CASE REVIEW

The *Cameroon v. Nigeria* Case – When the ICJ set *Pacta Sunt Servanda* and *Nemo Dat Quod Non Habet* to Nought *

1. Introduction

On 29 March 1994 the Government of the Republic of Cameroon ('Cameroon') filed in the Registry of the International Court of Justice ('the Court' or 'ICJ') an Application instituting proceedings against the Government of the Federal Republic of Nigeria ('Nigeria') concerning *inter alia*, a dispute described as '*relating essentially to the question of sovereignty over the Bakassi Peninsula*'.[1] In its Application, Cameroon requested the Court to adjudge and declare inter alia: [2]

> *(a)* that sovereignty over the Peninsula of Bakassi is Cameroonian, by virtue of international law, and that that Peninsula is an integral part of the territory of Cameroon;
> *(b)* that the Federal Republic of Nigeria has violated and is violating the fundamental principle of respect for frontiers inherited from colonization *(uti possidetis juris)*;
> *(c)* that by using force against the Republic of' Cameroon, the Federal Republic of Nigeria has violated and is violating its obligations under international treaty law and customary law;
> *(d)* that the Federal Republic of Nigeria, by militarily occupying the Cameroonian Peninsula of Bakassi, has violated and is violating the obligations incumbent upon it by virtue of treaty law and customary law;
> *(e)* that in view of these breaches of legal obligation, mentioned above, the Federal Republic of Nigeria has the express duty of putting an end to its military presence in Cameroonian territory, and effecting an immediate and unconditional withdrawal of its troops from the Cameroonian Peninsula of Bakassi; etc.

2. Facts of the Case

Cameroon and Nigeria are States situated on the West Coast of Africa. Their land boundary extends from Lake Chad in the north to the Bakassi Peninsula in the south. The dispute between the Parties as regards their land boundary falls within an historical framework marked initially, in the nineteenth and early twentieth centuries, by the actions of the European Powers in the partitioning of Africa, followed by changes in the status of the relevant territories under the League of Nations mandate system, then the United Nations trusteeships, and finally by the territories' accession to independence. This history is reflected in a number of conventions and treaties, diplomatic exchanges, certain administrative instruments, maps of the period and various documents.[3] The issue of the boundary in Bakassi and of sovereignty over the peninsula also involves specific instruments. On 10 September 1884 Great Britain and the Kings and Chiefs of Old Calabar concluded a Treaty of Protection (the '1884 Treaty'), under which Great Britain undertook to extend its protection to these Kings and Chiefs, who in turn agreed and promised *inter alia* to refrain from entering into any agreements or treaties with foreign nations or Powers without the prior approval of the British Government. Shortly before the First World War, the British Government concluded two agreements with Germany, dated respectively 11

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[1] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002*, p. 303

[2] Ibid at para 25

[3] Ibid at para 30

March and 12 April 1913, whose objects included '*the Settlement of the Frontier between Nigeria and the Cameroons, from Yola to the Sea*' and which placed the Bakassi Peninsula in German territory.[4] At the end of the First World War, al1 the territories belonging to Germany in the region, extending from Lake Chad to the sea, were apportioned between France and Great Britain by the Treaty of Versailles and then placed under British or French mandate by agreement with the League of Nations. In order to define the borders of the mandate territories, the first instrument drawn up for this purpose, was the Franco-British Declaration signed on 10 July 1919 by Viscount Milner, the British Secretary of State for the Colonies, and Henry Simon, the French Minister for the Colonies (the 'Milner-Simon Declaration'). In order to clarify the initial instrument, on 29 December 1929 and 31 January 1930 Graeme Thomson, Governor of the Colony and Protectorate of Nigeria, and Paul Marchand, *commissaire de la République française au Cameroun*, signed a further agreement (the 'Thomson-Marchand Declaration'). This Declaration was approved and incorporated in an Exchange of Notes dated 9 January 1931 between A. de Fleuriau, the French Ambassador in London, and Arthur Henderson, the British Foreign Minister (the 'Henderson-Fleuriau Exchange of Notes').[5]

After the Second World War, British and French mandates over the Cameroons were replaced by United Nations trusteeship agreements. These agreements referred to the line laid down by the Milner-Simon Declaration to describe the respective territories placed under the trusteeship of the two European Powers. Pursuant to Great Britain's Order in Council of 2 August 1946 regarding the territories then under British mandate, providing for the administration of the Nigeria Protectorate and Cameroons (the '1946 Order in Council'), the regions under its trusteeship were divided into two for administrative purposes, thus giving birth to the Northern Cameroons and the Southern Cameroons. The 1946 Order in Council contained provisions describing the line separating these two regions and provided that they would be administered from Nigeria. On 1 January 1960, French Cameroons acceded to independence on the basis of the boundaries inherited from the previous period. Nigeria did likewise on 1 October 1960. [6] In accordance with UN directives, the British Government organized separate plebiscites in the Northern and Southern Cameroons, '*in order to ascertain the wishes of the inhabitants . . . concerning their future*'.[7] In those plebiscites, held on 11 and 12 February 1961, the population of the Northern Cameroons '*decided to achieve independence by joining the independent Federation of Nigeria'*, whereas the population of the Southern Cameroons 'decided to achieve independence by joining the independent Republic of Cameroon.[8]

