



A relook at the principle of *uti possidetis* in the context of the Indo-Nepal border dispute

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Accepted: 15 May 2021 / Published online: 7 June 2021
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Abstract

The problems regarding borders are more pervasive among the postcolonial states. One of the reasons for this is that the borders of most of these postcolonial states were drawn by their colonisers who paid little to no regard to the local realities. This article is focused on one such colonial border, i.e., the one between India and Nepal. It will highlight the relation between the drawing of borders and colonialism. It will also discuss the complicit role of international law in maintaining these colonial borders, through a discussion of the principle of *uti possidetis*. The article will highlight the problems with the principle of *uti possidetis*. The aim is to assess the Indo-Nepal border dispute through the lens of the colonial principle of *uti possidetis*. The article offers a few suggestions regarding other international law principles which can be used instead of *uti possidetis*, the principle of equity being one of them. So far no work has been done on the Indo-Nepal border dispute from the perspective of the principle of *uti possidetis*. This article aims to fill that gap.

Keywords Indo-Nepal border · Colonial border · *Uti possidetis* · Drawing of borders · International law

1 Introduction

The modern nation states are divided by borders. They have a demarcated geographical limit within which they exercise their territorial sovereignty. However, in the cases of the Indian subcontinent and the African continent, these borders are often disputed. In many cases, the defined borders are not acceptable to all the parties

I am thankful to Antarnihita Mishra and Sridhar Krishnan for their help. I am also thankful to the reviewer of JGLR for their comments and suggestions. This article is dedicated to those Indians and Nepalese whose families were separated because of the Indo-Nepal border.

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concerned. The confusion regarding borders often leads to military or non-military conflicts.¹ Since the establishment of the United Nations (UN), the border disputes have largely been of ‘non-military’ character. This is, in part, due to the prominence of the UN’s purpose of ‘maintenance of international peace and security’.² This is not to say that military conflicts are not prevalent. Whatever be the nature of the conflicts, they are now regulated by international law, which has played a complicit role in causing these border conflicts. As will be discussed later, international law has colonial origins. It can even be said that international law, in its formative years, was a tool of colonialism.³ Rules were crafted by colonisers to justify their colonial actions. One such action was demarcating the borders of colonies they were ‘finding’.⁴ In the wake of decolonisation, when these colonies became independent, they were then forced to continue with the colonial border due to the international law principle of *uti possidetis*.

Hence, the problems regarding borders are more pervasive among the postcolonial states. The reason for this, as mentioned above, is that the borders of most of these postcolonial states were drawn by their colonisers who paid little to no regard to the local realities. These border-drawing exercises were often motivated by security interests, inherent within which were the commercial interests of the colonisers. This article is focused on such colonial borders in Asia, particularly the border drawn between the Republic of India (hereinafter referred to as India) and the Federal Democratic Republic of Nepal (hereinafter referred to as Nepal).⁵ These

¹ See for example, Tayyab Mahmud, ‘Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars along the Afghanistan-Pakistan Frontier’ (2010) 36(1) *Brooklyn Journal of International Law* 1. Mahmud argues that the Afghan war, like many of today’s international conflicts, is rooted in contested borders that have not stood the test of time.

² Charter of the United Nations (24 October 1945) 1 UNTS XVI arts 1.1 and 24.

³ Antony Anghie, ‘Francisco De Vitoria and the Colonial Origins of International Law’ (1996) 5(3) *Social & Legal Studies* 321; Antony Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (2006) 27(5) *Third World Quarterly* 739; Brett Bowden, ‘The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization’ (2005) 7(1) *Journal of the History of International Law* 1; James Thuo Gathii, ‘International Law and Eurocentricity’ (1998) 9 *European Journal of International Law* 184; Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law 1800–1850* (Harvard University Press 2016); Robert J Miller, ‘The Doctrine of Discovery: The International Law of Colonialism’ (2019) 5(1) *Indigenous Peoples’ Journal of Law, Culture & Resistance* 35.

⁴ Stelios Michalopoulos and Elias Papaioannou, ‘The Scramble for Africa and Its Legacy’ in Matias Vernengo, Esteban Perez Caldentey, and Barkley J. Rozer Jr (eds), *The New Palgrave Dictionary of Economics* (Palgrave Macmillan 2016); Emmanuel N Amadife and James W Warhola, ‘Africa’s Political Boundaries: Colonial Cartography, the OAU, and the Advisability of Ethno-national Adjustment’ (1993) 6(4) *International Journal of Politics, Culture, and Society* 533. For an alternate view, see Michel Foucher, ‘African Borders: Putting Paid to a Myth’ (2020) 35(2) *Journal of Borderlands Studies* 287; Gbenga Oduntan, *International Law and Boundary Disputes in Africa* (Routledge 2015).

⁵ There has been recent controversy regarding the official name of Federal Democratic Republic of Nepal. The Ministry of Law, Justice, and Parliamentary Affairs had issued a Circular on 14 October 2020. Through this Circular it was proposed that the current ‘Federal Democratic Republic of Nepal’ shall now be known as ‘N-E-P-A-L’. The Circular stated that this change was necessary to maintain uniformity in naming the country. The change has been called unconstitutional, primarily because Article 56.1 of the Nepalese Constitution refers to the country as the संघीय लोकतान्त्रिक गणतन्त्र नेपालको (Federal Democratic Republic of Nepal). The Parliamentary State Affairs and Good Governance Com-

two countries have entered into a fresh bout of border disputes. This latest dispute began after India inaugurated a road to its border with China in 2020.⁶ This road passes through Lipulekh Pass. The Pass is claimed by both India and Nepal. This was preceded by the publication of its revised political map by India on 02 November 2019, in the aftermath of the bifurcation of the erstwhile state of Jammu and Kashmir.⁷ The map included strategically important and historically disputed areas of Lipulekh, Kalapani, and Limpiyadhura. (Maps themselves can cause a lot of problems from an international law point of view,⁸ but this article will keep its focus on borders.)

This map was protested by the Nepalese government which in turn claimed these areas as its own.⁹ The Nepalese Parliament also amended its Constitution to include the three disputed areas mentioned above.¹⁰ So far, nothing has been done by the government of either country to settle the dispute.

The current border between Nepal and India was finalised between the East India Company and the Kingdom of Nepal in the year 1816 through the Treaty of Sugauli. India continued following this border after its independence and so did Nepal. Since this colonial border was not drawn keeping in mind the ground realities, today, many of the Indians and Nepalese living in the border areas have ancestors and relatives living on the other side of the border. Therefore, the families, despite sharing blood, do not share nationality. This problem became relevant in the recent protests (2015) by the Madhesi community in Nepal. Madhesis reside in the Madhes area of Southern Nepal that shares the border with India. Members of the Nepali Madhesi community have matrimonial and family ties with Madhesi people in India.¹¹ When

Footnote 5 (continued)

mittee has directed the government to not implement this change. See 'It Is Federal Democratic Republic Nepal, Not Just Nepal, Parliamentary Committee Says' (*Kathmandu Post*, 9 November 2020). <https://kathmandupost.com/national/2020/11/09/it-is-federal-democratic-republic-nepal-not-just-nepal-parliamentary-committee-says>. Accessed 04 January 2021. See also Surya Dhungel and Phillip Gonzalez, 'Nepal (Federal Democratic Republic of Nepal) from a Centralized Monarchy to a Federal Democratic Republic' in A Griffiths, R Chattopadhyay, J Light, and C Stieren (eds), *The Forum of Federations Handbook of Federal Countries* (Palgrave Macmillan 2020).

