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People of Old Calabar and Anglo-German Treaty, 1913, and the Validity of the Treaty in the Cameroon versus Nigerian Case, 2002

BANKOLE SODIPO, OSITA ADAH
Babcock University, Ilishan-Remo, Nigeria

Abstract. This study examined people of old Calabar and Anglo-German treaty, 1913, and the validity of the treaty in the Cameroon v Nigerian case, 2002. The research methodology was descriptive and the system theory was adopted. The study revealed that the 10 September 1884 treaty between Great Britain and the kings and chiefs of Old Calabar was a treaty of protection, not a colonial protectorate as it contains no clauses transferring sovereignty over old Calabar, including Bakassi territory, to Great Britain. It also found that by Anglo-German treaty of 11 March, 1913, Great Britain transferred the sovereignty over Bakassi territory to Germany without the consent and authority of the kings and chiefs of old Calabar. It further found that the kings and chiefs of old Calabar remained passive to the cession of Bakassi territory to Germany. The study concluded that the acquiescence of the kings and chiefs of old Calabar to the cession of Bakassi territory to Germany reinforced the defective-derivative title of Great Britain and rendered it valid or definitive. And that it is on the basis of the acquiescence of the kings and chiefs of old Calabar, not on the basis of the law in force at the time, that the Anglo-German treaty of 11 March 1913 is made valid and conferred derivative title on Great Britain and thus applicable to the Bakassi case in its entirety.

Keywords: Treaty, Pacta Sunt Servanda, Protectorate, Colony, Colonial Protectorate.

1. Introduction

On 10 September 1884 Great Britain, and kings and chiefs of old Calabar concluded a treaty of protection. Great Britain did not acquire sovereignty to the old Calabar as sovereignty to the city states remained vested in the kings and chiefs. The treaty established that the city states were politically and socially organized and independent. By the treaty Great Britain acknowledged that the kings and chiefs of old Calabar possessed International and legal personality and the capacity to enter into treaty relations with other nations. On 11 March 1913 Great Britain and Germany concluded a treaty in which Bakassi territory was ceded by Great Britain to Germany. The cession of Bakassi territory was made without the consent and authority of the kings and chiefs of old Calabar and the treaty made no reference to the 10 September 1884 treaty. The kings and chiefs of old Calabar remained passive to the 11 march 1913 Anglo-German treaty, and the treaty continued to define the maritime boundary between Cameroon and Nigeria till 1914, when southern and Northern protectorates of Nigeria were amalgamated, and 1960 when both States achieved Political Independence. The kings and chiefs of old Calabar did not also protest against the relevant authority for the exclusion of Bakassi territory and its inhabitants in the amalgamation of the colony and Southern, and northern protectorates of Nigeria in1914. At the hearing of the case Nigeria contended that the 10 September 1884 treaty was a treaty of protection and no more, that Great Britain had no sovereignty or title over Bakassi territory and thus lacks the legal authority to cede the peninsula to Germany without the consent and authority of the Kings and Chiefs of old Calabar, and that the cession was void on the principle of nemo dat quod non habet. Cameroon argued that the 10 September 1884 treaty established a colonial treaty which in the practice of the period gave Great Britain the power to cede Bakassi peninsula to Germany vide the 11 March 1913 treaty without the intervention of the native population or

the kings and chiefs of old Calabar. The International Court of Justice (ICJ) held that the Anglo-German treaty of 11 March 1913 was applicable in its entirety to Bakassi case in that, "It has been presented with no evidence of any protest in 1913 by the Kings and 0to independence in 1960", and 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 in the Southern Section". It submitted that the case of Cameroon cannot be sustained on the basis of the treaty provision or the law in force at the time. The position of Great Britain in the Anglo-German treaty of 11 March, 1913 was weakened by lack of express consent proceeding from the kings and chiefs of old Calabar to transfer sovereignty over Bakassi territory to Germany. The passivity or acquiescence of the kings and chiefs of old Calabar to the cession, however, reinforced the defective-derivative title of Great Britain rendering same valid or definitive. It is therefore on the basis of the acquiescence of the kings and chiefs of old Calabar, not on the basis of the law in force at the time, that the Anglo-German treaty of 11 March 1913 was made valid and conferred derivative title on Great Britain and thus applicable to the Bakassi case in its entirety.