In pursuance of its application before the ICJ[9], Cameroon in its final submissions requested the Court to adjudge and declare that sovereignty over the peninsula of Bakassi is Cameroonian. Nigeria took the contrary position. In its final submissions it requested that the Court should as to the Bakassi Peninsula, adjudge and declare that sovereignty over the Peninsula is vested in the Federal Republic of Nigeria.[10] Cameroon contended that the Anglo-German Agreement of 11 March 1913 fixed the course of the boundary between the Parties in the area of the Bakassi Peninsula, placing the latter on the German side of the boundary. Hence,

[4] Ibid at para 37
[5] Ibid at para 34
[6] Ibid para 35
[7] General Assembly resolution 1350 (XIII) of 13 March 1959
[8] General Assembly resolution 1608 (XV) of 21 April 1961
[9] (n 2)
[10] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment,* (n 1) para 193

when Cameroon and Nigeria acceded to independence, this boundary became that between the two countries, successor States to the colonial powers and bound by the principle of *uti possidetis.* For its part, Nigeria argued that title lay in 1913 with the Kings and Chiefs of Old Calabar, and was retained by them until the territory passed to Nigeria upon independence. Great Britain was therefore unable to pass title to Bakassi because it had no title to pass *(nemo dat quod non habet):* as a result, the relevant provisions of the Anglo-German Agreement of II March 1913 must be regarded as ineffective.[11]

3. The Decision and the Ratio Decidendi

At the Court, Cameroon contended that the Agreement of 11 March 1913 fixed the course of the boundary between the Parties in the area of the Bakassi Peninsula and placed the latter on the Cameroonian side of the boundary. Cameroon further stated that, since the entry into force of the Agreement of March 1913, Bakassi has belonged to its predecessors, and sovereignty over the peninsula is currently vested in Cameroon.[12] Nigeria contended that the title to sovereignty over Bakassi was originally vested in the Kings and Chiefs of Old Calabar, and argued that in the pre-colonial era, the City States of the Calabar region constituted an '*acephalous federation*' consisting of '*independent entities with international legal personality*'. It considered that, under the Treaty of Protection signed on 10 September 1884 between Great Britain and the Kings and Chiefs of Old Calabar, the latter retained their separate international status and rights, including their power to enter into relationships with '*other international persons*' although under the Treaty that power could only be exercised with the knowledge and approval of the British Government. According to Nigeria, the Treaty only conferred limited rights on Great Britain; in no way did it transfer sovereignty to Britain over the territories of the Kings and Chiefs of Old Calabar. Nigeria argued that, since Great Britain did not have sovereignty over those territories in 1913, it could not cede them to a third party. It followed that the relevant part of the Anglo-German Agreement of 11 March 1913 was *'outwith the treaty-making power of Great Britain, and that part was not binding on the Kings and Chiefs of Old Calabar'.* Nigeria added that the limitations on Great Britain's powers under the 1884 Treaty of Protection, '*and in particular its lack of sovereignty over the Bakassi Peninsula and thus its lack of legal authority in international law to dispose of title to it, must have been known to Germany at the time the 1913 Treaty was concluded, or ought to have been on the assumption that Germany was conducting itself in a reasonably prudent way*'. In Nigeria's view, the invalidity of the Agreement of 11 March 1913 was on grounds of inconsistency with the principle *nemo dat quod non habet*.[13]

In reply, Cameroon contended that Nigeria's argument that Great Britain had no legal power to cede the Bakassi Peninsula by treaty was manifestly unfounded. In Cameroon's view, the treaty signed on 10 September 1884 between Great Britain and the Kings and Chiefs of Old Calabar established a '*colonial protectorate*' and, '*in the practice of the period, there was little fundamental difference at international level, in terms of territorial acquisition, between colonies and colonial protectorates*'; and that the key element of the colonial protectorate was the '*assumption of external sovereignty by the protecting State'*, which manifested itself principally through '*the acquisition and exercise of the capacity and power to cede part of the protected territory by international treaty, without any intervention by the population or entity in question'*. Cameroon further argued that, even on the hypothesis that Great Britain did not

[11] Ibid. at para 194
[12] Ibid. at para 200
[13] Ibid. at para 201

have legal capacity to transfer sovereignty over the Bakassi Peninsula under the Agreement of 11 March 1913, Nigeria could not invoke that circumstance as rendering the Agreement invalid, since neither Great Britain nor Nigeria, the successor State, ever sought to claim that the Agreement was invalid on this ground. In this regard Cameroon stated that, *'[o]n the contrary, until the start of the 1990s Nigeria had unambiguously confirmed and accepted the 1913 boundary line in its diplomatic and consular practice, its official geographical and cartographic publications and indeed in its statements and conduct in the political field*', and that *'[t]he same was true as regards the appurtenance of the Bakassi Peninsula to Cameroon'*.[14]

The first observation of the Court was to note that during the era of the Berlin Conference, European Powers entered into many treaties with local rulers. Great Britain concluded some 350 treaties with the local chiefs of the Niger delta. Among these were treaties in July 1884 with the Kings and Chiefs of Opobo and, in September 1884, with the Kings and Chiefs of Old Calabar. That these were regarded as notable personages is clear from the fact that these treaties were concluded by the consul, expressly as the representative of Queen Victoria, and the British undertakings of '*gracious favour and protection*' were those of Her Majesty the Queen of Great Britain and Ireland. In turn, under Article II of the Treaty of 10 September 1884, '*The King and Chiefs of Old Calabar agree[d] and promise[d] to refrain from entering into any correspondence, Agreement, or Treaty with any foreign nation or Power, except with the knowledge and sanction of Her Britannic Majesty's Government.*'[15]