⁶ Constantino Xavier, 'Interpreting the India-Nepal Border Dispute' (*Brookings*, 11 June 2020). <https://www.brookings.edu/blog/up-front/2020/06/11/interpreting-the-india-nepal-border-dispute/>. Accessed 09 January 2021.

⁷ Office of the Surveyor General of India, *Political Map of India* (10th edn, 2020). <http://www.surveyofindia.gov.in/pages/political-map-of-india>. Accessed 04 January 2021.

⁸ William Thomas Worster, 'The Frailties of Maps as Evidence in International Law' (2018) 9(4) *Journal of International Dispute Settlement* 570.

⁹ Ministry of Foreign Affairs, Government of Nepal, Press Release on Lipu Lekh (09 May 2020). <https://mofa.gov.np/press-release-regarding-lipu-lekh/>. Accessed 25 March 2021.

¹⁰ Binod Ghimire, 'Constitution Amendment Bill to Update Nepal Map Endorsed Unanimously at the Lower House' (*Kathmandu Post*, 13 June 2020). <https://kathmandupost.com/national/2020/06/13/constitution-amendment-bill-to-update-nepal-map-endorsed-unanimously-at-the-lower-house>. Accessed 17 April 2021.

¹¹ Dhananjay Tripathi, 'Influence of Borders on Bilateral Ties in South Asia: A Study of Contemporary India–Nepal Relations' (2019) 56(2–3) *International Studies* 186, 188. See also Anup Kumar Pahari and Mahendra Lawoti (eds), *The Maoist Insurgency in Nepal: Revolution in the Twenty-First Century* (Taylor & Francis 2009) 161–162; Hari Bansh Jha (ed), *Nepal-India Border Relations* (Centre for Economic and Technical Studies 1995) 36.

the members of the Nepalese Madhesi community started protesting against certain constitutional amendments, India conveyed its concerns on behalf of them to Nepal. Then when these members blocked the Indo-Nepal border, the Nepalese government blamed India for imposing an ‘unofficial blockade’.¹² This is just one example of how a colonial border, drawn in total disregard of the socio-political realities, can cause permanent damage. Multiple such examples are available in the African continent.¹³ While the long-term effects of colonial borders have been studied in detail, not much attention has been paid to such borders in Asia. Moreover, the Indo-Nepal *colonial* border has not been a subject matter of study in international law. The present article is a contribution towards that gap in the literature. It will lay bare the role of colonialism in the modern-day border conflicts in postcolonial states, through this case study of the Indo-Nepal border dispute.

The first part of this article will highlight the problems at the Indo-Nepal border. I will begin by discussing the post-independence history of the Indo-Nepal border dispute. Subsequently, I will present a historical overview of the Indo-Nepal border. Here, I will discuss how this border came into being, and what the historical events were which led to the *drawing* of a border.

In the second part of this article, the relation between border drawing and colonialism will be highlighted. Here, the idea of borders will be discussed in detail. I will first discuss the meaning of borders before colonialism. I will then show how this meaning changed due to colonialism, and finally I will show that the drawing of borders was a European/colonial idea. I will conclude by answering the question, what did this import of a non-Asian idea of border do to Indo-Nepal relations?

In the third and final part, I will discuss the complicit role of international law in maintaining the colonial borders. This will be done through a discussion on the principle of *uti possidetis*. The article presents a critical take on the principle of *uti possidetis* and argues that the postcolonial states need to understand the colonial origins and aims of this principle. A brief conclusion will follow all these discussions.

2 History

The founder of the modern Nepali state, Prithvi Narayan Shah, once described Nepal as a ‘yam between two rocks’.¹⁴ This classification pertained to Nepal’s geographic location between India, the dominant power in the Gangetic plains, on the

¹² Tripathi, ‘Influence of Borders on Bilateral Ties in South Asia’ (n 11) 189.

¹³ Amadife and Warhola, ‘Africa’s Political Boundaries’ (n 4) 533; Raffaella A Del Sarto, ‘Contentious Borders in the Middle East and North Africa: Context and Concepts’ (2017) 93(4) *International Affairs* 767; Imre Josef Demhardt, ‘Evolution and Legacy of Africa’s Colonial Boundaries’ (1998) 6(12) *Journal of Area Studies* 102; Robert Blanton, T David Mason, and Brian Athow, ‘Colonial Style and Post-colonial Ethnic Conflict in Africa’ (2001) 38(4) *Journal of Peace Research* 473.

¹⁴ Pashupati Shumshere JB Rana, ‘India and Nepal: The Political Economy of a Relationship’ (1971) 11(7) *Asian Survey* 645, 645.

one hand, and Tibet and the Qing empire on the other.¹⁵ Despite this, due to their shared culture and history, India and Nepal have remained friends. Even during the colonial times, Nepal and British authorities were on relatively good terms.¹⁶ Nepal's support to the East India Company in suppression of the 1857 revolt is a testimony to the cordial relations between British India and Nepal,¹⁷ though there were some instances where these two were at loggerheads, for example the Anglo-Gorkha Wars. After India got independence from the British rule, it continued to be on amicable terms with Nepal.

In fact, as was revealed in the autobiography of India's former President Mr Pranab Mukherjee:

After the Rana rule was replaced by the monarchy in Nepal, he wished for democracy to take root. Interestingly, Nepal's king, Tribhuvan Bir Bikram Shah, had suggested to Nehru that Nepal be made a province of India. But Nehru rejected the offer on the grounds that Nepal was an independent nation and must remain so.¹⁸

So how does one explain the recent souring of their relationship? For this, one needs to understand the history, both modern and colonial, of the Indo-Nepal border and the disputes surrounding it.

2.1 Post-independence/modern history of the Indo-Nepal border dispute

The Indo-Nepal border dispute has existed since the 1950s.¹⁹ One region of dispute is Kalapani, located in the easternmost corner of Pithoragarh district of the Indian state of Uttarakhand. It shares a border with the Tibet Autonomous Region of China in the north and with Nepal in the east and south. It is the largest disputed territory between India and Nepal, consisting of at least 37,000 hectares of land. It is wedged between Limpiyadhura, Lipulekh, and Kalapani. India controls the entire territory of Kalapani but Nepal claims the region citing historical and cartographic reasons.²⁰

Besides Kalapani, there is also a second dispute with India in the Susta village where the river Gandak serves as an international border. While not well known,

¹⁵ Ibid. See also C Raja Mohan, 'Delhi Must Focus on India's Relations with Nepal' (*The Indian Express*, 2 June 2020). <https://indianexpress.com/article/opinion/columns/india-nepal-border-dispute-kalapani-lipulekh-china-c-raj-mohan-6437884/>. Accessed 08 January 2021.

¹⁶ With the obvious exception of the Anglo-Gorkha War.

¹⁷ Buddhi N Shrestha, 'The Natural Environment and the Shifting Borders of Nepal' (2013) 4(2) *Eurasia Border Review* 57, 64.

¹⁸ Pranab Mukherjee, *The Presidential Years: 2012–2017* (Rupa 2021).

¹⁹ Sam Cowan, 'The Indian Checkposts, Lipu Lekh, and Kalapani' (*Record*, 14 December 2015). <https://www.recordnepal.com/wire/indian-checkposts-lipu-lekh-and-kalapani/>. Accessed 07 January 2021.

