The ICJ's Decision on Bakassi Peninsula in Retrospect: a True Evaluation of the History, Issues and Critique of the Judgement

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Abstract

Territorial disputes are endemic in Africa; the Bakassi dispute was one of such. It was submitted by Cameroon to the International Court of Justice at The Hague for its determination. The judgement that followed suffered weighty denunciation particularly in Nigeria, yet it enjoyed great approbation internationally. This article takes a magisterial examination of the legal issues raised by the parties and the decision of the court thereto from two angles. First, it analyses the basis of Cameroon's claim over Bakassi and Nigeria's responses as formulated by parties. The second part of the article, which affords a critique, focuses on the general and legal grounds upon which the judgment can be faulted. The conclusion that flowed from this analysis is that the ICJ, with due respect, erred in its findings and should be properly guided when forced with similar dispute in future so as to render a valid narrative of International Law

Key Words: Judgement on Bakassi, History, Issues and Critique

Introduction

It is not in dispute that the Bakassi Peninsula is a Nigerian territory by origin. It is inhabited by Nigerians and the settlements bear Nigerian names (even though Cameroon tried to change the name at various times). None of the vast literatures on the Bakassi Peninsula subject has indicated anything to the contrary; not even the adverse claimants; Germany and Cameroon have stated otherwise. What is (or was) in dispute is whether the territory was transferred by Nigeria or on behalf of Nigeria to any other country, and whether such a transfer, if at all, was valid. Two explanations are available for the meaning and origin of the word "Bakassi"; both of them Nigerian. The first is that offered by the Efiks of Calabar, and that is to the effect the word Bakassi derives from the phrase "Akai Abasi Eke", meaning the "forest of Abasi Eke" (Aye, 2003). It is accounted that this is due to the fact that one Abasi Eke from Obutong (OldTown) of Calabar was the first to settle in that area. And that it was the foreign sailors who came in contact with Abasi Eke who distorted the name from Akai Abasi Eke to "Bakassi" in attempting to refer to the settlement of Abasi Eke. It is also recorded that the foreigners had earlier anglicised Abasi to "Bassey", making the distortion of Akai Abasi Eke to "Bakassey" easier. And that it was "Bakassey" that metamorphosed to "Bakassi" (Aye, 2003).

The second explanation is that proffered by the Mbo tribe of Southern Nigeria which is to the effect that the name derives from the Mbo expression "*bakkasi"*, which means "go early and arrive" (Odiong, 2008). According to them, the distance between Mbo and the area was very far requiring therefore that whoever wanted to go there must go early in order to arrive early (Odiong 2008). As a result, this area where the Mbo people went to fish and to buy fish became known as "Bakassi". Both explanations show that the name "Bakassi" is of a Nigerian origin as both Efik and Mbo are tribes of the southern part of Nigeria. In addition, all international documents relating to Bakassi, including treaties, show that Bakassi is primarily a Nigerian territory, or within the area which became known as Nigeria. Geologically, the Bakassi Peninsula lies approximately between latitudes $4^0$25 and $5^0$10 north of the equator, and longitudes $8^0$30 and $9^0$08 east of the Greenwich meridian. It is located at the extreme eastern end of the Gulf of Guinea where the warm east-flowing Guinea current meets with the cold north-flowing Benguela current (Efiong-Fuller, 2007). The Bakassi Peninsula appears to have been cut for conflict as it has been the subject of dispute both locally and internationally, under the twelve-state structure of Nigeria, Bakassi was under the South-Eastern State. When the South-Eastern State (later renamed Cross River State) was split into two states in 1987, a dispute arose between the two states, namely Cross River State and AkwaIbom State, as to where Bakassi fell (Odiong, 2008). The dispute was technically resolved, so to speak, when Bakassi was made a local government area of its own under Cross River State in 1992, but agitations continued to brew at the background from the axis of AkwaIbom State notwithstanding the subsequent reflection of this status in the First Schedule, Part 1 of the Constitution of the Federal Republic of Nigeria, 1999. The main contenders were the Efiks of Cross River State and the Mbo people of Akwa Ibom State whose interpretations of the meaning of Bakassi have been given above.

The Bakassi dispute is a creation of expansionism and colonialism. It is the consequence of the indiscriminate and haphazard fixing of African boundaries by the Europeans both within and outside of the Berlin Conference of 1885. Territories were created based on European political considerations, and usually without regard to tribal and ethnological factors. In his extensively cited work, (Brownlie, 1979) observed:

Political bargaining involved the construction of parcels of territory upon broad principles evidenced graphically by liberal resort to straight lines and general features such as drainage basins and watersheds. Within a framework of overall political bargaining, the accident of prior exploration and military penetration were often to determine delimitation as between Britain, France and Germany.

The lines were drawn and the boundaries determined on maps; sometimes hypothetical maps, without appropriate understanding of the areas concerned. The result is that the territories that emerged were not generally acceptable for varying reasons; three of which are remarkable. Firstly, they separated tribes and peoples with homogenous cultures who would otherwise have lived together and placed them in different states (Ali, 2008). Research has shown that the arbitrary fixing of African boundaries separated about 177 cultural or ethnic groups across Africa (Asiwaju, 1984).A common example is the case of Ghana where two of its ethnic groups are split into two. In its Western border, the Akan people are split between it and Ivory Coast while in its eastern border; the Ewe people are split between it and Togo (French, 2009). Another example is the Masai tribe of East Africa which is split between Kenya and Tanzania (Brownlie, 1979).

Secondly, they lumped together tribes, cultures, and, religion with long history of disagreement, antagonism and animosity. Nigeria has been cited as a classic example on this point by many writers. For example (Ali, 2008) observed:

The large territory which the British carved out and called Nigeria enclosed three major nations and several smaller ones. Among the larger groups, the Yoruba in the west were very different from the Muslim Hausa in the north, who in turn were quite distinct from the Ibo in the east. This artificial mixture was to lead to one of Africa's great human tragedies, the Nigerian civil war of 1967-70. Until pictures of starving Ethiopian children shocked the world in the 1980s the most haunting images from postcolonial Africa were those of starving Biafran children, the victims of the war.