Nigeria contended that the title of the 1884 Treaty and the reference in Article 1 to the undertaking of '*protection*', showed that Britain had no entitlement to do more than protect, and in particular had no entitlement to cede the territory concerned to third States: *'nemo dat quod non habet'*.[16] In this regard, the Court reasoned that the international legal status of a '*Treaty of Protection*' entered into under the law obtaining at the time cannot be deduced from its title alone, since some treaties of protection were entered into with entities which retained thereunder a previously existing sovereignty under international law. This was the case whether the protected party was henceforth termed *'protectorat"* (as in the case of Morocco, Tunisia and Madagascar (1885; 1895) in their treaty relations with France) or '*a protected State*' (as in the case of Bahrain and Qatar in their treaty relations with Great Britain). The Court further reasoned that in sub- Saharan Africa, however, treaties termed '*treaties of protection*' were entered into not with States, but rather with important indigenous rulers exercising local rule over identifiable areas of territory.[17]

The Court then came to the view that the 1884 Treaty signed with the Kings and Chiefs of Old Calabar did not establish an international protectorate, but was simply one of a multitude in a region where the local Rulers were not regarded as States. The Court convinced itself that the absence of evidence of a central federal power, and Britain from the outset regarding itself as administering the territories comprised in the 1884 Treaty, and not just protecting them were relevant in implying the absence of international personality to the Kings and Chiefs of Old Calabar. The Court reasoned that the fact that a delegation was sent to London by the Kings

[14] Ibid at para 202
[15] Ibid at para 203
[16] Ibid at para 204
[17] Ibid at para 205, the court then refereed to where Huber, sitting as sole arbitrator in the *Island of Palmas* case, explained that such a. treaty '*is not an agreement between equals; it is rather a form of interna1 organisation of a colonial territory, on the basis of autonomy of the natives . . . And thus suzerainty over the native States becomes the basis of territorial sovereignty as towards other members of the community of nations*.' (1928) 2 RIAA (*Reports of International Arbitral Awards),* 858-859

and Chiefs of Old Calabar in 1913 to discuss matters of land tenure cannot be taken as suggesting international personality. It then immediately contradicted itself when it deduced from the then practice that a feature of an international protectorate is that of ongoing meetings and discussions between the protecting Power and the Rulers of the Protectorate, but that in the present case, Nigeria cannot say that such meetings ever took place.[18] The Court held that, under the law at the time, Great Britain was in a position in 1913 to decide its boundaries with Germany in respect of Nigeria, including in the southern section.[19]

4. Critical Analysis

Generally, pre-colonial Africa did not consist of European type nation-states existing within fixed borders. Rather, there were a number of empires, emirates and kingdoms in many areas of the Continent, each of which was a government in its own right with sovereign powers. This was the case in Nigeria. European imperial powers used the concept of protectorate as the legal basis for much of their activity in Africa, acquiring protectorates on the basis of treaties of protection between themselves and the Kings and Chiefs of the protected lands. This system effectively met the European Powers' needs for a degree of control in the protectorates which excluded that of their rivals, while at the same time leaving in place the local authority of the Kings and Chiefs within their territories. It is accepted in international law that where territories are inhabited by tribes or peoples having a social and political organization, those territories are not *terra nullius* but are rather territories over which the local rulers have authority, and any acquisition of rights over or in relation to those territories must derive from agreements with those local rulers.[20]

The City States of the Calabar region were, in pre-colonial days, the holders of an original or historic title over their cities and their dependencies, and the Bakassi Peninsula was for long a dependency of Old Calabar. The British Crown acknowledged this historic title in treaties with the Kings and Chiefs of Old Calabar and it was this same historic title which subsisted under the umbrella of the Protectorate of Southern Nigeria created in 1906.[21] The political and legal personality of the Kings and Chiefs of Old Calabar were recognised in the treaty-making of the British Crown. Thus, in the period 1823 to 1884 no fewer than seventeen treaties were made between the British Government and the King and Chiefs of Old Calabar.[22]

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[18] Ibid at para 207

[19] Ibid at para 209

[20] *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* Counter-Memorial of The Federal Republic of Nigeria, volume 1, paras 616, 619, pp.87-88; see *Advisory Opinion on Western Sahara*, ICJ Reports 1975 at p. 39, para. 80

[21] *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* (n 20) paras 5.1 and 5.2 at p. 67; at para 6.35 at p. 94 – para 6.36 at p. 96, it was highlighted that contemporaneous evidence of the extent of Old Calabar, and in particular its inclusion of the Bakassi Peninsula, is available in the reports of the British Consul (Hewett) in September 1884, and of the later Consul (Johnston) in 1890. It is apparent that Bakassi was not peripheral to the domains of the Kings and Chiefs of Old Calabar, but was part of their heartlands.

[22] *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* (n 20) para 5.11 at p. 71 to para 5.13 at p. 74. The *Index* of *British Treaties* 1101-1968, published in three volumes in 1970, lists the following instruments: (1) Engagement of King of Caliba (cession of Lemain Island), signed at Lemain 14 April 1823. (2) Engagement of the King of Caleba permitting British subjects to cut and heave Stones and to make quarries on the mainland of Yani. Signed off McCarthy's Island 7 May 1827. (3) Treaty with King Eyamba. Signed at Old Calabar River 6 December 1841. Parties: Great Britain and Calabar. (4) Agreement signed by King Archibong of Calebar. Signed at Duke Town, Calebar 28 May 1849. (5) Agreement between the Chiefs of Old Calabar and the delegates of slaves of the Qua Plantations. Signed at Duke's Town 15 February 1851.

