (2003)).

131. Qalinle Hussein, *Somaliland Army Clashes with Militia, Five Dead*, SOMALILAND PRESS (July 20, 2010), <http://www.somalilandpress.com/somaliland-army-clashes-with-militia-five-dead-17144>; *see also* Abdiqani Baynax, *Somaliland's New President Ahmed Mohamoud's First Speech to Somaliland Citizens*, SOMALILAND PRESS (July 29, 2010), <http://somalilandpress.com/somalilands-new-president-ahmed-mohamouds-first-speech-to-somaliland-citizens-17378>.

132. *See* Hussein, *supra* note 131.

133. Several villages in the SSC region between Somaliland and Puntland are in dispute and have hosted clashes between opposing forces. For example, in February, Puntland clan militias attacked a Somaliland controlled village in the region. *Eight Killed in Disputed Somali Village*, AFP (Feb. 7, 2011), <http://www.google.com/hostednews/afp/article/ALeqM5gsy3YUo9x3Lpjon3hF7EXG2-1ICw?docId=CNG.2c5a19790e1a96031e65d4fdf8d64cdc.3d1>.

134. *See infra* Maps 2(A)–(B), p. 842.

borders should correspond exactly to those of Somalia, regardless of its self-imposed autonomy.<sup>135</sup>

When Somaliland became independent in 1960, its borders were clearly demarcated based on its previous borders as a British Protectorate.<sup>136</sup> The British map draws its eastern border at the 49th meridian,<sup>137</sup> which is confirmed by the western Somaliland border set at the 49th meridian of the Italian Map.<sup>138</sup> According to these colonial administrative boundaries at the time of independence,<sup>139</sup> the SSC region is within Somaliland's borders, since both Sanaag's and Sool's eastern borders (Cayn does not lie on Puntland's borders as it is the westernmost portion of the SSC)<sup>140</sup> also lie on the 49th meridian.<sup>141</sup> Based purely on an *uti possidetis juris* evidentiary standpoint, Somaliland should have title to the SSC region because it was originally a part of the British Somaliland Protectorate. Puntland can refute these claims by exhibiting the Act of Union, in which both Somaliland and Somalia merged in 1960.<sup>142</sup> The Act could be construed as evidence that both states agreed to alter the location of their respective boundaries, consequently creating a new critical date at the formation of the single unified Somalia state.<sup>143</sup> Based on *uti possidetis*, this implies that there are in fact no international borders between Puntland and Somaliland.<sup>144</sup>

Puntland could also appeal to ethnic uniformity to strengthen its critical date proposition, though this alone has never succeeded in ICJ jurisprudence.<sup>145</sup> Citing the *Benin/Niger* case as ICJ precedent<sup>146</sup> and the

135. Furthermore, the ICJ had previously stated that *uti possidetis* should be invoked in a great number of circumstances regarding several different political entities. See *supra* note 94 and accompanying text. Accordingly, while an autonomous region such as Puntland has yet to bring forth such a dispute, it is likely that such entities would be within the broad purview of territories that the ICJ would subject to *uti possidetis*.

136. See *supra* notes 26–27 and accompanying text.

137. See *infra* Map 2(A), p. 842.

138. See *infra* Map 2(B), p. 842.

139. In the final report on colonial Somaliland compiled by British authorities, the attached map confirms the Inter-Territorial eastern boundary running along the 49th meridian. See SOMALILAND PROTECTORATE REPORT FOR 1958, *supra* note 26.

140. See *infra* Map 3, p. 843.

141. The Colonial borders were delimited with the British occupying the western Burao territory and the Italians occupying the eastern Majertain territory. BRONS, *supra* note 13, at 13. After the 1975 territory restructuring, the former British territory would have comprised the administrative regions of Sanaag, Sool, Todger, Awdal, and Djibouti. *Id.* at 16. As such, prior to the Somali civil war, the SSC region was administratively located in modern-day Somaliland.