²⁰ Sohini Nayak, 'India and Nepal's Kalapani Border Dispute: An Explainer', ORF Issue Brief, Issue No. 356 (April 2020). See also Kallol Bhattacharjee, 'Why Are India and Nepal Fighting over Kalapani?' (*The Hindu*, 24 May 2020). <https://www.thehindu.com/news/national/why-are-india-and-nepal-fighting-over-kalapani/article31660401.ece>. Accessed 07 January 2021.

there is also a possible issue at the eastern tri-junction with China and the Indian state of Sikkim.²¹

The most recent dispute regarding the Indo-Nepal border began on 08 May 2020. On this day, India's Minister of Defence inaugurated a new 80 km long road in the Himalayas, connecting the Indian border with that of China, at the Lipulekh Pass.²² The Government of Nepal launched an immediate protest. It argued that the new road crossed a disputed territory between India and Nepal. It accused India of changing the status quo without consulting the Nepalese authorities.²³ The note read:

The Government of Nepal has consistently maintained that as per the Sugauli Treaty (1816), all the territories east of Kali (Mahakali) River, including Limpiyadhura, Kalapani and Lipu Lekh, belong to Nepal. This was reiterated by the Government of Nepal several times in the past and most recently through a diplomatic note addressed to the Government of India dated 20 November 2019 in response to the new political map issued by the latter.²⁴

It subsequently called upon India 'to refrain from carrying out any activity inside the territory of Nepal'.²⁵ The official protest was followed by a constitutional amendment which made changes in the Nepalese political map by formally including these disputed areas within its borders.

The territory in dispute, Lipulekh Pass, has been in India's effective possession for at least the last 60 years. India has been controlling the administration there and has also deployed its military in the area. Nepal, on the other hand, claims to have conducted a census there sometime in the 1950s. Reference is also made by the Nepalese authorities to the 1815 Sugauli Treaty to further their claims.²⁶

Constantino Xavier writes that the 'Indian road was not built overnight and the Nepal government was surely aware and monitoring the situation in Kalapani over the preceding months and years'.²⁷ In fact this was not the first time that the two countries disagreed over the said territory. In 2019 itself, when India had issued its revised political map on 02 November 2019, in the aftermath of bifurcation of the erstwhile state of Jammu and Kashmir,²⁸ the countries had disagreed regarding the inclusion/exclusion of certain territories. The Indian map included the strategically important and historically disputed areas of Lipulekh, Kalapani, and Limpiyadhura, which Nepal claims as its own. Xavier writes that historically these territories have been included in the Indian political map.²⁹ India has agreed to discuss the issue but only after the COVID-19 crisis.³⁰

²¹ Xavier, 'Interpreting the India-Nepal Border Dispute' (n 6).

²² *Ibid.*

²³ Ministry of Foreign Affairs, Government of Nepal, Press Release on Lipu Lekh (09 May 2020) (n 9).

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Xavier, 'Interpreting the India-Nepal Border Dispute' (n 6).

²⁷ *Ibid.*

²⁸ Office of the Surveyor General of India, *Political Map of India* (n 7).

²⁹ See Xavier, 'Interpreting the India-Nepal Border Dispute' (n 6).

³⁰ *Ibid.*

The Nepalese claims seem to be not recognised by other countries like China. This is evident from the Agreement signed between India and China in 2015.³¹ Through the Agreement, China and India agreed to enhance border areas cooperation and to transform the border into ‘a bridge of cooperation and exchanges’:

The two sides recognized that enhancing border areas cooperation through border trade, pilgrimage by people of the two countries and other exchanges can effectively promote mutual trust, and agreed to further broaden this cooperation so as to transform the border into a bridge of cooperation and exchanges. The two sides agreed to hold negotiation on augmenting the list of traded commodities, and expand border trade at Nathu La, Qiangla/Lipu-Lekh Pass and Shipki La.³²

Nepal immediately protested against the inclusion of Lipulekh without its consent and demanded that the two countries make necessary corrections to reflect the ground realities. The protest, however, was ignored. Dinesh Bhattraï calls it ‘a flagrant violation of the principle of “sovereign equality of all states”’.³³

In 1961, Nepal and China fixed pillar number one at Tinker Pass but left pillar number zero (the tri-junction of Nepal, India, and China) with the understanding that it would be fixed later.³⁴ Lipulekh Pass is 4 km northwest and Limpiyadhura 53 km west of Tinker Pass.³⁵ Subsequently, the Nepal-India Technical Level Joint Boundary Working Group was set up in 1981. Its primary task was to resolve boundary issues, to demarcate the international border, and to manage boundary pillars between the two countries. The group ascertained the position of 8,533 boundary pillars, prepared 182 strip maps, signed by the surveyors of the two sides, covering almost 98 per cent of the boundary by 2007. The only areas left ‘in-dispute’ were those of Kalapani and Susta.³⁶

Since the 1990s, the Indo-Nepal border dispute has been addressed through several official channels. The dispute over Kalapani is decades old and both the countries have shown willingness to resolve it. In 2014, the countries agreed to resolve the issue on a priority basis and directed their foreign secretaries ‘to work on the outstanding boundary issues including Kalapani and Susta’.³⁷

³¹ Joint Statement between the India and China during Prime Minister’s visit to China (15 May 2015). https://www.mea.gov.in/bilateral-documents.htm?dtl/25240/Joint_Statement_between_the_India_and_China_during_Prime_Ministers_visit_toChina. Accessed 17 April 2021.

³² *Ibid.*; emphasis added.

³³ Dinesh Bhattraï, ‘India-Nepal Ties Must Be Dominated by Opportunities of Future, Not Frustrations of Past’ (*The Indian Express*, 10 June 2020). <https://indianexpress.com/article/opinion/columns/rajnath-singh-nepal-india-relations-road-to-mansarovar-6451070/>. Accessed 13 May 2020.

³⁴ Shrestha, ‘The Natural Environment and the Shifting Borders of Nepal’ (n 17) 67.

³⁵ Bhattraï, ‘India-Nepal Ties Must Be Dominated by Opportunities of Future’ (n 33).

³⁶ Amit Ranjan, ‘India-Nepal Row over the Updated Map of India’, ISAS Working Paper No. 321, Institute of South Asian Studies, National University of Singapore (7 December 2019).

³⁷ Bhattraï, ‘India-Nepal Ties Must Be Dominated by Opportunities of Future’ (n 33).

2.2 Historical overview of the Indo-Nepal border

Very early in his reign, Nepalese king Prithvi Narayan Shah had recognised the threat of the British Raj in India. He had then dismissed European missionaries from his kingdom and for more than a century, Nepal remained in isolation.³⁸ The Nepalese rulers made offers to China to act as China's frontline against the expansion of the British Empire towards the Himalayas. They even sought to build a coalition of Indian princes to counter the Company. Because of their ambitions for expanding their kingdom, the Gorkha kings were eyeing the Terai region of British India. Naturally, the British started seeing them as a potential threat. The kingdom started claiming Gorakhpur, Bareilly, and other regions. They even started attacking and occupying some of these areas. Such actions eventually led to the Anglo-Gorkha War which the Nepalese lost.³⁹

After losing the Anglo-Gorkha War, Nepal remained sceptical of the British. However, once the British won the First Opium War, Nepal, realising the inevitable, began mending relations with the British. So much so that, during the 1857 revolt in India, Nepal offered support to them. They subsequently became a British protectorate.⁴⁰ For the purpose of this article though, the most significant part is the end of Anglo-Gorkha War. After the war, the warring parties entered into a treaty, known as the 1816 Treaty of Sugauli. Because of their superior military position, the British dictated the terms of the treaty⁴¹ and took from the Gorkha kings nearly one-third of their territories, especially most of the disputed Terai (the low-lying plains).⁴² It was this treaty that formalised a border between India and Nepal.