The first of the Old Calabar Protectorate Treaties to be concluded by the British Consul was the Preliminary Treaty with the Kings and Chiefs of Creek Town, Old Calabar River, signed on 23 July 1884. It was concluded between, on the one hand, the Kings and Chiefs of Creek Town, Old Calabar River, and, on the other, Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, *&c* represented by Lieutenant Moore, the Commander of HMS *Goshuwk.* It states that the parties, '*being desirous of maintaining and strengthening the relations of peace and friendship which have so long existed between them*', '*have agreed upon and concluded the following Articles'.* Article 1 of the Treaty records that there had been a 'request of the Kings, Chiefs, and people of Creek Town, Old Calabar River' and that Her Majesty the Queen '*in compliance with the request . . . hereby undertakes to extend to them, and the territory under their authority and jurisdiction, her gracious favour and protection'*. By Article II the Kings and Chiefs agreed to refrain from entering into any correspondence, Agreement or treaty with any foreign nation or Power, except with the knowledge and sanction of the British Government. A similar Preliminary Treaty was concluded the next day by the British Consul (Hewett) on behalf of Her Majesty with King Duke IV of Duke Town, '*in compliance with the wish of the Kings, Chiefs and people*'.[23] The second, and final, treaty in the present context was the Treaty of Protection with the Kings and Chiefs of Old Calabar, concluded on 10 September 1884. Again the parties were the British Queen (represented by the British Consul, Hewett) and the Kings and Chiefs of Old Calabar, apparently a compendious name for the various kings and chiefs in the area of the Calabar River. The purpose of the Treaty was the same as that of the Preliminary Treaty signed nearly two months earlier, and the first two Articles, were in substance identical with those of that earlier Treaty. The September Treaty, however, contained six additional Articles. These concerned the reservation of civil and criminal jurisdiction over British subjects to British authorities (Article III), settlement of disputes (Article IV), the obligations of the Kings and Chiefs to assist the British Consular authorities, and to act on their advice on a range of specified matters (Article V). The provision on freedom of trade in the territories of the Kings and Chiefs (Article VI) was not agreed by the Kings and Chiefs.[24] All through the discussions which led to the conclusion of the 1884 Treaty

Parties: Great Britain, Old Calabar, slaves of Qua Plantations. (6) Treaty with the Chiefs of Old Town, Old Calabar for the abolition of human sacrifice, the use of poison-nut and the practice of killing twin children. Signed at Old Town 21 January 1856. (7) Agreement with Duke Ephraim, King of Duke Town, Old Calabar. Signed 17 June 1856. (8) Agreement between the British supercargoes and the native traders of Old Calabar. Signed at Old Calabar River 19 September 1856. (9) Agreement with the Third Chief of Creek Town, Old Calabar, relative to the appointment of a British consul to reside at Fernando Po. Signed 16 January 1860. (10) Agreement with the Chiefs of Duke Town, Old Calabar, relative to the appointment of a British consul to reside at Fernando Po. Signed at Duke Town 3 May 1860. (11) Agreement with the King and Chiefs of Creek Town, Old Calabar for the abolition of substitutionary punishments. Signed 18 January 1861. (12) Agreement between the British and other supercargoes and the native traders of Old Calabar. Signed at Old Calabar River 5 May 1862. (13) Agreement with the King and Chiefs of Old Calabar (Duke Town) for the abolition of substitutionary punishments. Signed at Old Calabar 26 April 1871. (14) Treaty with the King and Chiefs of Creek Town, Old Calabar (recognition of King, and ratification of former treaties). Signed at Old Calabar River 27 February 1874. (15) Preliminary Treaty with Kings and Chiefs of Creek Town, Old Calabar River. Signed 23 July 1884. (16) Preliminary Treaty with Kings and Chiefs of Duke Town, Old Calabar. Signed at Old Calabar River 24 July 1884. (17) Treaty with the Kings and Chiefs of Old Calabar. Signed at Old Calabar River 10 September 1884. Accessions: Efut - 8 September 1884; Idommbi - 9 September 1884, Tom Shot - 11 September 1884. See also Clive Parry and Charity Hopkins (eds.), An *Index of British Treaties 1101-1968,* 3 vols., H.M.S.O., 1970; Vol. 1, p. 92.

[23] *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* (n 20) para 6.31 at p. 92