Similarly, (French, 2009) observed:

Even more troublesome are cases like Nigeria, where European boundaries forced starkly different rival cultures, each with long-standing political traditions of their own, to cohabit within the confines of a single state. When Nigeria won its independence in 1960 these rivalries remained. Regional antagonism have bedevilled Nigeria from the earliest days of independence from Britain and in the late 1960s led to one of the continent's most destructive civil wars.

Before it split into two countries in July 2011, Sudan was another example of this lumping which has resulted in persistent wars since 1955 with brief interludes. Sudan had two major dichotomies of North and South. The North is predominantly Arabs, while the South is made up of Non-Arab Africans mainly of the Nilotic tribe. Religion wise, the North is mainly Moslem, while the south has a large percentage of Christians. By land mass, Sudan was the largest country in Africa with about one million square miles and sharing boundary with nine other African countries (Deng, 2005). The ethnic and geographical combinations of Sudan, in no small way, aided the crises in the country. Again, it has been remarked by (Deng, 2005):

The crisis of statehood and national identity in Sudan is rooted in British attempt to bring together diverse peoples with a history of hostility into a framework of one state while also keeping them apart by entrenching inequities by giving certain regions more access to state power, resources, services and development opportunities than other regions.

Thus, not only were different tribes and nations arbitrarily lumped together, the entities so humped were not treated equally in terms development and opportunities; a clear case of ambivalence and contradictions.

Thirdly, they ceded land resources which traditionally belonged to one nation to another. Usually this is the result of either or both of the two points discussed above; that is the arbitrary separation or lumping of tribes, for example, the ceding of Bakassi Peninsula to Cameroon is a monumental loss of land resources to Nigeria. The consequences of their act in fixing arbitrary boundaries for Africa were of little concern to the Europeans; they knew what they were doing and they mocked the process thereafter. For example, a British Prime Minister of the colonial era, Lord Salisbury, is quoted to have remarked thus (Anene, 1970):

We have been engaged in drawing lines upon maps where no white man's foot ever trod; we have been giving away mountains and rivers and lakes to each other only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were.

Even though this was supposed to be a post-dinner humorous remark, it nevertheless betrayed the disposition and state of mind of the imperialists and colonialists at the time. Another example is afforded by a speech to the Royal Empire Society of Britain by a Consul-General who was involved in the drawing of the boundary between some parts of the eastern flank of Nigeria and Western Cameroon. Said he:

In those days we just took a blue pencil and a rule and we put it down at Old Calabar, and drew that blue line to Yola…I recollect thinking when I was sitting having an audience with the Emir [of Yola], surrounded by his tribe, that it was a very good thing that he did not know that I, with a blue pencil, had drawn a line through his territory.

Consequently the territories constituting Africa today did not emerge out of the desire of the Europeans to create definite territorial entities for the good of the African peoples, but out of the zeal to have defined spheres of influence and authority, mainly to avoid conflict among them. In so doing, they took little cognizance (if at all) of the realities on the ground. The result is that as they took their leave, they left for Africans a legacy of boundary disputes. One of such legacies is the Bakassi dispute.

Cameroon Takes Dispute before ICJ

After over a century of agreements and disagreement over the Bakassi Peninsula; firstly between the imperial powers of Germany and Great Britain and then between their former colonial subjects of Cameroon and Nigeria, respectively, Cameroon took the dispute over the area to the International Court of Justice (ICJ) at The Hague for its adjudication as now contained in Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening) (Judgment) 10 October, 2002, General List No. 94. Precisely on the 29th day of March, 1994, Cameroon commenced proceedings by filing its Application at the Registry of the ICJ, which it presented as concerning a dispute "relating essentially to the question of sovereignty over the Bakassi Peninsula." Specifically, Cameroon requested the ICJ to adjudge and declare:

(a) That sovereignty over the Bakassi Peninsula is Cameroonian, by virtue of international law, and that the 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 colonisation *(utipossidetis)*;
(c) That by using force against the Republic of Cameroon, the Federal Republic of Nigeria has violated and is violating its obligation 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 to an end to its military presence in Cameroon territory and affecting an immediate and unconditional withdrawal of its troops from the Cameroonian Peninsula of Bakassi;
(f) That the internationally unlawful acts referred to under (a), (b), (c), (d) and (e) above involve the responsibility of the Federal Republic of Nigeria;
(g) That consequently, and on account of the material and non-material damage inflicted upon the Republic of Cameroon, reparation in an amount to be determined by the Court is due from the Federal Republic of Nigeria to the Republic of Cameroon, which reserves the right of introduction before the Court of [proceedings for] a precise assessment of the damage caused by the Federal Republic of Nigeria.
(h) In order to prevent any dispute arising between the two States concerning their maritime boundary, the Republic of Cameroon requests the Court to proceed to prolong the course of its maritime boundary with the Federal Republic of Nigeria up to the limit of the maritime zones which international law places under their respective jurisdictions.

While this Application was pending, the Government of Cameroon wrote on 11th April, 1994 to Nigeria through its Ambassador in Yaoundé claiming that Nigeria was occupying some of its territory in the Lake Chad region (Bekong, 1997). The Nigerian Ambassador replied promptly through Note No. 73/114/Vol.VI/94, 14 April, 1994 from the Embassy of the Federal Republic of Nigeria, Yaoundé, Cameroon, rejecting any such claims in the following terms: It is both unfortunate and unacceptable that Darak, which has always been part and parcel of Wulgu District of Ngala Local Government Area of Bornu State of Nigeria and which has since time immemorial been administered as such, is now being claimed as part of Cameroon territory.