2. System Theory

This study adopts system theory to examine the people of old Calabar and Anglo-German treaty, 1913, and the validity of the treaty in the Cameroon v Nigerian case, 2002. The system theory is one of the approaches developed as a protest to the traditional approaches of politics. The major exponent of the system approach is David Easton (1973). The System approach attempts to describe the relationship existing between political processes with other aspects of social life. Easton (1973) sees the system approach as "the system of interaction in any society through which binding or authoritative decisions are made and implemented." He considers the political system as existing within an environment of other systems namely-physical, biological, social, or psychological which affect it and are in turn affected by the political system-through continuous transactions and exchanges. According to Easton, the political system functions in a way that it receives inputs from its environment which after undergoing some change processes within the political system emerges as outputs. Inputs are the demands that values be allocated in a particular way, that is, they are expressions of approval for particular decisions. Output on the other hand, are usually authoritative decisions such as government policies, judicial decisions, parliamentary acts made by the authorities. The outputs in turn evoke results or feedbacks depending on the volume and intensity of demands and support from the environment (Enemuo, 1999). The system theory has been criticized in particular with regard to the difficulty in defining authoritativeness especially when formal decision of the governments of many developing states are not allowed to be challenged. The theory has also been criticized for being abstract and unrealistic. In spite of the shortcomings of the system theory the model marks a significant improvement on the rational approaches. It is of great relevance when applied in the explanation and analysis of functional political system (Mahajan, 2014). The system Theory therefore applies to this study. (Osah and Adah 2017).

3. Objective of the Study

The main objective of this study is to examine people of old Calabar and Anglo-German treaty, 1913, and the validity of the treaty in the Cameroon v Nigerian case, 2002

The Specific objectives are:

- To investigate the status and legal effects of the 10 September 1884 Treaty between the people of Old Calabar and Great Britain.
- To determine the validity and applicability of the 11 March 1913, Anglo-German treaty in the Cameroon v Nigeria case, 2002
- To analyse the role of the kings and Chiefs of Old Calabar in the 11 March 1913 Anglo-German Treaty.

4. Conceptual Clarifications

4.1 Treaty

The New Webster's Dictionary of English Language (1995: 1051) defines 'treaty' as "a formal, signed and ratified agreement between States". Black (1990:1507) defines "treaty" thus:

A compact made between two or more Independent nations with a view to the public welfare.... An agreement, league, or contract between two or more nations or sovereigns formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each State. ..... A treaty is not only a law but also a contract between two nations and must, if possible, be so construed as to give full force and effect to all its parts.

Vienna Convention on the law of Treaties (1969: Article 2 (1) (a)), defines Treaty as follows:
. . . an International agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatsoever its particular designation.

In Abacha & ors v Fawehinmi,(2000:340) Uwaifo, J.S.C defined the term "treaty" in accordance with the Vienna Convention on the law of treaties (1969) to mean:
on international agreement or by whatever name called, eg Act, Charter, concordant, covenant, declaration, protocol, or statute concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

Achike, J.S.C has in the case of Abacha &ors v Fawehinmi(2000: 314) defined the term "treaty" as follows:
The term treaty has been variously defined. Suffice it to say that a treaty is a compact, an agreement or a contract-bilateral or multilateral- between sovereign states (two or more) whereby they establish or seek to establish a relationship between themselves governed by international law. A treaty, therefore, in a broad sense, is similar to an agreement under the civil law. The difference between an ordinary civil contract (or agreement) and a treaty is that while the former is an arrangement between individuals and derives its bindingness from municipal or domestic law of a state, a treaty on the other hand derives its binding force and effect from international law...Thus ordinarily, a treaty binds only states parties to it just as a contract binds individuals who are parties thereto.