The concept of border was new for Nepal. Before this, there was the idea of a fluid boundary.⁴³ No lines were drawn on land to demarcate the territory. Territories kept increasing or decreasing based on successful or unsuccessful military contests or political alliances. However, for colonisers, borders were of supreme importance. The East India Company was based out of Britain and was involved in trade. Being a trading company, its primary function was commerce and business. For that, it wanted to secure good relations with Nepal so as to carry on trade with China via land. What it also needed was security of its territories in India. This security was important to assure traders of continuous commerce and business. However, the constant claims and attacks by the king of Nepal on certain Indian territories (in modern-day Uttar Pradesh and Bihar) meant that the security was lacking. Thus,

³⁸ 'History of Nepal'. <https://mofa.gov.np/about-nepal/history-of-nepal/>. Accessed 05 May 2021.

³⁹ Shrestha, 'The Natural Environment and the Shifting Borders of Nepal' (n 17) 57, 64. See also Sridhar Krishnan, 'How Nepal Got Its Borders' (*The Diplomat*, 30 July 2020). <https://thediplomat.com/2020/07/how-nepal-got-its-borders/>. Accessed 05 January 2021.

⁴⁰ Raja Mohan, 'Delhi Must Focus on India's Relations with Nepal' (n 15).

⁴¹ Shrestha, 'The Natural Environment and the Shifting Borders of Nepal' (n 17) 64. Here there can also be a question of this treaty being an 'unequal treaty'. See Matthew Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74(3–4) *Nordic Journal of International Law* 335; Lucius Caffisch, 'Unequal Treaties' (1992) 35 *German Yearbook of International Law* 52.

⁴² Krishnan, 'How Nepal Got Its Borders' (n 39).

⁴³ Sandip Kumar Mishra, 'The Colonial Origins of Territorial Disputes in South Asia' (2016) 3(1) *Journal of Territorial and Maritime Studies* 5, 7.

when the British won the Anglo-Gorkha War, they formalised their border with Nepal through the treaty.⁴⁴

The treaty placed all the territories east of the Kali (Mahakali) River, including Limpiyadhura, Kalapani, and Lipulekh, at the northwestern front of Nepal, on the Indian side. Before this treaty, the Kingdom of Nepal stretched from the Sutlej River in the west to the Teesta River in the east. Loss in the war resulted in the truncation of Nepal's territory. The treaty stated that '[t]he Rajah of Nipal [Nepal] hereby cedes to the Honourable [the] East India Company in perpetuity all the under-mentioned territories,' including 'the whole of the lowlands between the Rivers Kali and Rapti'. It further elaborated that '[t]he Rajah of Nipal [Nepal] renounces for himself, his heirs, and successors, all claim to or connection with the countries lying to the west of the River Kali and engages never to have any concern with those countries or the inhabitants there of.'⁴⁵

This portion of the treaty is important to understand the current dispute. Today, Nepal is contesting that the tributary that joins the Mahakali River at Kalapani is not the Kali River. It has contended that the Kali River lies further west to the Lipulekh Pass.⁴⁶ The Lipulekh Pass was used by the British for trade with Tibet and China. Accordingly, since the 1870s, the Survey of India maps had showed the area of Lipulekh down to Kalapani as part of British India. For their support during the 1857 revolt, the British returned certain territories to the Nepalese king.⁴⁷ These were the areas of Nepalgunj and Kapilvastu. However, even then, the British did not return any part of Garhwal or Kumaon, including the Kalapani area, to Nepal. The boundaries have since remained the same with India succeeding the British as a party to the treaty.

⁴⁴ Pushpita Das, 'Towards a Regulated Indo-Nepal Border' (2008) 32(5) *Strategic Analysis*; Shrestha, 'The Natural Environment and the Shifting Borders of Nepal' (n 17); Matthew H Edney, *Mapping an Empire: The Geographical Construction of British India, 1765–1843* (University of Chicago Press 1997).

⁴⁵ Jayant Prasad, 'Lower the Temperature, Defuse the Issue' (*The Hindu*, 23 May 2020). <https://www.thehindu.com/opinion/lead/lower-the-temperature-defuse-the-issue/article31653570.ece>. Accessed 06 January 2021. Sadly, the original copy of the treaty is missing. See Anil Giri, 'Original Copies of Both Sugauli Treaty and Nepal-India Friendship Treaty Are Missing' (*Kathmandu Post*, 13 August 2019). <https://kathmandupost.com/national/2019/08/13/original-copies-of-sugauli-treaty-and-nepal-india-friendship-treaty-are-both-missing>. Accessed 17 April 2021. See also Shrestha, 'The Natural Environment and the Shifting Borders of Nepal' (n 17).

⁴⁶ Ministry of Foreign Affairs, Government of Nepal, Press Release on Lipu Lekh (09 May 2020) (n 9).

⁴⁷ PI Bhat, 'Peaceful Resolution of International Boundary Disputes: Drawing Lessons from the Indian Experiences' (2020) 59(1–4) *Indian Journal of International Law* 1; Dhananjay Tripathi and Sanjay Chaturvedi, 'South Asia: Boundaries, Borders and Beyond' (2020) 35(2) *Journal of Borderlands Studies* 173.

3 Colonialism

Tayyab Mahmud notes that '[d]rawing lines, both actual and metaphoric, constitutes modern legal orders, particularly international law.'⁴⁸ On 07 June 1494, through the Treaty of Tordesillas, a line, *partition del mar oceano*, was drawn. It divided 'all the undiscovered parts of the world by drawing a meridian of longitude from pole to pole' between Portugal and Spain.⁴⁹ Mahmud writes that 'the career of modern international law is the story of making, maintaining, and managing this enduring line.'⁵⁰ The Treaty of Tordesillas had followed Pope Alexander VI's edict of 04 May 1494, *Inter caetera divinae*, and together they 'injected colonialism into the genetic code of modern international law'.⁵¹

Another well-known incident of drawing borders by colonisers was the 'Scramble for Africa'. The African continent was allocated between the Europeans through the Berlin Conference of 1884–1885. No African leader was involved in this division. The continent continues to be plagued by conflicts related to the artificial borders drawn at the Conference.⁵²

The idea of 'border' is related with the notion of having a 'territory'. Territory became a feature of state only in the 19th century. Before that, as both Grotius and Vattel have argued, the emphasis was more on 'population, collective will, and government than on territory'.⁵³

Sandip Mishra writes that 'a nuanced understanding of their [borders'] colonial origins might be useful in providing recourse to at least some efficient management of the issue, if not their complete resolution.'⁵⁴ The territories of India and Nepal, much like the territories of other states in South Asia, were contiguous, porous, and ever-changing, and the notion that territory is an instrument of 'affect, influence and control'⁵⁵ was manifested in a very different manner. Before India became a colony, its sovereignty was vested with the Mughal Empire. However, the Mughals had seldom defined their territories properly. During that time, the territories of various constituents of India often interacted with one another, but their territorialisation was never done.⁵⁶ When the British began administering India, they started civilising India and one way they did so was through modernising India by drawing

⁴⁸ Mahmud, 'Colonial Cartographies, Postcolonial Borders' (n 1) 6.

⁴⁹ MF Lindley, *The Acquisition and Government of Backward Territory in International Law* (Longmans, Green and Co. 1926) 270.

⁵⁰ Mahmud, 'Colonial Cartographies, Postcolonial Borders' (n 1) 9.

⁵¹ *Ibid.* 8.

⁵² Michalopoulos and Papaioannou, 'Scramble for Africa and Its Legacy' (n 4); Amadike and Warhola, 'Africa's Political Boundaries' (n 4). For an alternate view, see Foucher, 'African Borders' (n 4); Oduntan, *International Law and Boundary Disputes in Africa* (n 4).

⁵³ Daniel-Erasmus Khan, 'Territory and Boundaries' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of History of International Law* (Oxford University Press 2012).