Cameroon's action, it would appear, was intended to create a territorial contest in the area over which none has existed to form a basis to claim the area in the ICJ where its application was already pending. Nigeria's response created that opportunity. Thus, on the 6th day of June, 1994, in an apparent attempt to amend its Application of 29th March, 1994, Cameroon filed an Additional Application at the Registry of the ICJ; this time, "for the purpose of extending the subject of the dispute" to a further dispute described in the Additional Application as "relating essentially to the question of sovereignty over a part of the territory of Cameroon in the area of Lake Chad." Cameroon requested further in the said Additional Application, that the Court should consolidate and examine the two Applications as one, and in so doing specify definitively the entire frontier between the two States from the Lake Chad to the sea. Both Applications were served on Nigeria who did not object to the consolidation whereupon the ICJ, by an Order of 16th June, 1994, consolidated the two Applications of Cameroon. The steps, circumstances and processes through which the frontier dispute between Cameroon and Nigeria got to the ICJ indicated where the interest of Cameroon lay; and that is, the Bakassi Peninsula. The joining of other areas in the subsequent Application was clearly secondary. For this and other reasons, the boundary dispute between Nigeria and Cameroon was popularly known as the "Bakassi dispute" or the "Bakassi case" as stated earlier.

Once the presence of the Bakassi dispute at the ICJ became of public knowledge, the primary question that came to the minds of many international law scholars was one of jurisdiction given the peculiar nature of the jurisdiction of the ICJ, particularly, as it relates to appearance in the Court rather than the character of the parties. The ICJ has no jurisdiction over, and its decision is not binding on, states that have not given their consent to be so bound. This is the purport of Art. 36 of the Statute of the International Court of Justice.This is irrespective of the fact that such nations are parties to the Statute of the International Court of Justice. Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice because the Statute is attached to the Charter of the United Nations. To be bound by the decision of the Court, State parties to the Statute must expressly give consent by one or more of three options (Brownlie, 2010). The first is by way of a declaration in writing accepting as compulsory the jurisdiction of the ICJ, which declaration must be deposited promptly with the Secretary-General of the United Nations as required by Art. 36(2)(3) and (4). The second is by way of a special agreement by the contending parties agreeing to refer a particular case to the Court. This agreement, otherwise known as a *compromise* of referral, is available to both parties and non-parties to the Statute of the International Court of Justice. And the third is by way of pre-existing obligation under treaty to submit to the jurisdiction of the Court. This being the case, the prayer of the supporters of the cause of Nigeria who did not know its status *vis-à-vis* the jurisdiction of the ICJ was that it should be that Nigeria had by no means submitted to the jurisdiction of the Court. Unfortunately, this was not the case.

Cameroon and Nigeria joined the United Nations in 1960 by virtue of which they were also parties to the Statute of the ICJ which is attached to the Charter of the United Nations (Harris, 2005). On the 3rd day of September, 1965 Nigeria formally deposited its first declaration accepting the compulsory jurisdiction of the ICJ with the Secretary-General of the United Nations in accordance with Article 36(2) and (4) of the Statute of the ICJ (Bekong, 1997). Cameroon never submitted to the jurisdiction of the Court until the 3rd day of March, 1994, just about three weeks to the filing of its first Application at ICJ. It did so by also depositing a declaration of acceptance with the Secretary-General of the United Nations. With this development, the primary question appeared to have been settled.

But Nigeria thought otherwise. Nigeria was not satisfied that the Court's jurisdiction had been founded. As a result, on the 13th day of December, 1995, Nigeria filed a preliminary objection on grounds, *inter alia,* that:

(a) that the Court had no jurisdiction over the parties because Cameroon acted prematurely and in bad faith by filing an Application at the ICJ when its Declaration of Acceptance of the Court's compulsory jurisdiction which it filed only on 3rd March, 1994 had neither been communicated to Nigeria nor other members of the United Nation as required by the Statute of the ICJ; and
(b) That the two parties had agreed to settle their dispute otherwise than by recourse to the ICJ and were therefore bound by the principle of *pactasuntservanda,* i.e. agreement must be kept,to stick to that agreement.

On the 11th day of June, 1998, the Court gave its ruling dismissing the preliminary objection and held that it had jurisdiction over the parties. It adjudged that only the deposit of the Declaration of Acceptance with the Secretary-General was relevant as that was what established the mutual consent to the Court's jurisdiction for all States that have so deposited. In so doing, the Court accepted its earlier decision in the case concerning the *Right of Passage over Indian Territory,* contained in ICJ Rep., 1957, cited by Cameroon wherein the Court had observed that:

The Statute does not prescribe any interval between the deposit by a state of its Declaration of Acceptance and the filing of an Application by that State, and the principle of reciprocity is not affected by any delay in the receipt of copies of the Declaration by the parties to the Statute.

The Court had also observed in the same ruling that by the deposit of the Declaration of Acceptance with the Secretary-General, the Accepting State becomes a party to the system of optional clause in relation to the other declaration States, with all the rights and obligations deriving from Article 36 on that very day.On the second point, the Court held that the fact that both States had attempted to solve their dispute bilaterally did not imply that either of the parties had excluded the possibility of sending the dispute to the ICJ. The Court went further to state that it cannot locate anywhere in international law where exhaustion of commenced diplomatic negotiations is a pre-condition for referring a matter to the ICJ. The Court similarly dismissed the other six grounds of the preliminary objections save for one which it refused to consider on the ground that it was not of a preliminary nature. Thus, the question of jurisdiction was settled.

Tactlessly, Nigeria was not done yet with preliminary matters. On the 28th day of October, 1998, Nigeria filed a request for the interpretation of the judgment of 11th June, 1998 pursuant to Article 98 of the Statute of the ICJ. In the said request, Nigeria stated that the meaning and scope of the judgment required interpretation, particularly as it pertains to the incidents for which Nigeria is alleged to bear State responsibility by Cameroon. Nigeria alleged that Cameroon had added other incidents in its reply to the preliminary objection which were not in its Application, which the Court ought to strike out. And that in its ruling of 11th June, 1998, the Court did not specify which of the incidents it was reserving to be considered on the merit. After considering Nigeria's request, the Court ruled that the request was inadmissible and was therefore struck out.