4.2 Pacta Sunt Servanda

The fundamental principle of the law of treaties is that a treaty in force is binding upon the parties to it, and must be performed by them in good faith in accordance with its terms (V.C.L.T 1969: Article 26)
This means that when a treaty has entered into force a party is under obligation to refrain from acts which would defeat the object and purpose of the treaty. In other words, a party to a treaty in force should not engage in acts capable or designed to forestall the performance of treaty in accordance with its terms or to frustrate the object and purpose of the treaty (VCLT 1969: Article 18)

The legal principle of good faith forms an integral part of the rule of Pacta Sunt Servanda. Pacta Sunt Servanda means that agreements and stipulations to a contract must be observed by the parties (Black 1990:1502) applying the rule Pact Sunt Servanda to treaties means that the application or performance of treaties must be governed by good faith. This proposition is supported by many literatures.

Article 2 paragraph 2 of the United Nations Charter 1945 clearly provides that "All members… Shall fulfill in good faith the obligations assumed by them in accordance with the present charter".

In certain valuations to be made under Article 95and 96 of the Act of Algeciras, the International Court of Justice (ICJ) in the case concerning the rights of Nationals of the United States of America in Morocco (1952:217) stated thus; 'The power of making the valuation rests with the customs authorities, but it is a power which must be exercised reasonably and in good faith'.

The Permanent Court of International Justice (PCIJ) also in applying treaty clauses prohibiting discriminations against minorities in the cases of Treatment of polish nationals in Danzig (1932:44), and Minority schools in Albania (1935: 64) maintained that the clauses must be so applied to ensure the absence of discrimination in fact as well as in law. In other words, the obligation must not be evaded by a merely literal application of the clauses. And in the North Atlantic Coast Fisheries Arbitration (1910: xi) Great Britain acquired the right to regulate fisheries in Canadian waters and has granted certain states nationals by dint of a treaty of Ghent the Tribunal in dealing with the case stated**:**
From the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the treaty

Interpretation is a necessary or key part in the application of treaties. The obligation to interpret a treaty provision in good faith is of equal and competing weight and relevance with its performance in good faith (Ibid). The general rule of international law that govern the interpretation of treaties are contained in Article 31 of the Vienna Convention on the law of treaties 1969. It provides thus; "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

4.3 Protectorate

To interpret the term "Protectorate" in good faith it might be pertinent to have a recourse to its plane or ordinary meaning. Lorimar and Lechner (1995:1051) define "Protectorate" as;
government by a protector, the office of protector, authority assumed by a strong State over one a week or underdeveloped one, without direct annexation, for the defence of the latter from external enemies, a State so governed, a territory ruled in foreign and domestic affairs by Britain but not having the legal status of a colony, the period of such government.

Starke (1977:130) defines a protectorate or a protected State as:
a State which has put itself by treaty under the protection of a strong and powerful State, so that the conduct of its most important international business and decisions on high policy are left to the protecting state.

Protectorate is not based on a uniform pattern. Each case depends on its special circumstances and more specifically on
(a) The particular terms of treaty of protection.
(b) The conditions under which the protectorate is recognised by third powers as against whom it is intended to rely on the treaty of protection.

Although not completely independent, a protected State may enjoy a sufficient measure of sovereignty to claim jurisdictional immunity in the territory of another State. It may also still remain a State under international law.

Judge Ajibola in his disenting opinion in the Cameroon v. Nigeria case (2002: par 126) defines a Protectorate thus;
… Protectorates are neither colonial protectorates nor colonies. Protectorates are to all intent and purposes international legal personalities and remain Independent States and they are not "colonial Protectorates" of the protecting Powers. Therefore, after the Treaty of 1884, the City States of Old Calabar and their territories were simply protectorates of Great Britain. Before and after 1913 these City States of Old Calabar remained Independent protectorates. There is nothing from the actions and instruments during this period which could describe the Old Calabar including Bakassi and other areas being claimed by the Kings and Chiefs, as a colony of Great Britain, nor is there anything in the Treaty indicating that Old Calabar including Bakassi, acquired the status of a colonial protectorate. Even Great Britain did not describe the territory as such and this cannot be done by any inference".