⁵⁴ Mishra, 'The Colonial Origins of Territorial Disputes in South Asia' (n 43) 7.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

borders.⁵⁷ By drawing these borders, several layers of sovereignty such as colonies, suzerains, protected states, and protectorates were exercised and justified.⁵⁸

3.1 Meaning of borders before colonialism

The idea of drawing a boundary on a map and demarcating borders on the ground marking a state's jurisdiction and sovereignty is of recent origin. As Mahmud notes, '[b]orders take different forms in different historical and political circumstances'.⁵⁹ Borders are '[u]sually traced back to the Roman Empire that marked out discrete territories to distinguish centres of population density and uninhabited surroundings, the history of borders and frontiers is ancient and varied'.⁶⁰ Despite the idea being traceable to Egyptian, Assyrian, Chinese, and Roman origins, the concept of precise boundaries as a feature of the postcolonial state is essentially a European development.⁶¹ Defined political borders gained prominence in the 12th and the 13th centuries when the centralised European monarchies were trying to consolidate their territories. Thus, maps became an instrument of centralising control.

In the initial years of colonisation, 'when the area open to acquisition was so vast, and the parts taken possession of by different States were widely separated from one another, the question of exact boundaries was not of urgent practical moment.'⁶² However, soon the need was felt to devise rules to determine the borders. This was because of the increase in the colonial possessions of the European colonisers. Now, due to the possible clashes between the colonisers regarding the possession of territories, 'the question often resolved itself into an enquiry as to the limits within which a given act of possession was effective.'⁶³

The colonisers used maps as a weapon of statecraft. The colonial powers used topographical features on maps as bargaining chips among themselves. Boundaries were then drawn to manipulate the distribution of power among themselves. This in turn created a direct connection between colonialism and borders later inherited by postcolonial states. That is how the 'European practice of demarcated borders was imposed upon, and subsequently internalized by, postcolonial [states]'.⁶⁴

⁵⁷ Ibid.

⁵⁸ Ibid. 8; Amit Ranjan, *India–Bangladesh Border Disputes: History and Post-LBA Dynamics* (Springer 2018) 17. See generally Edney, *Mapping an Empire* (n 44).

⁵⁹ See Mahmud, 'Colonial Cartographies, Postcolonial Borders' (n 1) 23.

⁶⁰ Ibid.

⁶¹ Verkijika G Fanso, 'Traditional and Colonial African Boundaries: Concepts and Functions in Inter-group Relations' (1986) 137–138 *Présence Africaine* (nouvelle série) 58, 59.

⁶² Lindley, *The Acquisition and Government of Backward Territory* (n 49).

⁶³ Ibid.

⁶⁴ See Mahmud, 'Colonial Cartographies, Postcolonial Borders' (n 1) 24.

3.2 Meaning of border after colonisation

From its very inception, modern geography was intrinsically related to knowledge production. Thus, drawing borders and maps was considered as an intellectual exercise. Drawing a border meant knowing the territory properly. This was related to the Enlightenment (a product of Renaissance) and the importance it gave to knowledge.⁶⁵ The defendants of imperialism argued in the 19th century that ‘geographical knowledge was the key to imperial power.’⁶⁶ There is an intimate relationship between geography and empire.⁶⁷ Thus, territories were ‘discovered’ and not found and these territories were always ‘new’, as if they came into existence only after the colonisers reached and discovered them. Mahmud notes that ‘[g]eography adopted the confident regime of reason that “there can be nothing so remote that we cannot reach to it, nor so recondite that we cannot discover it.”’⁶⁸

The majority of the postcolonial states have inherited borders which were largely determined by the geopolitical, economic, and administrative policies of their colonisers. These borders were often carved up with little regard to the historical, cultural, or ethnic realities. As a result of this border-drawing exercise by the colonisers, historical and cultural groups were split, and different cultures, religions, languages, identities, and affiliations were enclosed in demarcated territorial units.⁶⁹ These inherited colonial borders, which have been accepted by the postcolonial states, often provoke challenge and resistance from the local population due to the shared yet divided questions of identity and difference.⁷⁰

Shahabuddin writes that ‘[p]ost-colonial states are essentially products, via colonization and decolonization, of the international legal norms and associated rules crafted by Europe. International law has contributed to the formation of post-colonial statehood and the ensuing atrocities, which involve a wide range of issues such as: the drawing of post-colonial boundaries.’⁷¹

3.3 Impact of colonial borders on Indo-Nepal relations

A decade ago, Mahmud lamented that modern social theory had privileged time over geography (space). He thus wrote that the ‘[e]xamination of the role of geography within the matrix of modern regimes of knowledge production in general, and of colonialism in particular, is sorely needed.’⁷² He further noted that:

⁶⁵ See *ibid.* 17–18, 24.

⁶⁶ Morag Bell, Robin Butlin, and Michael Heffernan (eds), *Geography and Imperialism, 1820–1940* (Manchester University Press 1995) x.

⁶⁷ Edney, *Mapping an Empire* (n 44) 1.

⁶⁸ Mahmud, ‘Colonial Cartographies, Postcolonial Borders’ (n 1) 18.

⁶⁹ *Ibid.* 25.

⁷⁰ *Ibid.*

⁷¹ Mohammad Shahabuddin, ‘Post-colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar’ (2019) 9(2) *Asian Journal of International Law* 334, 336.

⁷² Mahmud, ‘Colonial Cartographies, Postcolonial Borders’ (n 1) 17.

The survey of Bengal, initiated in 1763, and the resulting *Bengal Atlas* (1779) and the *Map of Hindoostan* (1782), were deemed works of ‘the first importance both for strategic and administrative purposes’.... The Great Trigonometrical Survey of India (1878), guided by the ‘flawed ... certainty and correctness granted by the Enlightenment’s epistemology’ finally helped colonizers produce ‘their India’.⁷³

The creation of British India required the prior acceptance by the British of ‘India’ as signifying a specific region of the earth’s surface.⁷⁴ It is with this aim that they started mapping India.

Since the geography of the India and Nepal border included mountains and rivers, these borders were mapped differently. Lauren Benton highlights the proclivity of European colonisers to ‘categoriz[e] mountain and hill regions as distinctive political and cultural spaces ... [and to] portray ... highlanders as belligerents ... [and] hill regions as tending towards violence’.⁷⁵ Mahmud notes that ‘[m]odern geography facilitated such an image and colonial designs were devised to subdue and control mountain and hill regions.’⁷⁶ Lindley explains this colonial practice perfectly by writing that ‘[m]ountain ranges form at once a permanent line of demarcation and a barrier against invasion. The slopes up to the summits are presumed to belong to the same state as the adjoining country, and the boundary is the watershed or water-divide.’⁷⁷ He notes that it was the official policy of the Government of India ‘to make the north-eastern boundary of the Indian Empire coincide with the physical watershed’.⁷⁸ He then gives the example of the treaty of 17 March 1890 between Great Britain and China where it was agreed that ‘the boundary of Sikkim and Tibet shall be the crest of the mountain range separating the waters flowing into the rivers of Sikkim and Tibet respectively.’⁷⁹ The same mechanism was used by Britain while delimiting British India’s borders with Nepal. Such borders, based on geographical rather than social realities, often result in disputes.

Shahabuddin writes that ‘[d]iverse political entities with their own complex characteristics were compelled to adopt a Western concept of “statehood”—which embodies specific ideas of territory, the nation, and ethnicity—in order to gain recognition.’⁸⁰ Across the global South, colonial borders (zones of control and influence) have resulted in postcolonial states which lack correspondence between their borders and socio-political identity. These colonial borders have either split cultural groups or have put divergent cultural identities within a common territory. As a

⁷³ Ibid. 19.