[24] *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* (n 20) para 6.32 at p. 93

of Protection, and in that Treaty itself, the language used was consistently that of protection, and not that of annexation and acquisition of sovereignty, with which it stands in marked contrast.[25] Article 1 of the Treaty of Protection of 10 September 1884 expressly prescribed the scope of the British protection being granted by the Treaty by reference to '*the territory under their [the Kings and Chiefs'] authority and jurisdiction*', thus clearly acknowledging their possession of territorial rights. Moreover, the authority of the Kings and Chiefs over their territories was demonstrated by their rejection in the draft Treaty of Protection presented to them of an Article VI which provided that: '*the subjects and citizens of al1 countries may freely carry on trade in every part of the territories of the Kings and Chiefs parties hereto, and may have houses and factories therein*'.[26] The protectorate provisions of the Treaty of 10 September 1884 with the Kings and Chiefs of Old Calabar are: Article 1. '*Her Majesty the Queen of Great Britain and Ireland, &c, in compliance with the request of the Kings, Chiefs, and people of Old Calabar, hereby undertakes to extend to them, and to the territory under their authority and jurisdiction, her gracious favour and protection'.* Article 2. '*The Kings and Chiefs of Old Calabar agree and promise to refrain from entering into any correspondence, Agreement, or Treaty with any foreign nation or Power, except with the knowledge and sanction of Her Britannic Majesty's Government*.'[27] Clearly, the Treaty of 10 September 1884 was a Treaty establishing British protection over the territories in question, and not a treaty purporting to acquire territorial sovereignty or other title over them. Although the local Rulers had, by virtue of their sovereignty over their territories, the power in international law to cede territorial sovereignty to Great Britain, they did not exercise that power. They granted to Great Britain only the limited rights of protection, so as to make themselves a British Protectorate. An Article

[25] Ibid. para 6.60 at p. 108

[26] Ibid. para 6.22 at p. 89

[27] Ibid. para 6.63 at p. 109. At para 6.64 at p. 109-111, it was pointed out that five features of these provisions may be noted. (1) The protection arrangements were the result of a request from the Kings and Chiefs of Old Calabar. A similar request had been recorded in the Preliminary Treaty concluded with Creek Town on 23 July 1884, while the Preliminary Treaty concluded with Duke Town stated that protection was being given '*in compliance with the wish of the Kings, Chiefs and people*'. The instructions given to the British Consul (Hewett) to negotiate the various protection agreements stipulated that he was to express Britain's willingness, *if requested,* to extend its protection. (2) The protection arrangements clearly involved '*an arrangement of a contractual character*'. The 1884 Treaty of Protection was expressly described as a '*Treaty*' in Article IX, and was consistently regarded by the British Government as a treaty. Thus on 17 January 1885 the Secretary of State for Foreign Affairs, Lord Granville, wrote to the British Minister in Madrid asking him to point out to the Spanish Government that the British Government '*by Treaties concluded with the native Chiefs*' had '*assumed the Protectorate over the whole Coast from Ambas Bay to the River Benin inclusive, comprising Old Calabar and the lower portion of the Cross River*'. This notification was duly passed to the Spanish Minister of Foreign Affairs on 30 January. Similarly, in the notice of 5 June 1885 proclaiming the British Protectorate of the Niger Districts. it was recited that '*By virtue of certain Treaties concluded between the month of July last and the present date, and by other lawful means, the territories on the West Coast of Africa, hereinafter referred to as the Niger Districts, were placed under the Protectorate of Her Majesty the Queen from the date of the said Treaties respectively*'. (3) Article 1 does not provide for Great Britain to exercise the international relations of the Kings and Chiefs of Old Calabar, or otherwise act in their name and on their behalf. (4) Article 2 does not provide that the Kings and Chiefs have given up their right and power to have dealings (including making Treaties and Agreements) with foreign States, but that they will do so only after having first informed the British Government and obtained its approval. *(5)* It must also be borne in mind that, by virtue of the Treaty concluded in September 1884 together with the contemporaneous unilateral declarations by Kings and Chiefs who were subject to the authority of the Kings and Chiefs of Old Calabar, the geographical extent of the Protectorate arrangements established by the 1884 Treaty included the area of the Bakassi Peninsula.

providing for the cession of their territory when requested by Great Britain was omitted from the Treaty they signed.[28]

In considering the nature of a protectorate it must be recalled that, the relationship which it establishes between the protecting State and the protected State is one of '*protection*' of the latter by the former.[29] Following the conclusion of the 1884 Treaty of Protection, Great Britain by proclamation established the '*British Protectorate of the Niger district*'. The proclamation recited that '*By virtue of certain Treaties concluded between the month of July last and the present date, and by other lawful means,*' British protectorates had been established. It went on to bring together in one Protectorate the various territories covered by the individual treaties of protection and lying '*on the line of Coast between the British Protectorate of Lagos and the right or western river-bank of the mouth of the Rio del Rey*', together with certain inland areas to the North. It included the Bakassi Peninsula.[30] From 1884 until Independence in 1960, Britain consistently treated the various Nigerian territories as Protectorates save only for the Lagos area - where Great Britain acquired sovereignty.[31] Thus, after the conclusion of the Treaty of Protection in 1884, the Kings and Chiefs of Old Calabar retained their separate international status and rights, including their power to enter into relationships with other international persons, although under the Treaty that power could only be exercised with the knowledge and approval of the British Government. That position, did not change before the conclusion of the March 1913 Anglo-German Treaty; nor did it change in substance until Nigeria became an

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[28] Ibid. para 6.37 at p. 96

[29] Ibid. para 6.39 at p. 97 and para 6.44 at p. 100; see *Oppenheim's International Law. Vol.* 1, 9th ed., 1992. pp. 267, 268. 269 '*An arrangement may be entered into whereby one state, while retaining to some extent its separate identity as a state, is subject to a kind of guardianship by another state. The circumstances in which this occurs and the consequences which result vary from case to case, and depend upon the particular provisions of the management between the two states concerned . . . Protectorate is, however, a conception which lacks exact legal precision, as its real meaning depends very much upon the special case . . . The position within the international community of a state under protection is defined by the treaty of protection which enumerates the reciprocal rights and duties of the protecting and the protected states. Each case must therefore be treated according to its own merits ... But it is characteristic of a protectorate that the protected state always has, and retains, for some purposes, a position of its own as an international person and a subject of international law*'. As expressed in the first edition of *Oppenheim's International Law* (1905) in introducing discussion of States under protection, '*Generally speaking, protectorate may ... be called a kind of international guardianship'.* (at p. 138). [Substantially the same language has been used in all subsequent editions, up to and including the 9th ed., 1992, at p. 267.]