Also Judge Koroma in his dissenting opinion in the Cameroon v Nigerian case (2002: par 17) defines protectorate as follows;
In my view, the position with regard to protectorates is correctly stated in the latest edition of Oppenheim. According to the author:
"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 arrangement 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…

4.4 Colony

A colony is a territory attached to another nation, known as the mother Country, with political and economic ties. It is a dependent territory the government of which is to some extent the legal responsibility of the government of another territory (Black 1990:265; Martin and Law 2006:159).

4.5 Colonial Protectorate

Colonial Protectorate is, in substance, a term used by writers or commentators to rationalize the many but varied range of Protectorates. In the main, Colonial Protectorate was neither a legal instrument nor juridical institution. It was a practice or political construct of Great Britain adopted in the 19th century to defeat the legal essence of treaty of protection and exploit African treaty parties. The motion was not supported by actual state practice or judicial precedent. Protectorate treaty in its original or classical notion did not involve the annexation of territory of protected state, whereas, acquisition of territory formed the basis of colonial protectorate. It is the system adopted by Great Britain to acquire the

territory of protected state without that intention forming a clause of the treaty of protection. It is this practice that constitutes the political or colonial element that contradicts the terms and validity of the legal instruments---the treaty of protection. Colonial or International Protectorate as a political tool or expedient has no place or recognition in International law. It cannot therefore be imported to affect the validity of any treaty of protection in that the fundamental principle of treaty remains Pancta Sunt Servanda. (FRN Rejoinder 2001, Alexandrowicz 73:70-71, 80-81). The places of Colonial protectorate and Protectorate treaties have been correctly summarized by Alexandrowicz as follows:
In fact it can hardly be maintained that the Colonial Protectorate (whatever its meaning in municipal law) could fit into the edifice of traditional international law...

The 'Colonial Protectorate' was bound to remain a shadow of a legal institution which could neither take shape by intention nor by actual annexation. In the first case it was a political expectancy, in the second case there was no more room for any protectorate...

The transformation of the classic protectorate into the colonial protectorate was in its essence not a legal but a political development. The texts of the treaties of protection show no trace of such development. Intention to annex the territory of the protected state could not have been stipulated by the contracting parties (to the Berlin Act 1885). It was the arrangement adopted behind the scenes of the Berlin Conference by which the signatory powers gave each other carte blanche to absorb protected states, which led to a deformation of the protectorate as such. It has been emphasised that such an arrangement could not affect the validity of the treaties of protection with Rulers, for pacta tertiis nec nocent nec prosunt. The colonial protectorate is the outcome of a para-legal metamorphosis and has no place in international law as a juridical justifiable institution. It was at most a political expedient (Ibid).

5. The Anglo-German Treaty

On 11, March 1913 Great Britain and Germany executed a treaty in which Britain ceded Bakassi territory to Germany. Great Britain had earlier on 10 September 1884 entered into a treaty with the Kings and Chiefs of Old Calabar. Articles 1 and 2 of the 10 September 1884 treaty provide thus:-

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 undertake to extend to them, and to the territory under their authority and jurisdiction, her gracious favour and protection.

Article 2:
The King 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 (Cameroon v Nigeria 2002:par 14; Dakas 2003: 195).

From the tenor and detail of the 10 September 1884 treaty between Great Britain and the Kings and Chiefs of Old Calabar, the Sovereignty over Bakassi territory was not transferred to Great Britain but remained vested in the Kings and Chiefs of Old Calabar (Cameroon v Nigeria 2002:201) The vex issue arising from the circumstances of the Anglo-German treaty of 11 March 1913 is, whether Great Britain had the right, power and authority to convey Bakassi territory to Germany. In other words, whether Great Britain acquired derivative title over Bakassi territory which they transferred to Germany vide the 11 March 1913 treaty.