⁷⁴ Edney, *Mapping an Empire* (n 44) 3.

⁷⁵ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge University Press 2014) 223–224.

⁷⁶ Mahmud, ‘Colonial Cartographies, Postcolonial Borders’ (n 1) 20–21.

⁷⁷ Lindley, *The Acquisition and Government of Backward Territory* (n 49) 274–275.

⁷⁸ Ibid. 275.

⁷⁹ Ibid.

⁸⁰ Shahabuddin, ‘Post-colonial Boundaries, International Law’ (n 71) 335.

result, the crisis of the postcolonial state stems from their artificial colonial boundaries and the ‘specter of the colonial still haunt the postcolonial nation’.⁸¹

4 International law

The border-related problems in the postcolonial states are often related to international law.⁸² Anghie has highlighted the complicit role played by international law in the entire colonial project.⁸³ The ramifications of this can be seen in the modern-day postcolonial states in South Asia. One way in which these ramifications can be studied is through the international law principle of *uti possidetis*. There is ample literature available on this principle, but predominantly the literature is skewed in favour of the African continent.⁸⁴ Not much has been written about the application and subsequent ramification of this principle in South Asia. Most of the eight South Asian countries have either been colonies or had fought battles with the colonisers. India, Pakistan, and Bangladesh were part of the British Indian empire. The British fought wars with and drew borders with Afghanistan, China, and Nepal. These borders have practical modern-day ramifications. The border between Pakistan and Afghanistan is still contested, much like the borders between India and China, India and Nepal, etc. Surprisingly though, these borders have not been studied from the lens of the principle of *uti possidetis*. There is some literature on the Pakistan-Afghanistan border,⁸⁵ but not about the other postcolonial borders in South Asia.⁸⁶

In the last one year, however, there has been an increase in the literature on South Asia and the principle of *uti possidetis*. Mohammad Shahabuddin has written on the negative impacts of this principle and its complicit role in causing the Rohingya crisis.⁸⁷ His article talks about the problems the principle of *uti possidetis* can cause

⁸¹ Mahmud, ‘Colonial Cartographies, Postcolonial Borders’ (n 1) 50.

⁸² Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

⁸³ Ibid. 82.

⁸⁴ Amadife and Warhola, ‘Africa’s Political Boundaries’ (n 4) 533; Del Sarto, ‘Contentious Borders in the Middle East and North Africa’ (n 13); Demhardt, ‘Evolution and Legacy of Africa’s Colonial Boundaries’ (n 13); Blanton et al., ‘Colonial Style and Post-colonial Ethnic Conflict in Africa’ (n 13); Oduntan, *International Law and Boundary Disputes in Africa* (n 4) 330–349.

⁸⁵ See Mahmud, ‘Colonial Cartographies, Postcolonial Borders’ (n 1); Fawad Poya, ‘The Status of Durand Line under International Law: An International Law Approach to the Pakistan-Afghanistan Frontier Dispute’ (2020) 35(2) *Journal of Borderland Studies* 227.

⁸⁶ While making this claim, I understand that there might be some literature on this subject, but such literature is not visible. Visibility depends on the forum where a particular piece gets published and there are numerous law journals which are published by their respective universities. More often than not, they are not visible. Sometimes, literature, especially that written in vernacular languages, is either not visible or not accessible. This, of course, is because of no fault of their authors and is also not a comment on their quality.

⁸⁷ See Shahabuddin, ‘Post-colonial Boundaries, International Law’ (n 71). While Shahabuddin’s article is about Myanmar which is not a South Asian state, I have included it here since the border of Myanmar was drawn in relation to the British Empire. So, Shahabuddin also informs us about how the Indians went about arguing for independence and how it was related to the boundary formation.

within the colonial borders. Vanshaj Ravi Jain has also written a piece on this theme. His piece is directly related to South Asia and talks about the Radcliffe Line which divided Punjab (in modern-day India and Pakistan). Much like Shahabuddin, Jain also talks about the role of *uti possidetis* in producing intrastate violence which, he points out, has been entirely overlooked.⁸⁸ Jain argues that ‘any study of *Uti Possidetis* is incomplete without examining its application in South Asia.’ For this claim, he gives two reasons. Firstly, he says that ‘if the claim that *Uti Possidetis* was applied in South Asia is found to be true, it significantly impacts the legal arguments used to critique the foundation of this rule.’ Secondly, he points out that ‘the consequences that *Uti Possidetis* precipitated in South Asia are different from those studied in Africa and Latin America, and thus play a critical role in widening the functional critique currently levied against the rule.’⁸⁹

Before Jain, KD Raju had written a piece on India’s border dispute with China in the Doklam area.⁹⁰ However, Raju has just made a passing reference to the principle of *uti possidetis*,⁹¹ and has not analysed the relationship of this principle and the Indo-China border dispute. Most recently, P Ishwara Bhat has written a piece in the *Indian Journal of International Law* on peaceful resolution of international boundary disputes.⁹² Bhat has presented a TWAIL (Third World Approaches to International Law) critique of the principle of *uti possidetis* by taking BS Chimni’s ‘Customary International Law: Third World Perspective’⁹³ as a reference point.⁹⁴ Bhat points out that ‘[t]he Third World perspectives introduce new debate on impact of boundary jurisprudence and point out the weakness of the *uti possidetis juris* rule that it justifies colonial policy and supports capitalism.’⁹⁵ The piece is very exhaustive since Bhat has discussed all the border disputes India is and was engaged with. At the end, Bhat has suggested how the dispute with Nepal can be resolved.⁹⁶ I will return to his suggestions in a later part of this article.

The present article aims to fill the gap in the literature on the Indo-Nepal border dispute. Other than Bhat, none of the authors has talked about this dispute and understandably so since they were focused on one specific border dispute. And though Bhat has talked about the Indo-Nepal border dispute, since his article is very broad (it focuses on the resolution of boundary disputes and not on one single such dispute), it does not deal with the Indo-Nepal border dispute comprehensively.

⁸⁸ VR Jain, ‘Broken Boundaries: Border and Identity Formation in Post-colonial Punjab’ (2020) 10(2) *Asian Journal of International Law* 261, 262.

⁸⁹ *Ibid.* 266.

⁹⁰ KD Raju, ‘Doklam and Beyond: Revisiting the India-China Territorial Disputes — An International Law Perspective’ (2020) 19(1) *India Review* 85.

⁹¹ *Ibid.* 94.

⁹² See Bhat, ‘Peaceful Resolution of International Boundary Disputes’ (n 47).

⁹³ BS Chimni, ‘Customary International Law: Third World Perspective’ (2018) 112(1) *American Journal of International Law* 1.

⁹⁴ See Bhat, ‘Peaceful Resolution of International Boundary Disputes’ (n 47) 10.

⁹⁵ *Ibid.* 41.

⁹⁶ *Ibid.* 39–40.