[30] Ibid. para 6.66 at pp. 111-112

[31] Ibid. para 6.80 at p. 112; in explaining the essential characteristics of a Protectorate, Kennedy, LJ in *R. v. Earl Crewe, ex parte Sekgome,* (1910) 2 KB at 619 stated as follows**:** '*Now the features of Protectorates differ greatly. . . . The one common element in Protectorates is the prohibition of al1 foreign relations except those permitted by the protecting State. Within a Protectorate, the degree and the extent of the exercise by the protecting State of those sovereign powers which Sir Henry Maine has described (International Law, p. 58) as a bundle or collection of powers which may be separated one from another, may and in practice do vary considerably. . . . What the idea of a Protectorate excludes, and the idea of annexation on the other hand would include, is that absolute ownership which was signified by the word 'dominium' in Roman Law, and which, though perhaps not quite satisfactorily, is sometimes described as territorial sovereignty. The protected country remains in regard to the protecting State a foreign country . . .'* Similarly, in *Nyali Ltd v Attorney-General,* (1956) 1 QB 1 the Court of Appeal accepted that the Kenya Protectorate was not under British sovereignty. In similar language to the constitutional position in relation to the Colony and Protectorate of Nigeria, Denning LJ explained the situation in Kenya as follows: *'... The difference in law between Kenya Colony and Kenya Protectorate is* ***this:*** *In Kenya Colony the jurisdiction of the British Crown is unlimited; but in the Kenya Protectorate it is only limited. It is limited* ***to*** *such jurisdiction as the Crown has acquired by treaty, capitulation, grant, usage, sufferance and other lawful means.'* (at p. 14)

independent State in 1960.[32] The fact that, as a matter of English law, powers were taken to deal with Protectorates '*as if*' they were colonies, not only shows that they were in fact *not* colonies, but also does not, as a matter of international law, affect their international status as Protectorates, as derived from the relevant treaties of protection. Those treaties must be observed whatever particular rules of municipal law may provide: if a State fails to comply with a treaty's provisions, it cannot justify that failure by reference to its municipal law.[33] The rule now embodied in Article 27 of the Vienna Convention on the Law of Treaties 1969 is well-established in international judicial practice: '*A party may not invoke the provisions of its interna1 law as justification for its failure to perform a treaty'*.[34] In the light of the relevant considerations of international and municipal law, it is apparent from the terms of the 1884 Treaty and subsequent British arrangements for the governance of Nigerian territories that: those territories constituted British Protectorates; the Protectorates were at no stage transformed into a British colony; they were in no way conformable to a British colony; the United Kingdom possessed in relation to them only such rights and powers conferred by the 1884 Treaty of Protection; the United Kingdom at no time possessed territorial sovereignty over them, in whole or in part; in their relationship with the United Kingdom, the Protectorates were at all times foreign countries; and in exercising its rights and responsibilities as the protecting State, the United Kingdom was bound to uphold and not to subvert the interests of the Protectorates.[35]

The Treaty of 11 March 1913 between Britain and Germany, provided for the course of the boundary resulting from the Treaty to have the effect of purporting to re-draw the eastern boundary of the Protectorate of Southern Nigeria in such a way that the boundary between that Protectorate and Cameroon runs to the West of Bakassi, thus attributing the Bakassi Peninsula to Germany.[36] Before the conclusion of this 1913 Treaty, Bakassi formed part of the territories of the Kings and Chiefs of Old Calabar, which in turn formed part of the British Protectorate of Southern Nigeria. Accordingly, the boundary delimitation provisions of the Treaty had the purported effect of alienating Bakassi and transferring it to German administration.[37] However, under the Protectorate Treaty of 1884 Great Britain did not acquire, or in 1913 have, territorial sovereignty over Bakassi. Because of the nature and scope of the Protectorate agreed by the Kings and Chiefs of Old Calabar with Great Britain, the Kings and Chiefs did not grant to Great Britain any right to transfer their title to Bakassi to a third Party. Great Britain could not and did not, therefore, transfer territorial sovereignty over Bakassi to' Germany by the Anglo-German Treaty of 11 March 1913.[38] Bound as Great Britain was by the 1884 Treaty of Protection, which imposed obligations of protection upon it, and conferred various rights on it;

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[32] Ibid. para 6.65 at pp. 111; at para 6.68 at p. 114; see *Parliamentary Debates* (Commons), 4th series. Vol. 73. cols. 1290-1291 (3 luly 1899), it was emphasized that at this stage, within this region of Africa three different kinds of British administration were established. First, there was the Colony of Lagos under the control of the Colonial Office; second, there was the Niger Coast Protectorate under the Foreign Office; and, third, there was the Royal Niger Company, subject only, as far as Her Majesty's Government were concerned, to very slight control.