At the hearing of the case over Bakassi territory between Cameroon and Nigeria, Cameroon contended that the Old Calabar possessed no defined territorial limit which Nigeria inherited upon attainment of independence and had no juristic personality in international law; that the Kings and Chiefs of Old Calabar did not have territorial sovereignty over Bakassi territory; Great Britain in the 10 September 1884, treaty of protection acquired sovereignty over Bakassi territory and thus had the right, power and authority to cede the territory to Germany (Cameroon v Nigeria 2002 :par 202)

Nigeria contends that the Anglo-German treaty of 11 March, 1913 is invalid to the extent that it is inconsistent with the provisions of 10 September 1884 treaty of protection. Nigeria avers that Articles XVIII, XIX, XX, XXI and XXII of the Anglo-German treaty of 11 March, 1913 in so far as they purport to convey Bakassi territory to Germany are the offending parts of the treaty. In effect Nigeria argues that Great Britain in the Anglo-German treaty of March 11, 1913 passed no title or sovereignty to Germany on the principles of nemo dat quod non habet (Ibid :par 201)

The International Court of Justice (ICJ) held that, the 10 September, 1884 treaty between Great Britain and the Kings and Chiefs of Old Calabar did not establish

an international protectorate; that from the outset Great Britain regarded itself as administering the territories comprised in the 1884 treaty and was not just protecting them, and the fact that a delegation was sent to London by the Kings and Chiefs of Old Calabar in 1913 to discuss matters of land tenure cannot be considered as implying international personality but simply confirmed the British administration by indirect rule. The court further held that Nigeria itself was unable to state with clarity and certainty what happened to the international personality of the Kings and Chiefs of Old Calabar after 1885. This implies that the 1884 treaty did not mean or intend the content of its provisions and Great Britain was thus entitled to cede the Bakassi comprised in the September 10, 1884 treaty of protection notwithstanding the express provisions of the treaty (Ibid 207).

From the argument of Nigeria and Cameroon and the decision of the ICJ what have emerged for resolution are the status and legal effect of 10 September 1884 treaty between Great Britain and the Kings and Chiefs of Old Calabar, the validity of the Anglo-German treaty of 11 March 12913, and the role of acquiescence of the Kings and Chiefs of old Calabar in the Anglo-German treaty.

6. The Status of 10 September 1884 treaty

On 10 September, 1884 Great Britain executed an instrument with the Kings and Chiefs of Old Calabar. The instrument is titled "Treaty with the Kings and Chiefs of Old Calabar, 10 September 1884". On the provision on its operative date the instrument states "this treaty shall come into operation (Dakas 2003:167) From the foregoing it can be safely stated that the 10 September, 1884 instrument executed by Great Britain with the Kings and Chiefs of Old Calabar is an international legally binding instrument – a treaty. A careful reading of article 1 and 2 of the 10 September, 1884 instrument reveals the intention of the parties and the purpose of the instrument. The instrument is a treaty that creates and assigns obligation or duties to the different parties. The term of the 10 September, 1884 treaty is clear, plane and unambiguous. The law is settled that "a treaty whose terms and provisions are clear does not need to be interpreted. Nor may interpretation be used as a pretext to deny the clear meaning of a legal instrument. In other words, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose According to jurisprudence, a treaty in force is to be interpreted in accordance with the rules of international law in force at the time when the treaty was concluded and this includes the principle of pacta sunt servanda. It follows that if the 10 September, 1884 treaty is interpreted in accordance with the rules of international law that were in force at the relevant period, the only meaning that could be ascribed to the treaty, is that in 10 September, 1884 Great Britain entered into a treaty of protection with the Kings and Chiefs of Old Calabar.(Dakas 2003: 195).

A treaty of protection such as the 10 September, 1884 treaty entered into between Great Britain and the Kings and Chiefs of Old Calabar has been described by Judge AL-Khasewneh in his separate opinion in the case of Cameroon v Nigeria (2002:par 7; Dakas 2003:213) as *"the first step towards acquiring a full colonial title or a legal lever for acquiring an inchoate title to territories: a title capable of being perfected more or less at Leisure".*

The 10 September, 1884 treaty of protection contains no clauses which may be construed as transferring title to Great Britain. In the absence of such clauses, the treaty remains a lever – a treaty of protection and no more (Ibid)

This assertion is amply supported by the fact that at the relevant period, which is in the 1880s, the focus of foreign policy of Great Britain in Africa was to enter into treaties of protection with African Treaty Parties. The creation or acquisition of more colonies in Africa was outside the pale of British Foreign Policy. This was because creating a new British colony of necessity entailed expensive machinery of government. (Dakas 2003:170). It is also not a legal instrument, but a political construct that was favoured by neither State practice nor judicial precedent (Dakas, 2003: 216)

In summation, the 10 September, 1884 instrument entered into between Great Britain and the Kings and Chiefs of Old Calabar is a treaty and it is a treaty of protection.