4.1 Principle of *uti possidetis*

The international law principle of *uti possidetis* has been a contentious one. The principle ‘treats the acquisition and possession of a state’s territory as given, with no territorial adjustments allowable without the consent of the currently occupying parties’.⁹⁷ It favours actual possession rather than a true title to the territory. Therefore, there is no difference between a *de jure* possession and a *de facto* possession. The principle, like most of international law, has a colonial origin.⁹⁸ It made colonial territorial holdings permanent and also established the ground rules for improving relations between European powers.⁹⁹

In Rome, the principle was applied to cases in which two individuals disagreed as to ownership of property.¹⁰⁰ While the judicial process went on, the court used to apply this principle for maintenance of status quo. Shahabuddin notes that the principle reappeared in the early 18th century together with the concept of the *status quo post bellum* (the state of possession existing at the conclusion of war), though still connected with the concept of possession.¹⁰¹ It was then reformulated in the 19th century, in connection with the colonisation of Latin America.¹⁰² The then Spanish colonies had agreed to apply the principle to resolve their territorial disputes with each other. Subsequently, when decolonisation began in the 20th century, the principle was extended to their colonies by the withdrawing colonisers. Since the principle mandated that ‘new States ... come to independence with the same borders that they had when they were administrative units within the territory or territories of one colonial power,’ it froze colonial boundaries.¹⁰³ This became problematic because, as mentioned before, the colonial borders were not created keeping in mind the socio-political realities.¹⁰⁴ Thus, in the wake of decolonisation, the new postcolonial states had to reimagine their identities.¹⁰⁵ In the context of the Indo-Nepal border conflict too, this reimagination is visible. A case in point is the Madhesi community mentioned before. They never got a chance to regroup due to the existence of India and Nepal as two separate and sovereign entities. India continued occupying the territories the Britishers had acquired. As a result, the Madhesi community on either side of the Indo-Nepal border have relatives on the other side. This reimagination of

⁹⁷ Mahmud, ‘Colonial Cartographies, Postcolonial Borders’ (n 1) 59.

⁹⁸ Anghie, ‘Francisco De Vitoria and the Colonial Origins of International Law’ (n 3); Anghie, ‘The Evolution of International Law’ (n 3); Bowden, ‘The Colonial Origins of International Law’ (n 3); Gathii, ‘International Law and Eurocentricity’ (n 3); Benton and Ford, *Rage for Order* (n 3); Miller, ‘The Doctrine of Discovery’ (n 3).

⁹⁹ Vasuki Nesiah, ‘Placing International Law: White Spaces on a Map’ (2003) 16(1) *Leiden Journal of International Law* 1, 24.

¹⁰⁰ Oduntan, *International Law and Boundary Disputes in Africa* (n 4) 330.

¹⁰¹ See Shahabuddin, ‘Post-colonial Boundaries, International Law’ (n 71) 341.

¹⁰² See Nesiah, ‘Placing International Law’ (n 99) 23–24.

¹⁰³ Malcolm Shaw, ‘The Heritage of States: The Principle of *Uti Possidetis Juris* Today’ (1996) 67(1) *British Yearbook of International Law* 75, 97.

¹⁰⁴ See Shahabuddin, ‘Post-colonial Boundaries, International Law’ (n 71) 336.

¹⁰⁵ See Mahmud, ‘Colonial Cartographies, Postcolonial Borders’ (n 1) 60.

the identities and the practical day-to-day problems it causes is one of the reasons why India has a very porous border with Nepal.

One of the reasons why international law supports the principle of *uti possidetis* is because of its conflict-avoiding nature.¹⁰⁶ Thus, despite its colonial origin, the principle continued to be applied in postcolonial states.¹⁰⁷ It is said that in the wake of decolonisation, had the colonies been given a chance to redraw their borders, it would have led to conflicts. Thus, the colonies were required to respect the border drawn for them by their colonisers. But the conflicts have nonetheless happened. Africa is ripe with such conflicts, for example the Nadapal boundary dispute between Kenya and South Sudan, border disputes between Sudan and South Sudan, land and maritime disputes between the Cameroon and Nigeria.¹⁰⁸ In South Asia, too, there are many examples of such disputes. The Durand Line between Pakistan and Afghanistan, the border between India and Bangladesh, between India and China, and between India and Nepal are/were disputed.

Some of the border-related conflicts have reached the International Court of Justice (ICJ). One such instance was the frontier dispute between Burkina Faso and Mali. The ICJ designated *uti possidetis* as ‘a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs’.¹⁰⁹ The court further said that the ‘obvious purpose (of the principle) is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.’¹¹⁰ It further observed:

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.¹¹¹

About the ICJ, Vasuki Nesiiah notes that its ‘jurisprudence ... in the postcolonial context often ... both “exposes and colludes” in international law’s mystifications, its own condemnation of the colonial legacy conveyed through the deployment of colonialism’s tropes.’¹¹²

Mahmud concludes that ‘[t]he doctrine of *uti possidetis*, far from being grounded in any sound legal principle, is thus more a political instrument to legitimize

¹⁰⁶ See Shahabuddin, ‘Post-colonial Boundaries, International Law’ (n 71) 347; Nesiiah, ‘Placing International Law’ (n 99) 23–24.

¹⁰⁷ Nesiiah, ‘Placing International Law’ (n 99) 24.

¹⁰⁸ See, generally, Oduntan, *International Law and Boundary Disputes in Africa* (n 4).

¹⁰⁹ *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, ICJ Reports (1986) 554, 565, para 20.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* 566, para 20.

¹¹² Nesiiah, ‘Placing International Law’ (n 99) 2.

existing state boundaries.¹¹³ He refers to the Beagle Channel Arbitration where it was observed that the principle is ‘possibly, at least at first, a political tenet rather than a true rule of law’.¹¹⁴ His argument is that:

uti possidetis furnishes a cloak of legitimacy over colonial disposition of territories of the global South by sidestepping the questions of the origins of these dispositions. By forcing disparate people to circumscribe their political aspirations within predetermined territorial bounds, *uti possidetis* reverses the vision of self-determination that seeks to protect vulnerable populations by allowing them political and territorial arrangements of their own.¹¹⁵

Nesiah argues that:

There has been a strong repudiation of *uti possidetis* as extending the reach of ills wrought by colonialism into the postcolonial moment. Rejecting *uti possidetis* for imposing the arbitrary boundaries of colonial administration, ... critics argue instead for more ‘authentic’ boundaries that track ‘real’ community, defined variously through ethnos, political allegiance, culture, language, religion, and so on.¹¹⁶

5 Conclusion

In its formative years, international law was couched in the language of natural law as is evident from the writings of the classical writers on the subject. Hugo Grotius had sketched a jurisprudence which explained the natural law basis for international law.¹¹⁷ Since the signing of the Treaty of Westphalia in 1648 till the disintegration of the Holy Roman Empire, there was very little need for any change in understanding international law. France and Britain, the new nation states, were continuously fighting each other for supremacy. However, after Napoleon’s defeat in 1814, Britain emerged as the winner of this lengthy battle.¹¹⁸ Economic progress was the outcome of the following period of peace.¹¹⁹ This progress and peace, however, were confined to the territories of the colonisers. This was despite the fact that the wars which had brought peace and progress were fought in the colonies.¹²⁰ However, because the economic progress of these colonisers depended on the colonies, the former continued exploiting resources. This exploitation resulted in episodes of rebellions

¹¹³ Mahmud, ‘Colonial Cartographies, Postcolonial Borders’ (n 1) 65.

¹¹⁴ Ibid.

¹¹⁵ Ibid. 65–66.

¹¹⁶ Nesiah, ‘Placing International Law’ (n 99) 27.

¹¹⁷ Antony Anghie, ‘Towards a Postcolonial International Law’ in Prabhakar Singh and Benoit Mayer (eds), *Critical International Law: Postrealism, Postcolonialism, and Transnationalism* (Oxford University Press 2014) 124.

¹¹⁸ RP Anand, *Development of Modern International Law and India* (Nomos Verlagsgesellschaft 2005) 66.

¹¹⁹ Ibid. 69.