[33] Ibid. para 6.77 at p. 120; in the case of the Applicability *of the Obligation to Arbitrate under section 21 of the UN Headquarters Agreement of 26 June 1947,* ICJ *Report* 1988, pp. 12, 34, it was held that it is accepted that it is a '*fundamental principle of international law that international law prevails over domestic law'* .

[34] In the *Greek and Bulgarian Communities Case,* PCU. Series B, No. 15. pp. 26-7 the Court said: '*It is a generally accepted principle of international law that in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of a treaty'*.

[35] *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* (n 20) para 6.90 at pp. 125-126

[36] Ibid. paras 8.20- 8. 24 at pp. 154-156

[37] Ibid. para 8. 25 at p. 156

[38] Ibid. para 8. 26 at p. 156

the principle *pacta sunt servanda* certainly applied to that 1884 Treaty of Protection as much as to any other: a later treaty concluded by Britain with another party could not detract from it.[39] Thus, the existence of the Protectorate created by the 1884 Treaty of Protection, the conditions for the establishment of the Protectorate, the rights and obligations of the Protector and Protected under the Treaty, made Great Britain's lack of sovereignty over Bakassi Peninsula evident and made its lack of legal authority in international law to dispose of title over the Bakassi Peninsula incontrovertible.

Nemo dat quod non habet is a well-established principle of law recognised by all nations. In its application in international law, in any situation where territorial title derives from a cession, the successor State will acquire a good title only if the predecessor State was itself, at the time of the transfer, the holder of a good title which it was free to transfer.[40] The same principle underlies the rule that a cession of territory carries with it the international obligations connected with the territory, since otherwise the ceding State would be able to transfer the territory unencumbered by those local obligations and that would be to accept that that State could transfer greater rights than it possessed at the time of the cession.[41] In the *Island of Palmas case* the issue was whether the Island was under the sovereignty of the United States or The Netherlands. The United States based its claim to sovereignty on the cession of various territories, said to include the Island, by Spain to the United States under the Treaty of Pans, 1898. Finding that as between Spain and The Netherlands, during the period up to 1898, title to the Island was not vested in Spain, the Arbitrator held that, Spain having had no title in 1898, could not transfer title by cession to the United States in that year and that the Island accordingly formed part of Netherlands territory. The Arbitrator held that the mere fact that Spain and the United States had concluded a Treaty the terms of which might have applied to the Island of Palmas was not conclusive of the United States' title.[42] In the context of this case, Germany could not have acquired from Great Britain any better title than Great Britain itself possessed; and therefore Germany could have acquired a good title to Bakassi by virtue of the 1913 Treaty only if, in 1913, Great Britain had a good title. Great Britain, however, did not have any title at all to territorial sovereignty over Bakassi. [43] Therefore, the 1913 Treaty, in purporting to cede

[39] Ibid. para 8. 46 at p. 165

[40] Ibid. para 8.28 at p. 158

[41] Ibid. para 8.34 at p. 160; see *Oppenheim's international Law,* Vol. 1 (9th ed.), (n 21) 682 invoking the maxim *nemo plus juris transferre potest quam ipse habet.*

[42] In *The Island of Palmas Case* (n 17) Max Huber, the arbitrator said '*Titles of acquisition of territorial sovereignty . .. like cession, presuppose that the ceding and the cessionary Powers or at least one of them, have the faculty of effectively disposing of the ceded territory. ... (at p. 839). The title alleged by the United States of America as constituting the immediate foundation of its claim is that of cession, brought about by the Treaty of Paris, which cession transferred al1 rights of sovereignty which Spain may have possessed in the region indicated in Article III of the said Treaty and therefore also those concerning the Island of Palmas (or Miangas). It is evident that Spain could not transfer more rights than she herself possessed. ... (at p. 842). It is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers. . . . The essential point is therefore whether the island of Palmas (or Miangas) at the moment of the conclusion and coming into force of the Treaty of Paris formed a part of the Spanish or Netherlands territory. . . . (p. 843). The claim of the United States to sovereignty over the Island of Palmas (or Miangas) is derived from Spain by way of cession under the Treaty of Paris. The latter Treaty, though it comprises the island in dispute within the limits of cession, and in spite of the absence of any reserves or protest by the Netherlands as to these limits, has not created in favour of the United States any title of sovereignty such as was not already vested in Spain. The essential point is therefore to decide whether Spain had sovereignty over Palmas (or Miangas) at the of the coming into force of the Treaty of Paris. . . (p.866-7).*'

[43] *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* (n 20) para 8.38 – 8.39 at pp. 161-162. Great Britain possessed no authority by the Protectorate Treaty to act on behalf

to Germany, territory which was not Great Britain's to transfer, was concluded in excess of any territorial rights and legal powers vested in Great Britain, and was to that extent ineffective to achieve the purported transfer of territorial sovereignty.[44] The legal effect of a purported transfer of title in conflict with the principle *nemo dat quod non habet* is, as the *Island of Palmas Case (supra)* clearly shows, that the purported transfer of title is without legal effect. The position is essentially one in which a party to a treaty purports to deal with a matter which is not that party's to deal with. Whether this issue is looked at as a lack of power to conclude a treaty on that matter, or as the conclusion of a treaty having as its object a matter which cannot properly be the subject-matter of a treaty between the parties, or as the conclusion of a treaty purporting to affect the rights of a third Party, the result is the same: the treaty cannot (to the extent of the impropriety) achieve the purported result.[45] The Court was thus in momentous error when it upheld the validity of the Anglo-German Treaty of 1913 as efficacious in passing to Germany, title over the Bakassi Peninsula