In the meantime, while the preliminary objection was pending, Cameroon applied to the Court for the indication or granting of provisional measures on the ground, *inter alia,* that an armed conflict had broken out between the troops of Nigeria and Cameroon following an attack by the Nigerian military on its territory at the Bakassi Peninsula on the 3rd day of February, 1996. Based on this request, the Court ordered some provisional measures, as contained in ICJ Press Release No. 1999/13, which were intended to maintain the *status quo* pending the determination of the merits of the case. All preliminary matters having now been seemingly resolved, it was time for the Court to get into the substance of the matter. Cameroon had filed its Memorial on the 16th day of March, 1995. Because of the preliminary matters highlighted above, Nigeria could not file its Counter-Memorial until the 31st day of May, 1998; the final extension granted it to do so. Nigeria's Counter-Memorial included counter-claims, thus requiring a Reply from Cameroon, which Reply also elicited a Rejoinder; all of which were duly filed. Before hearing could commence, the Republic of Equatorial Guinea applied to intervene in the proceeding as an interested party and this was granted. Eventually, public hearing was held from the 18th day of February to the 21st day of March, 2002.

The formulation of issues by Cameroon and Nigeria's Response

Cameroon relied on:

- The Anglo-German Agreement of 11th March, 1913;
- The Yaoundé II Declaration of 4th April, 1971;
- The Maroua Declaration of 1st June, 1975.

Cameroon argued that the Anglo-German Agreement of 11th March, 1913 fixed the point at which the maritime boundary is anchored to the land at the mouth of the Akwayafe River. It cited, among others, the provision of Article XXI which provides in part that the boundary shall follow the centre of the navigable channel of the Akwayafe River as far as the 3-mile limit of territorial jurisdiction. Cameroon contended further that both parties set up a Joint Commission in 1970 with the mandate of determining their maritime boundary, and that it was the work of this Commission that formed the basis of the Yaoundé II Declaration under which their maritime boundary was determined up to a point known on the British Admiralty Chart No. 3433 as Point 12.

Cameroon submitted further that by the Maroua Declaration, their maritime boundary was extended from point 12 to point G on the aforesaid Chart, and that both Declarations having been signed by the Heads of State of both countries represent internationally binding agreements, just as the Anglo-German Agreement of 11th March, 1913.

On its part, Nigeria contended that the Yaoundé II Declaration was not a binding document, but one which simply represented the record of a meeting which was part of an on-going programme of meetings relating to the maritime boundary of the parties. And that as a result, subsequent meetings could vary the decisions of previous ones. As for the Maroua Declaration, Nigeria submitted that it lacked validity because it was not ratified by the Supreme Military Council of Nigeria which was the Nigerian parliament at the relevant time. Nigeria maintained that Cameroon knew or ought to know of this situation, the Nigerian Head of State at the time having written to the Cameroonian Head of State on the 23rd day of August, 1974, informing him that whatever agreements the two States reached concerning their borders was subject to the approval of the two governments. Nigeria further submitted that it ought to have been objectively evident to Cameroon within the meaning of Article 46, paragraph 2 of the Vienna Convention on the Law of Treaties, that the Head of State of Nigeria did not have unrestricted treaty-making authority. Finally that Nigeria had manifested its rejection of the Declarations between 1977 and 1993.

After listening to both parties, the Court held that notwithstanding the fact that the status of Yaoundé II Declaration has been called into question on a number of occasions by the Nigerian leadership, its content were revived and confirmed by the Maroua Declaration which in the opinion of the Court, was a valid and binding international agreement in a written form; and that the requirement of ratification was an internal law, which could not invalidate the applicability of a treaty by virtue of the provision of the Vienna Convention on the Law of Treaties. Particularly Art. 46, para. 1, which is to the effect that a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent. The Court concluded that the maritime boundary between Cameroon and Nigeria up to Point G on the British Admiralty Chart No. 3433 had been fixed by the combined effects of the Anglo-German Treaty of 11th March, 1913, the Yaoundé II Declaration of 1971 and the Maroua Declaration of 1975.

By the combined effects of Cameroon's Applications, Memorials, Rejoinder and Oral submissions, Cameroon asked the international Court of Justice (ICJ), as it relates to the Bakassi Peninsula, to adjudge and declare that "sovereignty over the Peninsula of Bakassi is Cameroonian" by virtue of international law. The submissions of Cameroon as contained in the Memorial in support of this claim can be categorised into three segments as follows:

(i) That the Anglo-German Agreement of 11th March, 1913 fixed the course of the boundary between the parties in the area of the Bakassi Peninsula, placing the Peninsula on the German side of the boundary. And that when Cameroon and Nigeria acceded to independence, the said boundary became the boundary of the two countries; the successor States to the colonial powers and as such were bound by the principle of *utipossidetis.* Cameroon cited Articles XVIII to XXII of the Agreement as being the operational clauses.

(ii) That the actions of the international community in the period between 1913 and 1960 showed recognition of the fact that the Bakassi Peninsula was on the Cameroonian side. And that these acts/actions included the following:

That under the Mandate system of the League of Nations, which was succeeded to by the Trusteeship of the United Nations, the Bakassi Peninsula was administered as part of British Cameroon. In support of this claim Cameroon cited the British Order in Council 1923 and the British Order in Council 1946.

That when the plebiscite was conducted for Southern and Northern Cameroons on the 11th and 12th of February, 1961, the map attached to the Report of the United Nations Plebiscite Commissioner showed that the Bakassi Peninsula was in Cameroon. The implication being that the United Nations recognised this state of affairs.That Resolution 1608(XV) of the General Assembly of the United Nation, by which British Trusteeship was formally terminated, recognised a boundary line which showed that the Bakassi Peninsula was on the Cameroon side and that Nigeria voted in favour of the Resolution.

(iii) That the acts and actions of Nigeria shortly before and after independence showed recognition by Nigeria of the fact that the Bakassi Peninsula was on the Cameroon side. And that these acts/actions included the following: The "Northern Region, Western Region and Eastern Region (Definition of Boundaries) Proclamation, 1954" issued pursuant to the Nigeria (Constitution), Order in council, 1951 repeated verbatim the provisions of the Anglo-German Agreement 1913 fixing the boundary between Cameroon and Nigeria at the Akwayafe River thereby recognising that the Bakassi Peninsula was on the Cameroon side.