7. The Legal Effect of 10 September 1884 Treaty

The treaty of protection vested in Great Britain only certain limited rights. In particular Great Britain acquired only the right to external sovereignty. Great Britain did not acquire territorial sovereignty or other title as the sovereignty over the territories of Old Calabar, including Bakassi, continued to vest in the kings and Chiefs of the Old Calabar. The terms of the 10 September, 1884 treaty established that the city states or Old Calabar, which includes Bakassi, was

socially and politically organized and were independent entities. It established that the Kings and Chiefs had sovereignty over the territories of Old Calabar including Bakassi. The treaty acknowledged that the Kings and Chiefs of Old Calabar possessed international legal personality including the capacity to enter into treaty relations with other nations or international persons. The 10 September, 1884 treaty, thus, has international standing or recognition. Under the treaty of protection, the treaty making powers of the Kings and Chiefs of Old Calabar can only be exercised with the knowledge and approval of Great Britain. The treaty of protection did not divest the Kings and Chiefs of Old Calabar of the residual power to enter into treaty relations. It only placed restrictions on their powers to transfer their territories to the other nations or powers while leaving the sovereignty over their internal affairs wholly and essentially unaffected (Cameron v Nigeria 2002: par 201; Dakas 2003:196)

Great Britain never took exception to the terms and provisions of the September 10, 1884 treaty. Great Britain rather held up the treaty against other nations or powers whenever their interests in the region were in conflict. By the 10 September 1884 treaty, Great Britain thus acknowledged the capacity of the Kings and Chiefs of Old Calabar to enter into treaty relations with other nations or international legal personalities and it was is too late in the day for Great Britain to renege or contend the contrary. (Ibid)

It thus follows that the International Court of Justice (ICJ) erred in law when it held that the choice of a protectorate treaty by Great Britain was a question of the preferred manner of rule; Great Britain has a clear understanding of the area ruled at different times by the Kings and Chiefs of Old Calabar, and of their standing; this area was one of a multitude in a region where the local rules were not regarded as states, further, from the outset Great Britain regarded itself as administering the territories comprised in the 1884 treaty, and not just protecting them (Cameroon v Nigeria 2002:par 207; Dakas 2003:197)

It is submitted that since the nineteenth century till date the notion of "protectorate" or "protected state" has been well recognized in international law and the decision of the ICJ thus runs in conflict with the notion of protectorate treaty. According to Judge Koroma in his dissenting opinion:

...These conclusions are totally at variance with the express provisions of the 1884 Treaty and in violation of the principle of pacta sunt servanda. Moreover, by concluding the 1884 Treaty, it is clear that the territory of Old Calabar was not regarded as a terra nullius but a politically and socially organized community which was recognized as such and which entered into a treaty relationship with Great Britain, a treaty Great Britain felt able to raise against other European States. (Cameroon v Nigeria 2002:15; Dakas 2003:197).

8. The Validity of Anglo-German Treaty

A consideration of the Anglo-German Treaty of 11 March 1913 calls for examination of the purpose of the 10 September 1884 treaty between Great Britain and the Kings and Chiefs of Old Calabar, and the intention of the parties to the treaty. It is important to emphasize that the Anglo-German Treaty, all through its length and detail, made no reference to the 10 September 1884 Treaty. By dint of September 10, 1884 treaty Great Britain established a protectorate over Old Calabar. The terms of the treaty clearly show that the Kings and Chiefs of Old Calabar did not vest in Great Britain their title or sovereignty over the Old Calabar (including Bakassi territory) nor did they authorize Great Britain to conclude on their behalf the 11 March, 1913 treaty ceding Bakassi territory to Germany. It becomes manifest that Great Britain in the March 11, 1913 treaty conveyed no title or sovereignty over Bakassi territory to Germany on the principle of memo dot quod non habet – a principle of great antiquity. The Anglo- German Treaty of March 11, 1913 is, therefore, null and void or lacks the requisite legal force. For the reason of the foregoing it is submitted, with due respect, that the International Court of Justice erred in law when it 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 in the southern section" (Cameroon v Nigeria 2002:par 209)