5. Conclusion

During the hearing of the case at ICJ, Sir Arthur Watts, QC, counsel for Nigeria repeatedly and forcefully posed the questions, Who gave Great Britain the right to give away Bakassi? And when? And how? Answers to these questions would disclose the moral dubiousness of colonialism and the fact that colonialism was a flagrant violation of even the then existing international law. Without giving answers to these questions, and in deliberate avoidance of the weighty issues implied by the questions, the Court chose, unnecessarily, as stated by Judge Khasawneh[46] to revert to the question of the validity of the 1913 Agreement between Great Britain and Germany under which the former ceded the Bakassi Peninsula to Germany without the consent of the Kings and Chiefs of Old Calabar, the territorial owners of the Bakassi Peninsula, notwithstanding that Great Britain had in 1884 entered into a Treaty of Protection with them which, in return for their agreeing and promising '*to refrain from entering into any correspondence, Agreement or Treaty, with any foreign nation or Power, except with the knowledge and sanction of Her Britannic Majesty's Government'*, Her Majesty would extend Her '*favour and protection*' to them. He pointed out that reversion to the Agreement was unnecessary and unfortunate, for the attempt at reconciling a duty of protection and the subsequent alienation of the entire territory of the protected entity. As the learned Judge Khasawneh pointed out, by deliberating refusing to interrogate that crucial issue, overlooking application of the principles of *pacta sunt servanda* and *nemo dat quod non habet*, and taking it for granted that establishment of a colonial protectorate was coterminous with acquisition of title over the so-called colonial protectorate, the Judgment by merely contenting itself with a formalistic appraisal of the issues involved was unable to constitute a legally and morally defensible scheme.[47] Another paradox in the legal reasoning of the court was the inconsistency in the international legal status accorded Kings and Chiefs of Old Calabar. In one breadth, for purposes of concluding the Treaties of Protection with the British Consul as the representative

of and in the name of the Kings and Chiefs of Old Calabar. A grant of authority to alienate territory needs clear language, and being a grant derogating from the sovereignty of Old Calabar, any relevant language is to be interpreted restrictively. Those considerations, like the very word '*protection*', preclude the unauthorised giving away of territory which was to be '*protected*'.

[44] Ibid. para 8.40 at p. 162

[45] ibid. para 8.41 at pp. 162-163

[46] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment,* (n 1) see separate opinion of Judge Khasawneh

[47] Ibid.

of Queen Victoria, the Court treated them as possessing absolute sovereign immunity; and thereafter, the court treated them as having been contemporaneously divested of their territorial sovereignty. Judge Khasawneh attempts to explain this incomprehensible inconsistency as being founded in a Eurocentric conception of international law premised on ideas of otherness.[48] In this regard, he pointed out that there were at the time in Europe protected principalities without anyone seriously entertaining the idea that they had lost their sovereignty to the protecting Power and could be disposed of at its will.[49] In the *Namibia (South-West Africa) Case*, the ICJ stated that the Act of Berlin was a monstrous blunder and a flagrant injustice to consider Africa south of the Sahara as *terrae nullius*, to be shared out among the Powers for occupation and colonization.[50] It is impossible to either overstate or correct the evils of colonialism. The colonialists' practice of border demarcation and territorial exchanges without the consent of native peoples split historical and cultural groups and created lasting problems into the current period. The *Cameroon v. Nigeria Case* gave a rare opportunity to the ICJ to attempt to undo a continuing evil consequence of colonialism. It gave the ICJ the opportunity to repudiate the fiction that local Kings and chiefs possessed absolute sovereign authority and immunity to enter into binding treaties regarding their domains, and were simultaneously divested of this territorial sovereignty at one and the same time; that the effect of entering into a treaty of friendship and protection was a forfeiture of sovereignty. However, what the Court unfortunately did, was to hark back to abstruse legal theory justifying concurrent repudiation of the maxims, *pacta sunt servanda* and *nemo dat quod non habet*, thus, encouraging the calling into question of the principle of the sanctity of contracts.[51]

[48] Ibid.

[49] Great Britain established a protectorate over the Ionian Islands in 1814 which was maintained in accordance with the classical concept of protection which excluded any notion of sovereignty of the protecting Power. Much earlier during the Muslim Conquests many agreements of protection were concluded with local rulers in certain parts of Europe and elsewhere. For example, The Treaty of Tudmir of Rajab 94 AH-April 731 AD, concluded between Abdulaziz Son of Musa Son of Nusair the Ummayyad Governor of Spain and Theodemir, representative of local fortress-chiefs in South East Spain, an area encompassing the modern region of Murcia, Alicante and Valencia, the pact itself transformed *political power* from the Hispanic Visigoths to the Ummayyads of Damascus, but rights in property and other rights were retained by those chiefs and their descendants. For the text of the treaty see *Negotiating Cultures, Bilingual Surrender Treaties in Moslem — Crusader Spain Under James the Conqueror*, edited by Robin Burns and Paul Cliveddan, p. 202. Many similar treaties of protection were entered into by the Ottomans with various principalities in Eastern Europe where dominion in the sense of power passed to the Ottomans but ownership rights and other rights were retained by the indigenous European chiefs.

[50] *Namibia (South-West Africa) Case*, 1971 ICJ Rep. 55

[51] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment*, (n 1) see separate opinion of Judge Ranjeva