¹²⁰ For example, see the famines in colonial India.

against the colonial rule.¹²¹ The colonisers thus felt the need to protect their colonial possessions. Eventually, they negotiated treaties among themselves. Through these treaties, the colonisers demarcated the borders of their colonies.¹²² Therefore, in the post-1814 era, international law developed through such colonial tools of treaties. This development (signing of treaties) was reflective of the shift from a naturalist to a positivist understanding of international law.

Drawing up well-defined borders is reflective of this positivist turn in international law.¹²³ Positivists wanted well-laid-out laws to avoid any conflicts between them. These positivists, mostly Europeans, were also the ones who provided legal justification for colonisation of territories.¹²⁴ This turn towards positivism was a result of colonialism and in fact played a major role in causing and legitimising colonisation. Lindley thus wrote:

No doubt, at the time when large areas of territory were available for appropriation, it was open to a State, on taking possession of a particular region, to notify its intention of extending its dominion up to boundaries which it could fix upon as it chose, and thus provisionally reserve to itself, so long as it did not encroach upon territory already appropriated or claimed, an area which, within reason, might be bounded in almost any manner.¹²⁵

In all this, the principle of *uti possidetis* has also played a complicit role. So, the question is, should the postcolonial states completely disregard this principle? It might be difficult to do so considering that the ICJ has called it a general principle of law.

The solution might be to turn towards the principle of equity, says Luker.¹²⁶ He suggests that '*Uti Possidetis* should not be disregarded entirely, only applied judiciously, and always with an eye on what other policy options may provide a more just solution to questions of territory. The doctrine will then have progressed on its way to becoming an effective tool of the international order.'¹²⁷

Similarly, Bhat argues that the 'Nepal-India territorial dispute requires the application of *uti possidetis* rule and other principles.'¹²⁸ He has suggested that:

¹²¹ Like the 1857 rebellion in India and the 1865 rebellion in Jamaica against the British rule.

¹²² For example, the 'Scramble for Africa'. See generally, Matthew Craven, 'Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade' (2015) 3(1) *London Review of International Law* 31; Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 82) 90–97.

¹²³ Luigi Nuzzo, 'Territory, Sovereignty, and the Construction of the Colonial Space' in Martti Koskeniemi, Walter Rech, and Manuel Jiménez Fonseca (eds), *International Law and Empire Historical Explorations* (Oxford University Press 2016).

¹²⁴ Anghie, 'Francisco De Vitoria and the Colonial Origins of International Law' (n 3).

¹²⁵ Lindley, *The Acquisition and Government of Backward Territory* (n 49) 271.

¹²⁶ Daniel Luker, 'On the Borders of Justice: An Examination and Possible Solution to the Doctrine of *Uti Possidetis*' in Russell A Miller and Rebecca M Bratspies (eds), *Progress in International Law* (Martin Nijhoff 2008).

¹²⁷ *Ibid.* 170.

¹²⁸ Bhat, 'Peaceful Resolution of International Boundary Disputes' (n 47) 40.

India's position is to be 'photographed' to the time of decolonisation, and as per *uti possidetis juris* rule, administrative records about the possession by British India become decisive. Further, maps standing for a long time cannot be undone by a new map, however approved by the contesting party (even by constitutional amendment) after the occurrence of the dispute.¹²⁹

Bhat's suggestion of judicious application of the principle of *uti possidetis* is much closer to the ICJ's ruling in the *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*,¹³⁰ and the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*.¹³¹ In both these cases, the ICJ was focused on achieving equitable results and also classified equity as a general principle of law.¹³² Equity as a legal concept is a direct emanation of the idea of justice.¹³³ It means considerations of fairness and reasonableness are often necessary for the application of settled rules of law.¹³⁴

Daniel Luker has highlighted three problems with this idea of equitable solution, but all three of his reasons are regarding the situation where the disputes have to be taken to the ICJ.¹³⁵ Bhat, on the other hand, seem to be suggesting 'judicious application' in bilateral negotiation while trying to resolve the border dispute. This might be a better solution. As this article has highlighted, the borders between India and Nepal were drawn by the colonisers. Further, no attention was paid to the socio-political realities while drawing these borders. Post decolonisation, India is simply following these colonial borders, a practice which is perfectly fine according to the international law principle of *uti possidetis*. However, as was highlighted earlier, this colonial principle has caused many border disputes. The idea of boundary can never be separated from the culture and history of the people it surrounds or from the nature of their political groupings and the territory occupied by them.¹³⁶ Nonetheless, as Mahmud notes, 'modern geography produced classifications of bodies and spaces that enabled colonial powers to draw lines on a map which had little relation to underlying cultural or economic patterns'.¹³⁷ He further notes that '(f)

¹²⁹ Ibid. 39–40.

¹³⁰ *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (1982 ICJ 18 (24 February)).

¹³¹ *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* (1982 ICJ 13 (3 June)).

¹³² Article 38(2) of the Statute of the ICJ lists equity as a source of international law. It states: 'This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.' However, academics are divided over whether *ex aequo et bono* under Article 38(2) is same as equity. The Permanent Court of International Justice in the *Free Zones* case had ruled that they are not the same. See generally James Crawford, *Brownlie's Principles of International Law* (8th edn, Oxford University Press 2012) 45–46; Ruth Lapidot, 'Equity in International Law' (1987) 81 *Proceedings of the Annual Meeting (American Society of International Law)* 138; SK Chattopadhyay, 'Equity in International Law: Its Growth and Development' (1975) 5(2) *Georgia Journal of International and Comparative Law* 381.

¹³³ See *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 130) 60, para 71.

¹³⁴ Crawford, *Brownlie's Principles of International Law* (n 132) 44.

¹³⁵ Luker, 'On the Borders of Justice' (n 126) 168.

¹³⁶ See Fanso, 'Traditional and Colonial African Boundaries' (n 61) 58.

¹³⁷ Mahmud, 'Colonial Cartographies, Postcolonial Borders' (n 1) 20.

orged on the anvil of modern European history and enshrined in modern international law, modern statehood and sovereignty are deemed the preserve of differentiated ‘nations’ existing within exclusive and defined territories’.¹³⁸ Jain writes that in his study ‘*uti possidetis* in South Asia, far from the ‘objective’, ‘neutral’ solution it is often proclaimed to be, has been shown to be little more than a series of political choices disguised in judicial garb’.¹³⁹

Now, to resolve the Indo-Nepal border dispute, one way would be to let go of this principle and adopt other principles,¹⁴⁰ like that of equity, to redraw the borders based on the ground realities. India’s successful border delimitation exercise with Bangladesh, based on ground realities, should act as a boost to resolving the border dispute with Nepal too. Here, it must also be highlighted that the ICJ had rejected equity in favour of *uti possidetis*. It had held that:

to resort to the concept of equity in order to modify an established frontier would be quite unjustified. Especially in the African context, the obvious deficiencies of many Frontiers inherited from colonisation, from the ethnic, geographical or administrative standpoint, cannot support an assertion that the modification of these frontiers is necessary or justifiable on the ground of considerations of equity. These frontiers, however unsatisfactory they may be, possess the authority of the *uti possidetis* and are thus fully in conformity with contemporary international law.¹⁴¹

Therefore, what the ICJ said in this case is that as long as the borders are in consonance with the principle of *uti possidetis*, states should accept the borders. But, as I have argued, the postcolonial states need to understand the colonial origins and aims of the principle of *uti possidetis* and subsequently reject its *obvious* application.

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¹³⁸ Ibid. 48.

¹³⁹ Jain, ‘Broken Boundaries’ (n 88) 289.

¹⁴⁰ Crawford, *Brownlie’s Principles of International Law* (n 132).

¹⁴¹ *Frontier Dispute (Burkina Faso/Republic of Mali)* (n 109) 633, para 149.