9. Role of the Kings and Chiefs of old Calabar in the Anglo-German Treaty of 11 March 1913

The Anglo –German Instrument of 11 March 1913, either under the law in force at the time or standing alone, was vitiated or nullified by lack of express consent or avowed authority proceeding from the Kings and Chiefs or the people of Old Calabar to Great Britain to transfer sovereignty over Bakassi territory to Germany (Dakas 2003:224) Consent is an essential element in cession and the absence of consent in such circumstances negatives or nullifies the exercise(Shaw 2008:516) The inherent weakness or defect in the Anglo-German Treaty of 11 March 1913 was however removed, ratified and validated by the Kings and Chiefs, or the people of Old Calabar

through their silence or passivity. The Kings and Chiefs or the people of Old Calabar chose to remain silent and watch while Great Britain ceded their territory, the Bakassi, to Germany. The passivity of the Kings or Chiefs of Old Calabar was emphasised by the International Court of Justice (ICJ) when it stated thus:-

Moreover, the Court has been presented with no evidence of any protest in 1913 by the Kings and Chiefs neither of Old Calabar, nor of any action by them to pass territory to Nigeria as it emerged to independence in 1960.

The Court thus concludes 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 in the southern section (Cameroon v Nigeria: 261-262).

The failure or neglect of the Kings and Chiefs, or the people of Old Calabar to raise any objection or protest to the cession denotes tacit consent or acquiescence. Acquiescence is a species of estoppel that connotes consent in the form or appearance of silence in that consent can reasonably be inferred from conduct. It is the failure or neglect to make any objection to an act which one has knowledge. It implies intention to waive or abandon a right, interest or entitlement (Black 1990:24). Acquiescence occurs in a situation that demands protest and the protest did not come (Shaw 2008:516) or did not come within a reasonable time as warranted by the circumstances (Ibid). In De Bussche v Alt, (8ch.D:314), Thesiger L.J explained what the term acquiescence is as follows.

If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This,... is the proper sense of the term 'acquiescence' and in that sense may be defined as acquiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of ESTOPPEL by words or conduct.

Acquiescence, however, imports full knowledge (James 1973:37) Evidence of acquiescence reinforces a defective title rendering same definitive (Shaw 2008:517). Acquiescence of the Kings and Chiefs of Old Calabar to the cession of Bakassi territory to Germany rendered valid Great Britain's derivative title to the territory (Ibid).

The Kings and Chiefs or people of Old Calabar, by failing to raise any protest have acquiesced to the 11 March 1913 Anglo-German Treaty. In 1914 the Colony and Southern Protectorate of Nigeria and Northern Protectorate of Nigeria were amalgamated. At the time of amalgamation Southern Cameroon which includes Bakassi Peninsula formed an integral part of Cameroon territory. From 1914 to 1960 when Cameroon and Nigeria achieved independence the 11 March, 1913 treaty continued to define the maritime boundary between the two States. Bakassi Peninsula was ceded by Great Britain to Germany without the consent and authority of the kings and Chiefs of Old Calabar who did not express their resentment or disgust. The Kings and Chiefs of Old Calabar did not also protest against the relevant authority for their exclusion in the amalgamation of the Colony and Southern protectorate and Northern protectorate of Nigeria in 1914. (Ikome 2004: 11-13;Bassey 2014: 9833-9834;Ngalim 2016:6).