The Yaounde II Declaration, the Kano Agreement, 1974 and the Maroua Declaration signed by the Nigerian Head of State recognised the validity of the Anglo-German Agreement of 11th March, 1913, the boundary deriving from it and Cameroon's sovereignty over the Bakassi Peninsula. By Nigeria's Note Verbale No. 510 of 27th March, 1962 addressed to Cameroon, Nigeria recognised that its boundary with Cameroon was at the Akwayafe River thereby recognising that Bakassi was on the Cameroon side.

Nigerian Consuls and Ambassadors have habitually requested for permission from the Cameroonian government before visiting the Bakassi Peninsula and have always expressed thanks for such permissions, and that by this development; Nigeria also recognised Cameroon's sovereignty over the Bakassi Peninsula.

In reaction, Nigeria vehemently refuted Cameroon's claim and urged the ICJ to reject same, and instead to adjudge and declare "that sovereignty over the Peninsula is vested in the Federal Republic of Nigeria. A summary of the main submissions made by Nigeria in support of its position are as follows:

I. That title over the Bakassi Peninsula lay, as at 1913 with the Kings and Chiefs of Old Calabar, and not with Britain which purportedly ceded same to Germany.

II. That in the pre-colonial era, the city-states of the Calabar region constituted an "acephalous federation" consisting of "independent entities with international legal personalities" capable of concluding international agreements.

III. That under the Treaty of Protection of 10th September, 1884 between Great Britain and the Kings and Chiefs of Old Calabar, the latter retained their separate international status and rights, including the power to make agreements with other international entities, subject only to the knowledge and consent of the British Government.

IV. That the Treaty of Protection of 10th September, 1884 conferred some rights on Great Britain, but in no way transferred sovereignty over the territories of Kings and Chiefs of the Old Calabar to it. Therefore, that Great Britain could not have passed title over the BakassiPeninsula to Germany since it had none to pass – *nemodat quod non habet.*

V. That the Anglo-German Agreement of 11th March, 1913 was defective on the grounds that:it was contrary to the preamble of the General Act of the Berlin Conference of 26th February, 1885;it was not ratified by the German Parliament as was the requirement under the German law prevailing at the time; and that; it was abrogated by virtue of the provision of Article 289 of the Treaty of Versailles of 28th June, 1919, not having been formally revived after the first world war as required by the said Article.

VI. That title to the Bakassi Peninsula belonged to Nigeria by virtue of long occupation by Nigeria and Nigerian nationals constituting a historical consolidation of title and confirming the original title of the Kings and Chiefs of Old Calabar, which title vested in Nigeria upon independence in 1960.

VII. (vii)That sovereignty over the BakassiPeninsula is also Nigeria's by virtue of peaceful possession; manifestations of sovereignty by Nigeria with acquiescence by Cameroon.Nigeria supplied massive evidence in support of its submissions, particularly those relating to its historical consolidation and acts of sovereignty, details of which can be found in the counter-Memorial/counter-claim and Rejoinder of Nigeria.

After hearing the parties, the Court came to the following conclusions in relation to the Bakassi Peninsula:

(1) By the nature of the Treaty of Protection of 1884 between Great Britain and the Kings and Chiefs of Old Calabar, and the international law prevalent at the time, Great Britain was in a position to determine its boundary with Germany including ceding the Bakassi Peninsula.

(2) The Anglo-German Agreement of 11th March, 1913 was valid and applicable in its entirety. And that by the various acts and actions of Nigeria, the Court found that Nigeria accepted that it was bound by the provisions of Articles XVII to XXII of the said Agreement which are the operational clauses relating to the cession of the Bakassi Peninsula.

(3) As a result, "sovereignty over the Bakassi Peninsula lies with the Republic of Cameroon.

The Judgment of the ICJ and Reasons for the Award

As noted above, the International Court of Justice in its judgment of 10th October, 2002, decided, among other things, that sovereignty over the Bakassi Peninsula lay with the Republic of Cameroon. In so doing, the Court gave reasons for its decision, and it is to these reasons that we shall turn.

i. As to whether Great Britain was entitled to transfer title over the Bakassi Peninsula to Germany in spite of the provisions of the Treaty of Protection, 1884.

As would be recalled, the Court answered this question in the affirmative and the main reasons given are discussed hereunder.

Firstly, the Court stated that during the colonial era "Treaties of Protection" entered into with local rulers, such as the Kings and Chiefs of Old Calabar, were regarded as derivative roots of title, quoting with approval the *Western Sahara, Advisory Opinion Case,* ICJ Rep., 1975, p. 39, para. 80. This, it said was different from Treaties of Protection entered into with States or other entities with previously existing sovereignty under international law such as Morocco, Tunisia, Madagascar, Behrain and Qatar. And on this point, the Court concluded as follows:

In the view of the Court, many factors point to the 1884 Treaty signed with the Kings and Chiefs of Old Calabar as not establishing an international protectorate. It was one of a multitude in a region were the local Rulers were not regarded as states.

Indeed, apart from the parallel declarations of the various lesser Chiefs agreeing to be bound by the 1884 Treaty, there were not even convincing evidence of a central federal power. There appears in Old Calabar rather to have been individual townships, headed by chiefs who regarded themselves as owing a general allegiance to more important Kings and Chiefs.

It added that there is no reference to the Protectorate of Old Calabar in the British Orders-in-Council, which lists protectorates and protected persons.

Secondly, that from the onset Great British "regarded itself" as administering the territories comprised in the Treaty of Protection 1884, and not just protecting them contrary to the submission of Nigeria. And that the choice of a protectorate treaty as the basis of colonisation was simply a preferred manner of rule. Further that a treaty of protection of the sort of 1884 was:

… not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy of natives… And thus suzerainty over the native states becomes the basis of territorial sovereignty as towards other members of the community of nations.