142. See *supra* note 33 and accompanying text.

143. See *supra* note 106 and accompanying text.

144. Somaliland could provide evidence of insufficient voting on the Act of Union referendum in an attempt to refute this argument. See *supra* note 33.

145. See *supra* note 95 and accompanying text.

All-Africa People's Conference<sup>147</sup> as historical justification, Puntland could present disparate clan distribution evidence demonstrating that Puntland is composed solely of the Harti sub-clan, while Somaliland is composed of the Isaq clan.<sup>148</sup> The most populous clan in the Sool and Sanaag regions is Harti, and Puntland can therefore argue that tribal clan membership puts the SSC region within its "ethnic" borders.<sup>149</sup>

Further, Puntland issued a press release shortly after becoming autonomous stating that it intended to include Sool and Sanaag as part of its territory.<sup>150</sup> However, the inhabitants of those regions are politically divided between allegiance to Somaliland and Puntland,<sup>151</sup> as clan families in the region have held administrative offices in both governments.<sup>152</sup> Puntland may have slightly greater popular support in the SSC region<sup>153</sup> because of the aforementioned clan ties, though the Puntland government has recently disenfranchised several elders.<sup>154</sup> Conversely, there are some within the region who advocate for the SSC to be an autonomous region in

146. See *supra* notes 107–12 and accompanying text.

147. See *supra* note 80 and accompanying text. But see *supra* note 82 and accompanying text regarding the OAU Conference.

148. BRONS, *supra* note 13, at 15. The Isaq clan territory in Somaliland cuts off west of the SSC region. See *infra* Map 1(A), p. 840.

149. BRONS, *supra* note 13, at 276; see *infra* Maps 1(A), 1(B), 3, pp. 840–41, 843 (comparing clan territory to current Somali territories, Somaliland, and Puntland). The Harti clan is broken down into several subgroups. See *supra* note 16. The subgroups in the SSC region are primarily Warsangeeli and Dhulbahante, while Puntland's territory is comprised of the Majeerteen. Thus, while the SSC region and Puntland do share the same parent tribe (Harti), they are still somewhat divided. Regardless, based on parental lineage alone, the Harti still dominate both the SSC region and Puntland. Hoehne, *supra* note 8.

150. BRONS, *supra* note 13, at 276. This compares to the British Treasury Warrant of 1875 that claimed Ecrehos as part of its territory, which the court included as evidence for supporting Great Britain. Unlike Great Britain, however, Puntland knew at the time that the SSC territory was disputed. See *supra* note 123. Further, Article 1.3 of the Charter for Puntland State of Somalia does not mention claiming the SSC region as its territory. BRONS, *supra* note 13, at 276.

151. This is primarily due to ethnic membership, as it is "the clan elders of the Dulbahante clans in Sool and Sanag [sic] [who] remain divided." BRONS, *supra* note 13, at 276–77.

152. See Hoehne, *supra* note 8 ("[D]hulbahante and Warsangeeli had representatives in both of the regional administrations of Somaliland and of Puntland."). Some Harti clan members still maintain allegiance to southern Somalia and its capital Mogadishu. Thus, the Harti clan is torn between all three political entities: Somalia, Somaliland, and Puntland. ICG AFRICA REPORT N°66, *supra* note 130, at 28–29 ("[H]arti loyalties are split at least three ways, with members of the clan's political and traditional elite scattered between Somaliland, Puntland, and Mogadishu.").

153. David H. Shinn, *Africa Notes: Somaliland: The Little Country that Could*, CTR. FOR STRATEGIC AND INT'L STUDIES (Nov. 2002), [http://csis.org/files/media/ctsis/pubs/anotes\\_0211.pdf](http://csis.org/files/media/ctsis/pubs/anotes_0211.pdf) ("It is generally agreed that about half of the residents of Sanaag and a higher proportion in Sool have sympathies with Puntland.").