It is submitted that on the basis of the acquiescence of the Kings and Chiefs of Old Calabar, not on the basis of the law in force at the time, that the Anglo – German Instrument of 11 March 1913 is valid and conferred derivative title on Great Britain (Jibril, 2004: 649; Merrills, 2003: 795; Ifesi, 2003: 66). This study thus agrees with the International Court of Justice (ICJ) only on the basis of acquiescence of the Kings and Chiefs of Old Calabar that "the Anglo–German Agreement of 11 March 1913 was valid and applicable in its entirety" to the Bakassi case. This assertion is the view of jurists and scholars. Judge AL–khasawneh in his separate opinion in Cameron v Nigeria. (2002: par 22)(Dakas 203: 224-225) states thus:

.....Whilst the case of the Kings and Chiefs of Old Calabar was not weakened by the treaty itself, their subsequent behaviour certainly has had that effect. It is said that the God of sovereignty is a jealous God but apparently not in Bakassi, for in reflecting on this case, one cannot but notice an extreme passivity and inaction on their part that managed to rebut the presumption. Apart from a single trip in 1913 to London, when a delegation sent on their behalf discussed matters relating to land tenure, they remained silent in the face of momentous events that had an impact on their status. Most notably, their failure to protest at the cession of their territory to Germany under the 1913 Agreement leaves me with no choice but to conclude that they had given their consent to that transfer volenti not fit injuria. It is for this reason alone – and not the surrealistic interpretation of the Treaty of 1884 or the reference to a fictitious sub-category of colonial protectorates,

nor the equally fictitious reference to a form of intertemporal law that would shield a deformed practice of the concept of protection from invalidation – that I have voted in favour of point III (A) of the dispositif relating to those provisions of the 1913 Agreement that deal with Bakassi.

In the same vein Bassey(2014) states that:-
The 1913 Agreement is one of such pre-independence Agreements Britain had entered into with Germany on behalf of Nigeria. The acceptance of the Exchange of Notes implies that Nigeria accepted the 1913Treaty as binding on it. Pacta sunt servenda. Agreements must be honoured and are binding on the parties that entered into them. An exception to this rule is protest against Colonial treaties that are not in the best interest of Nigeria. The Kings and Chiefs of Old Calabar should have protested against the Anglo-German treaty of 1913 in which Britain wished away Bakassi to Germany without their consent. If there was any protest by the people of Old Calabar during the Colonial rule or by Nigeria at independence, it is believed that the World Court might have held in favour of Nigeria in the Cameroon vs. Nigeria case (2002). This belief is premised on the fact that the ICJ said that it had not been presented with any evidence of protest against the 1913 Anglo-German treaty. The Court noted, "(m)oreover, the Court has been presented with no evidence of any protest in 1913 by the Kings and Chiefs of Old Calabar, nor of any action by them to pass territory to Nigeria as it emerged to independence in 1960"… Legally speaking, the absence of any protest meant that the Nigerian government and people had acquiesced in the 1913 Treaty.

And Bassey (2015) states that:-
… Protest was very important because even the ICJ had made reference to legal effect of protest when it noted in its judgment thus: 'moreover, the Court has been presented with no evidence of any protest in 1913 by the Kings and Chiefs of Old Calabar; nor of any action by them to pass the territory to Nigeria as it emerged to independence in 1960.' This implies that protest was a necessary instrument to get back Bakassi.

10. Summary and Conclusion

On the 10 September 1884 Great Britain and the Kings and Chiefs of Old Calabar concluded a treaty of protection. Great Britain did not acquire sovereignty to the old Calabar as sovereignty to the city states remained vested in the Kings and Chiefs. On 11 March 1913 Great Britain and Germany concluded a treaty in which Bakassi territory was ceded by Great Britain to Germany. The cession of Bakassi territory was made without the consent and authority of the kings and chiefs of old Calabar and the treaty made no reference to the 10 September 1884 treaty. The kings and chiefs of old Calabar remained passive to the 11 march 1913 Anglo-German treaty. It is submitted that the case of Cameroon cannot be sustained on the basis of the treaty provision or the law in force at the time. The position of Great Britain in the Anglo-German treaty of 11 March, 1913 was weakened by lack of express consent proceeding from the Kings and Chiefs of old Calabar to transfer sovereignty over Bakassi territory to Germany. The passivity or acquiescence of the kings and chiefs of old Calabar to the cession, however, reinforced the defective-derivative title of Great Britain rendering same valid or definitive. It is therefore on the basis of the acquiescence of the kings and chiefs of old Calabar, not on the basis of the law in force at the time, that the Anglo-German treaty of 11 March 1913 is made valid and conferred derivative title on Great Britain and thus applicable to the Bakassi case in its entirety.

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