And on this point, the Court concluded that "under the law at the time, Great Britain was in a position in 1913 to determine its boundaries with Germany in respect of Nigeria, including the southern section.

Thirdly, that Nigeria did not produce strong evidence as to the following:

- Meetings and discussion between the ruling power of Great Britain and the Rulers of the "Protectorate of Old Calabar as such meetings and discussions are characteristics of an international protectorate;

- Protest by the Kings and Chiefs of Old Calabar in 1913; and
- Formal ceding of the Bakassi to Nigeria upon independence by the Kings and Chiefs, if it is true that they still retained title after 1913.

In the circumstances, the Court overruled Nigeria's submission that because title to Bakassi did not pass to Great Britain, it did not have any to pass unto Germany – *nemodat quod non habet.*

ii. As to Whether the Anglo-German Agreement of 11th March, 1913 was Valid.

Nigeria had argued that the Anglo-German Agreement of 11th March, 1913 was invalid for reasons already discussed. The Court rejected Nigeria's contention and the reasons given are hereunder discussed. Firstly, the Court said the fact that German Parliament did not approve or ratify the Anglo-German Agreement of 11th March, 1913 did not affect the validity of the Agreement. It maintained that this is so because Germany itself considered that the procedures prescribed by its domestic law had been complied with; nor did Great Britain ever raise any question in relation thereto. And that moreover the Agreement had been officially published in both countries. That as a result, it was "irrelevant that the Anglo-German Agreement of 11 March, 1913 was not approved by the German Parliament.

Secondly, that notwithstanding the provision of Article 289 of the Treaty of Versailles which required the revival of pre-World War One bilateral treaties with Germany, the Agreement was nevertheless valid even though it was not so revived by Britain. The Court observed that this was so because it was not necessary for Great Britain to revive the Anglo-German Agreement with Germany since by Articles 118 and 119 of the said Treaty, Germany had relinquished title to all its overseas possessions. Thirdly, that the acts and actions of the international community in the period between 1913 and 1961 showed that they recognised the validity of the Anglo-German Agreement of 11th March, 1913.

Fourthly, that the acts and actions of Nigeria shortly before and after independence showed that it recognised the validity of the Anglo-German Agreement, meaning that it accepted that it was bound by all its provisions. In the circumstances, the Court again, overruled Nigeria on the point that the Anglo-German Agreement of 11th March, 1913 was defective at least so far as its Bakassi provisions were concerned.

iii. As to Why Sovereignty over the Bakassi Peninsula did not Vest in Nigeria but Cameroon.

In holding that sovereignty over Bakassi lay with the Republic of Cameroon, the Court rejected Nigeria's claim to title based on historical consideration and *effectivites.* Nigeria's claim on *effectivites* was presented as peaceful possession by Nigeria acting as sovereign, and in the absence of protest by Cameroon and manifestations of sovereignty by Nigeria together with acquiescence by Cameroon in Nigerian sovereignty over the Bakassi Peninsula. The Court stated in paragraph 65 that having declared that the Anglo-German Agreement of 11th March, 1913 was valid and applicable, it meant that Cameroon had treaty title to Bakassi and that a claim based on historical consolidation cannot override or prevail over established treaty title. Further, the Court stated that "at the time of accession to independence, there existed no Nigerian title capable of being confirmed subsequently by 'long occupation'. It added that there was nothing in its earlier decision on the *Fisheries case (United Kingdom v. Norway), ICJ Report, 1951,p.130,* which suggested anything contrary to this position.

The Court's position did not change in respect of Nigeria's claim based on *effectivites.* It stated that *effectivites* are relevant on the question of title only when they do not conflict with legal title. Thus, where a territory is effectively administered by one State, while legal title vests in another, preference will be given to the holder of the legal title. The Court also rejected Nigeria's argument that its *effectivites* was with the acquiescence of Cameroon, and that on the contrary Cameroon had since independence engaged in activities which made it clear that it was not abandoning its title to Bakassi. In support, the Court cited the negotiations between Cameroon and Nigeria leading to the Yaoundé, Kano and Maroua Declarations wherein the maritime lines drawn followed a pattern showing that Bakassi was a Cameroonian territory. In the circumstances, the Court concluded that sovereignty over the Bakassi Peninsula lay with the Republic of Cameroon not Nigeria.

Critique of the Judgment

The judgment of the ICJ on the Bakassi dispute attracted diverse reactions nationally and internationally. In Nigeria, as was expected, so much outrage was expressed in both the print and electronic media. For example, *The Guardian,* a daily newspaper in Nigeria described the judgment as "a travesty", as "cunning" and by *The Guardian* of 22nd October, 2002, as a "brutal re-enactment of colonial injustices". Another daily, *THISDAY,* described it as "unwholesome, demeaning, a-historical, anti-people, anti-justice and above all, superficial and partial."

The newspaper further accused the Court of abandoning issues of facts and equity in preference for "undue legalism" which it said was borne out of partiality. Some Nigerians called on the Federal Government of Nigeria not to obey the judgment. The *Daily Champion,* another daily newspaper, reported that a serving Nigerian Senator urged the Federal Government not to obey the judgment. Another prominent Nigerian, Chief Richard Akinjide, a senior member of the legal profession, a former Attorney-General of Nigeria and a member of the Nigeria's legal team to The Hague for the Bakassi case, sternly condemned the judgment and urged the Federal Government to treat it "with the greatest contempt it deserves". He cited Britain and the United States of America as examples of nations that have disobeyed the ICJ judgment with no consequences following.

The first reaction of the Federal Government of Nigeria was one of rejection. Nigeria stated, among other things, that the judgment was political and bias. That the French, British and German judges whose countries' acts were under scrutiny in the case ought to have disqualified themselves, failing which they have acted as judges in their own case. Some were, however, quick to warn against any step that will result in going to war with Cameroon as that would amount to going to war with France, since Cameroon had a military pact with France, while Nigeria had none with any super-power. The above are the general grounds upon which the judgment was rejected. However, the judgment can be faulted on some legal grounds which will be discussed presently below.