154. *Somalia: Las Anod Clan Elders 'Give Up' on Puntland Govt*, GAROWE ONLINE (June 8, 2008, 8:52 AM), <http://allafrica.com/stories/200806090032.html>. This was in response to Puntland's lack of local support following Somaliland's seizure of Sanaag's capital. See *infra* notes 159–61 and accompanying text.

and of itself.<sup>155</sup> It would likely be difficult, however, to effectively maintain and police the area with both Somaliland and Puntland disputing the territory<sup>156</sup> while also lacking a credible legal claim.<sup>157</sup>

Puntland can make a final argument based on effective control or *effectivités*, as the autonomous territory first began to utilize State functions in the SSC region in the early 2000s<sup>158</sup> until the Sool capital was seized by Somaliland.<sup>159</sup> Similarly, because of the Harti clan distribution, Puntland could argue that its “citizens” (Harti clan members) were effectively occupying and administering the territory as an ethnic majority at the time of independence and beyond, even though it was technically within British Somaliland’s borders.<sup>160</sup> Since the capital was overtaken, however, Somaliland has been under effective control of the territory.<sup>161</sup> Regardless, violent acquisition of the region will not provide proper legal title because the territory has always been within some formulation of Somali borders, and thus, it is not considered *terra nullius*.<sup>162</sup>

155. Several SSC political leaders recently met in Nairobi to discuss the possibility of a separate administration apart from Somaliland and Puntland. Liban Ahmad, *Sool, Sanaag and Cayn Leadership: Some challenges and opportunities*, WARDHEER NEWS (Oct. 31, 2009), [http://wardheernews.com/Articles\\_09/Oct/31\\_sool\\_sanaag\\_liban.pdf](http://wardheernews.com/Articles_09/Oct/31_sool_sanaag_liban.pdf).

156. Both the Somaliland and Puntland administrations have begun efforts to weaken plans for independent SSC leadership brought forth at the Nairobi Conference. *Id.*

157. Those pushing for SSC autonomy have only an ethnic composition argument, in that their sub-clans are all uniform. They were never a separate State, nor a separate administrative colony like Somaliland. *See supra* notes 29–32 and accompanying text. Therefore, they would have no *uti possidetis* claims whatsoever.

158. Hoehne, *supra* note 8, at 3 (“[Puntland] took serious steps to establish an effective military and then civilian administration [in Sool] in early 2004.”). Puntland police officials also worked in SSC police stations as early as 1999. Patrick Gilkes, *Briefing: Somalia*, 98 AFR. AFFAIRS 571, 572 (1999), available at <http://www.jstor.org/stable/723893>. The actual enforcement and administration within the SSC region has been intermittent since the Somali civil war and primarily based on military advantage. Prior to 2002, “few politicians from [Somaliland’s Capital] Hargeysa or [Puntland’s Capital] Garoowe ever visited” the region. Markus V. Hoehne, *People & Politics along & across the Somaliland-Puntland Border*, in BORDERS & BORDERLANDS AS RESOURCES IN THE HORN OF AFRICA 103 (Dereje Feyissa & Markus V. Hoehne eds., 2010). After a clash between Somaliland and Puntland forces in 2002, the region “was left to the local powers” until December 2003. Markus V. Hoehne, *Not Born as a De Facto State: Somaliland’s complicated state formation*, in REGIONAL SECURITY IN THE POST-COLD WAR HORN OF AFRICA 328 (Roba Sharamo & Berouk Mesfin eds., 2011). Following several military skirmishes, the region was effectively under Puntland’s control from 2004–2007. *Id.* at 329.

159. Las Anod, the administrative capital of Sool, was successfully invaded by Somaliland forces on October 15, 2007. Faisal Roble, *Somaliland: Is Invading Las Anod Part of Creating “New Reality on the Ground”?*, WARDHEER NEWS (Oct. 22, 2007), [http://wardheernews.com/articles\\_07/october/21\\_Somaliland\\_Faisal\\_Roble.html](http://wardheernews.com/articles_07/october/21_Somaliland_Faisal_Roble.html).