Firstly, on the nature of a Treaty of Protection such as the one between Great Britain and the Kings and Chiefs of Old Calabar signed on the 10th day of September, 1884, it is submitted that its effect cannot be determined by whether it was with a State or with local rulers. The effect is determinable by the general nature of the treaty which is primarily one of protection. This nature has been acknowledged variously. For example, in 1885, the British Foreign Office stated unequivocally that a protectorate arrangement is not a direct assumption of territorial sovereignty, but "the recognition of the rights of the aborigines, or other actual inhabitants to their own country with no further assumption of territorial rights than is necessary to maintain the paramount authority and discharge the duty of the protecting power" (Dakas, 2003). Further, it has been acknowledge by a British Court that a "protectorate is under His Majesty's Dominion in the sense of *power and jurisdiction*, but not under his dominion in the sense of *territorial dominion* (Dakas, 2003)." Thus, during the relevant period, Britain maintained a colonial policy of distinguishing between a colony and a protectorate with the former involving effective occupation and territorial domination; and the latter not. Therefore, the view of the Court that "[t]he choice of a protectorate treaty by Great Britain was the question of a preferred manner of rule" cannot be valid, with all due respect, if it purports to show that colony and protectorate mean the same thing. It is to be noted that even upon the argument that a protecting power acquires a *derivative* title to the territory of the protected, it is submitted that it cannot cede part of the territory without the consent of the source of derivation. This much is distillable from the *Western Sahara, Advisory Opinion Case*, ICJ Reports, 1975, p. 39, para. 80. Fair enough, the Court agreed that such was not a mode of acquiring title today, but unfortunately, went ahead to give effect to this odd mode today.

Secondly, as to the status of the Anglo-Efik Treaty of Protection, 1884, it is submitted that it was a valid and binding agreement between internationally recognised entities, to which Nigeria succeeded, irrespective of whether the parties were equals or not. Therefore, the reliance on the dictum of Max Huber in the *Island of Palmas Case* that the parties to a treaty of protection are not usually equal is, with all due respect, irrelevant. The Anglo-Efik Treaty 1884 is a "treaty"; an international agreement, containing terms which regulate the relationship between the parties, which terms must be kept by the parties under the international legal principle of *pactasuntservanda*. To suggest that a party can agree to one thing in an agreement, and in reality do another, is to profess and promote deceit.

In other words, irrespective of any general status ascribed to the 1884 Treaty, it ought to be binding on its own terms. Article I of the Treaty provides as follows:

Her Majesty, the Queen of Great Britain and Ireland, & C, in compliance with the request of the Kings, Chiefs and people of the Old Calabar, hereby undertakes to extend to them, and to the territory under their authority and jurisdiction, her gracious favour and protection.

And Article II provides:

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.

The above provisions clearly evince the intention, rights, obligations and limitations of the parties. The Court had no business to imputing other meanings or embarking on any interpretation outside of the Treaty. Under Art. 31 of the Vienna Convention on the Law of Treaties 1969, a treaty must be interpreted in good faith and in accordance with the ordinary meaning to be given to its terms. The ICJ applied this rule in the *Case Concerning Territorial Dispute (Libyan Arab Jamahiriya/Chad)* ICJ Rep., 1994, p. 6 in interpreting the Treaty of Friendship and Good Neighbourliness between France and Libya 1955, and there is no reason why the same rule of interpretation should not be extended to the Treaty of Protection between Britain and Old Calabar. The obligation of Great Britain was to protect *the people* and *their territory*. And for this favour, the people and their leaders were not to enter into any agreement or correspondence with any other power or nation without Britain's consent. Therefore, the ceding of the Bakassi Peninsula to Germany would not have amounted to protecting "the territory under [the] authority and jurisdiction" of the Kings and Chiefs of Old Calabar.

Before it was more or less coerced into signing the Anglo-German Agreement of 11th March, 1913, Britain had always pleaded the title of the Kings and Chiefs of Old Calabar whenever any other nation contested title to Bakassi (Anene, 1970). In the light of this, there would appear to be no strong legal justification, with respects, for the Courts view that "from the onset Britain regarded itself as administering the territories comprised in the 1884 Treaty, and not just protecting them".

Much as in the view of this paper Britain was entitled to determine the boundary between its sphere of influence and that of Germany, it could only do so in so far as it did not violate its duty to protect the territory of the people of Old Calabar as required by the 1884 Treaty. Any such determination outside the Treaty was in the circumstances, invalid. The power of Britain to determine the boundaries of its spheres of influence was limited to unclear areas since it did not have the authority to cede known territories. The Bakassi Peninsula was a territory under the Kings and Chiefs of Old Calabar, clearly marked on the left boundary by the Akwayafe River and on the right by the *Rio del Rey* estuary.

The view that protectorate arrangements are regulated by treaties creating them finds eloquent expression in the view that 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 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 (Jenning and Watts, 1992). By the Anglo-Efik Treaty of 10th September, 1884, Great Britain neither acquired title to the territory of the Kings, Chiefs and peoples of Old Calabar, nor had the authority to cede any part of it. That being the case, Great Britain could not have validly ceded the Bakassi Peninsula, which was a territory under Old Calabar to Germany. This view finds expression in the latin maxim: *nemodat quod non habet.*

Thirdly, the Court erred when it held that the Anglo-German Treaty of 11th March, 1913 was valid and applicable in its entirety. It is submitted that the said Treaty was invalid and that the Court ought to have upheld Nigeria's argument in this regard. Under the Vienna Convention on the Law of Treaties, 1969, a treaty may be invalid for the following reasons (Wallace, 2005):

- Non-compliance with a national law of fundamental importance (Art. 46);
- Error (Art. 48);
- Fraud and corruption (Art. 49-50);
- Coercion (Art. 51); and
- Violation of *jus cogens* (Art.53).

The 1913 Treaty was invalid for non-compliance with a national law of fundamental importance, error and for violation of *jus cogen* rules of international law. The failure by the British and German parliaments to ratify the 1913 Treaty as required by their respective municipal laws at the time rendered the Treaty invalid. This is so because when ratification is required, but not done, the treaty will not be binding on the party that has not ratified. And when the two parties to a bilateral treaty did not ratify, the Treaty is nothing but a carcass. In reaction to Nigeria's argument on this point, the Court stated thus:

The Court notes that Germany itself considered that the procedures prescribed by its domestic law had been complied with; … [t]he Agreement had, moreover been officially published in both countries. It is therefore irrelevant that the Anglo-German Agreement of 11th March, 1913 was not approved by the German parliament.

This view, to say the least, is most incongruous. It is difficult to see how publication of a treaty tantamount to ratification of same, or how what Germany "considers" will equals what its law "stipulates". If the law requires ratification before a treaty can become enforceable, mere publication of same will not suffice.

Again, the Anglo-German Treaty of 11th March, 1913 is invalid for error. By Article 48(1) of the Vienna Convention of the Law of Treaties 1969, a State can resile out of a treaty for error if "the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty". At the time when Britain signed the Anglo-German Treaty of 11th March, 1913, it did so under the erroneous impression that it had the power to cede the Bakassi Peninsula, whereas it did not have such powers by virtue of the Anglo-Efik Treaty 1884. It wallowed in this misconception until Nigeria gained independence. Nigeria as the successor State was entitled to plead invalidity, as it did. Further, a treaty is invalid if it violates a *jus cogens* rule of international law. The principle of *pactasuntser vanda* translated as "agreements must be kept" is a *jus cogens* rule of international law. In signing the Anglo-German Treaty of 11th March, 1913, Britain did not keep to the terms of the Anglo-Efik Treaty of Protection of 1884. Therefore, the 1913 Treaty is invalid on this ground.

Fourthly, assuming but not conceding that the Anglo-German Treaty 1913 is valid, it cannot be invoked before the ICJ by Cameroon to claim title to Bakassi, same not having been registered with the Secretariat of the United Nations in accordance with Article 102(1) of the United Nations Charter and Article 80 of the Vienna Convention on the Law of Treaties 1969. The consequence of non-registration is captured in Article 102(2) of the United Nations Charter as follows:

No party to any [such] treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

The Court, therefore, erred in law when it admitted Cameroon's claim and proceeded to award the Bakassi Peninsula to Cameroon based on the unregistered Anglo-German Treaty of 11th March, 1913. Fifthly, the Court erred in law when it failed to consider and accept Nigeria's argument for the severability of Articles XVIII to XXII of the Anglo-German Treaty 1913.

In what appears to be Nigeria's alternative argument to the question of validity, Nigeria had urged the Court to expunge Article XVIII to XXII which were the operational clauses relating to the Bakassi Peninsula. Under Article 44(3) of the Vienna Convention on the Law of Treaties 1969, a party to a treaty can denounce, withdraw or suspend the operation of some clauses in a treaty only where:

(i) The said clauses are separable from the remainder of the treaty with regard to their application;
(ii) The acceptance of the relevant clauses was not an essential basis of the consent of the other party or parties; and
(iii) The performance of the remainder of the treaty would not be unjust. It is clear from the entire facts of the case that Articles XVIII to XXII which relate to the Bakassi Peninsula are severable. Thus, I cannot agree more with Judge Ajibola (Judge *ad hoc*) who noted thus: The Articles dealing with the Bakassi eninsula are separate and independent in this sector which has been so treated by Cameroon and Nigeria. Indeed the Peninsula was the only independent sector filed in the first Application that relates to the Agreement of 11 March, 1913.

Again, the acceptance of other boundary lines as contained in other provisions of the 1913 Treaty was not dependent on the Bakassi Provisions. So the Bakassi provision cannot be said to be the "essential" basis of Germany's consent to be bound by the Treaty. Nor can it be said that the performance of the remainder of the Treaty will be unjust as a result of the excision of the Bakassi clauses. And sixthly, the Court erred in law when it rejected Nigeria's claim to the Bakassi Peninsula based on historical consolidation, and held among other things, that "invocation of historical consolidation cannot in any event vest title to Bakassi in Nigeria, where its 'occupation' of the Peninsula is adverse to Cameroon's prior treaty title and where, moreover, the possession has been for a limited period". In the first place, Cameroons purported "treaty title" was not prior to Old Calabar original title to which Nigeria succeeded upon independence.

This being the case, Nigeria's occupation which derives from that of Old Calabar which has occupied the territory from time immemorial cannot be viewed as being for a "limited period of time". Again, had the Court expunged Articles XVIII to XXII of the Anglo-German Agreement of 11th March, 1913 as it ought to, it would have inevitably accepted Nigeria's claim based on historical consolidation with the attaching *effectivites*. It must be added, on a final note, that contrary to the Court's view that the theory of historical consolidation is highly controversial, it has in a number of cases held that it can be the basis of establishing territorial title if supported by the requisite evidence. For example *Fisheries Jurisdiction Case* (United Kingdom v. Norway), ICJ Rep., (1951) p. 139; *Minquiers and Ecrehos* (United Kingdom v France), ICJ Rep., (1953) p. 57; *Land, Island and Maritime Frontier Dispute* (Elsalvador/Honduras: Nicaragua Intervening), ICJ Rep., (1992) p. 565.

Conclusion

It is the above faults and fallibility of the judgment that elicited calls for rejection of the verdict. The majority of Nigerians by words and action rejected the judgment on Bakassi. What naturally followed was wide speculation and contemplation as to the possibility of a reversal of the judgment and the trauma it brought on the psyche of the people. Thus away from the call for a total disobedience and disregard of the judgment in some quarters, it was suggested that Nigeria should "appeal". Unfortunately there is no provision for appeal in the Statute of the ICJ. The decision of the ICJ, by Art 59 and 60 of the Statute of ICJ, is final and binding on the parties in respect of the particular case,and has now been enforced.

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