160. *See supra* notes 52 and 141 and accompanying text.

161. *Id.*

162. *See supra* notes 74 and 159 and accompanying text.

Consistent with ICJ jurisprudence, if there exists traceable evidence of colonial boundaries, then the application of *uti possidetis juris* according to those borders will nearly always prevail as the ruling evidence; ethnic composition and effective control arguments merely supplement the primary legal evidence.<sup>163</sup> Accordingly, if Puntland successfully proves that the critical date of independence was the Act of Union and contradicts Somaliland's *uti possidetis* evidence, then effective control and ethnic supplemental arguments could push the Court in Puntland's favor. Conversely, if Somaliland can demonstrate that the Act of Union is illegitimate and the critical date is when British Somaliland alone became independent, then *uti possidetis juris* demands that the SSC region be within Somaliland's borders. Because Somaliland is currently a quasi-state and not internationally recognized,<sup>164</sup> however, it follows that the international community, and by extension the ICJ, considers the Act of Union to be legal. Puntland's evidence, therefore, could very well convince the ICJ to defer to effective control and ethnic composition to put the SSC region within Puntland's borders.

#### CONCLUSION

The international community has a demonstrated legitimate interest in stabilizing the one area that is generating hostility in an otherwise fairly peaceful northern Somalia. Solving the dispute can help quell the violence between Somaliland and Puntland while fostering democratic ideals that will hopefully spread into war-torn southern Somalia.<sup>165</sup> Left in its current

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163. See *supra* notes 117–19 and accompanying text.

164. Recognition of Somaliland may yet be on the horizon based on the recent Sudanese referendum results that granted Southern Sudan its long awaited independence, which could potentially improve Somaliland's case. Following the referendum, the U.S. government announced that it would officially recognize Southern Sudan as a legitimate State. David Gollust, *US Welcomes Sudan Referendum Results*, VOICE OF AMERICA NEWS (Feb. 7, 2011), <http://www.voanews.com/english/news/usa/US-Welcomes-Sudan-Referendum-Results-115518304.html> ("The United States . . . welcomed the official results of the referendum in southern Sudan, and announced that it will recognize an independent Southern Sudanese state.").

Somaliland Foreign Minister Mohamed A. Omar stated, "We will be using the South Sudan case to take a more aggressive policy to the African Union and the Intergovernmental Authority on Development." William Davison, *Somaliland to Push for Recognition After Sudan Referendum*, BLOOMBERG (Jan. 18, 2011, 4:39 AM), <http://www.bloomberg.com/news/2011-01-18/somaliland-to-push-for-recognition-after-sudan-referendum.html>. On the other hand, Ethiopia's Foreign Minister Hailemariam Desalegn believes this will have no effect on Somaliland because the situation is so different. Northern Sudan agreed to the South's referendum, which Somalia is unable to do, as it has no "representative legitimate government in Mogadishu." *Id.*

165. This process may already have commenced, as both Somaliland's foreign minister and Puntland's State Minister for International Cooperation recently attended an international conference

state, the lack of international recognition presents Somaliland with a unique problem because it is unable to seek a legal judgment of its border dispute with Puntland. Utilizing the jurisprudence of the ICJ, both Somaliland and Puntland have persuasive arguments based on *uti possidetis*. Puntland's evidence that the Act of Union adjusts the critical date of independence in conjunction with effective control and ethnic uniformity, however, is the most convincing argument, providing it with rightful ownership of the SSC region at the present time.

*Michael Farrell\**

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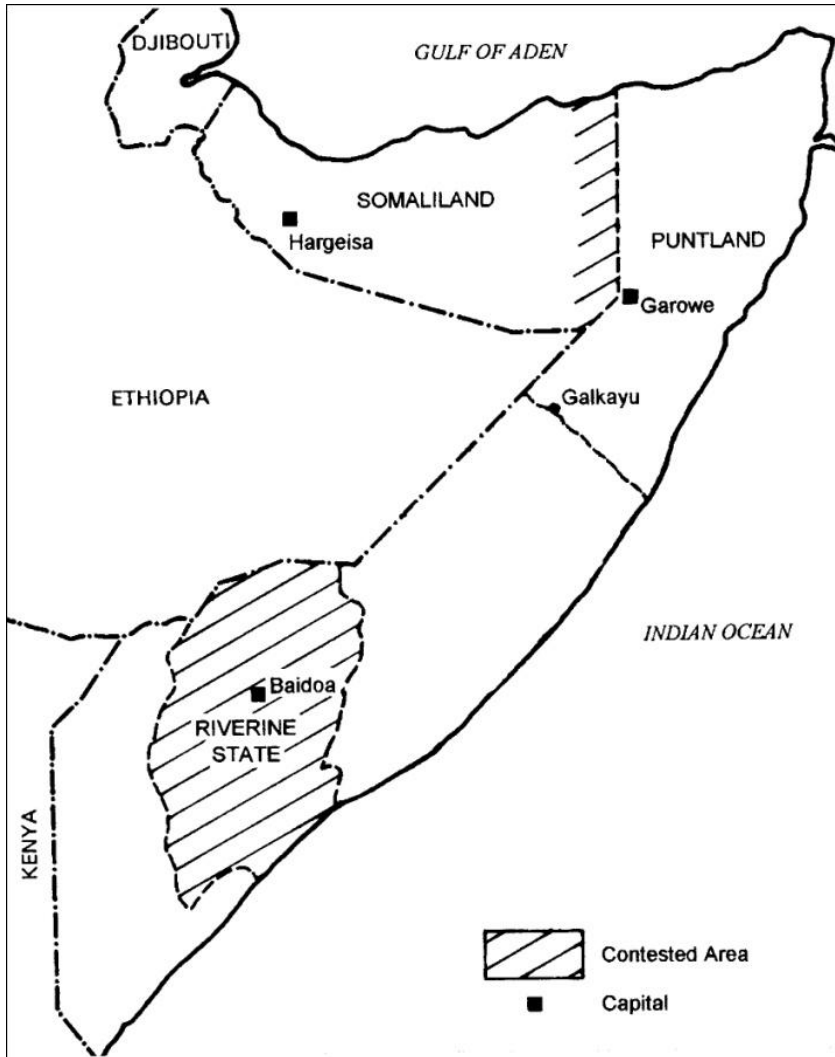
in the United Kingdom to discuss governmental transition in Somalia. *Somaliland to Attend Somalia Conference for First Time*, GAROWE ONLINE (Feb. 7, 2011, 5:19:51 PM), [http://www.garoweonline.com/artman2/publish/Somalia\\_27/Somaliland\\_to\\_attend\\_Somalia\\_conference\\_for\\_first\\_time.shtml](http://www.garoweonline.com/artman2/publish/Somalia_27/Somaliland_to_attend_Somalia_conference_for_first_time.shtml).

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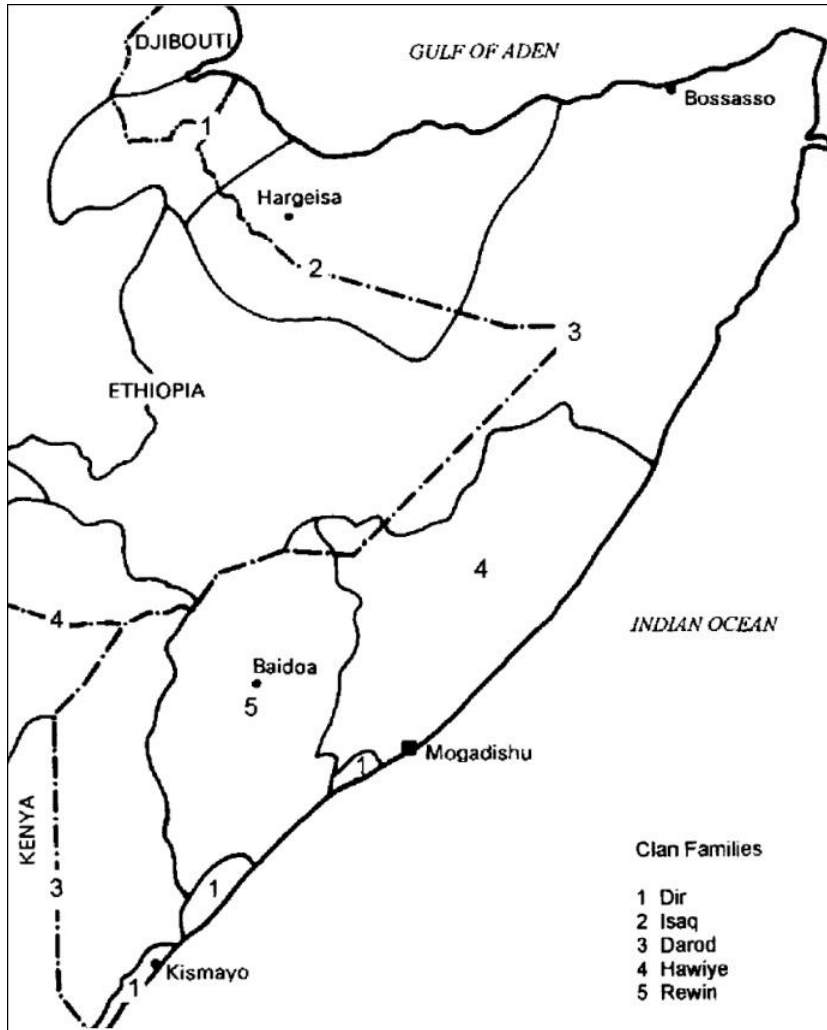
MAPS 1(A) & 1(B)

PRESENT-DAY SOMALILAND & PUNTLAND

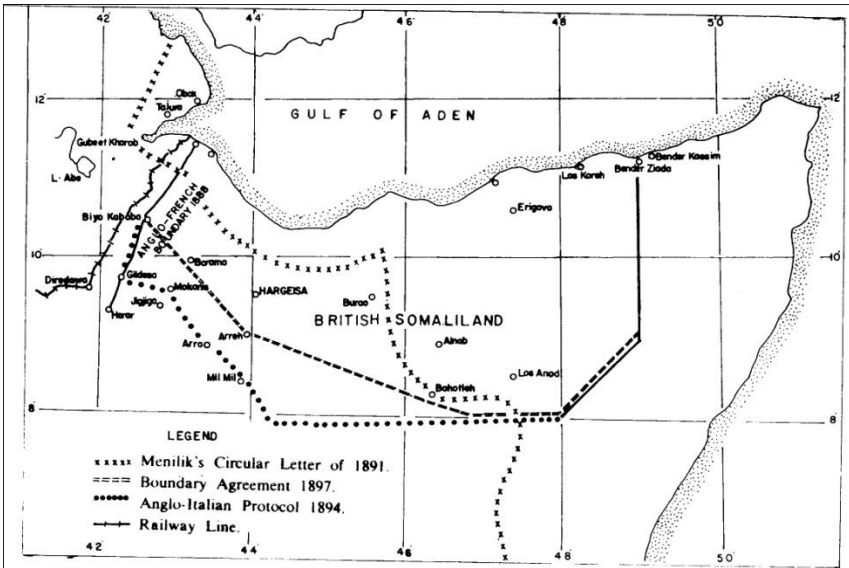
SOMALIA CLAN TERRITORY







MAPS 2(A) & 2(B): BRITISH & ITALIAN COLONIAL BORDERS OF SOMALILAND



MAP 3: SOMALI TERRITORIES—2002

