

PART I

BAKASSI

CHAPTER 1

THE ORIGINAL TITLE OF NIGERIA:

THE 1913 TREATY AND ITS ANTECEDENTS

A. Background

(i) Cameroon's *Applications* of 29 March and 6 June 1994

1.1 So far as concerned the question of title to the Bakassi Peninsula, Cameroon's initial *Application* of 29 March 1994 sought a declaration from the Court "that sovereignty over the Peninsula of Bakassi is Cameroonian, by virtue of international law, and that that Peninsula is an integral part of the territory of Cameroon".

1.2 Cameroon's *Additional Application* of 6 June 1994 made no further claim to title over the Bakassi Peninsula.

(ii) Cameroon's *Memorial*

1.3 So far as concerned the question of title to the Bakassi Peninsula, Cameroon, in its *Memorial* contended in essence that

(1) the pattern of Anglo-German agreements between 1885 and 1913 established in practice that the boundary between British and German territories ran to the west of the Bakassi Peninsula, leaving the Peninsula on the German side of the boundary (MC, paragraphs 2.06-2.58);

(2) the Anglo-German Treaty of 11 March 1913 provided for a boundary between British and German territories which left the Bakassi Peninsula on the German side of the boundary (MC, paragraphs 4.277-4.342);

(3) *effectivités* after the entry into force of the 1913 Treaty confirmed that Bakassi formed part of German/Cameroonian territory (MC, paragraphs 4.420-4.454);

(iii) Nigeria's *Preliminary Objections*

1.4 None of Nigeria's *Preliminary Objections* directly questioned the Court's jurisdiction over, or the admissibility of, that part of Cameroon's *Application* which put in issue the question of sovereignty over the Bakassi Peninsula (although certain other aspects of Cameroon's *Application* and *Additional Application* indirectly affected that issue or made assumptions as to the conclusions to be reached in relation to it). Indeed, although

Nigeria submitted in its fifth *Preliminary Objection* that there was no dispute concerning boundary delimitation as such throughout the whole length of the boundary from the tri-point in Lake Chad to the sea, Nigeria stated that this was without prejudice to Nigeria's title over the Bakassi Peninsula: Nigeria accepted that there was a dispute over title to that peninsula. Accordingly, nothing said by the Court in its Judgment of 11 June 1998 (I.C.J. Reports 1998, p. 275) was directly relevant to the question of title to the Bakassi Peninsula.

(iv) Nigeria's *Counter-Memorial*

1.5 In its *Counter-Memorial* Nigeria's argument regarding sovereignty over the Bakassi Peninsula was principally, in essence, as follows:

(1) the Kings and Chiefs of Old Calabar were acknowledged to possess international personality including the capacity to conclude international treaties (NC-M, paragraphs 5.11-5.13, 6.15-6.26; and see below, paragraphs 1.6 *et seq.*, 1.31);

(2) Bakassi was included within the domains of the Kings and Chiefs of Old Calabar (NC-M, paragraphs 5.15-5.19, 6.33-6.36; and see below, paragraphs 1.15-1.16);

(3) in 1884 the Kings and Chiefs of Old Calabar concluded a treaty with Great Britain, by virtue of which Great Britain established a Protectorate over the Kings and Chiefs (NC-M, paragraphs 6.27-6.65; and see below, paragraph 1.29 *et seq.*);

(4) under that Protectorate Treaty Great Britain acquired only certain limited powers, and in particular did not acquire sovereignty over the territories of the Kings and Chiefs, which continued to be territory belonging to them (NC-M, paragraphs 6.37, 6.45-6.60; and see below, paragraphs 1.32, 1.41, 1.46-1.47);

(5) Great Britain and Germany (as the Protecting State for the neighbouring protectorate of Kamerun (Cameroon)) concluded various agreements in and after 1885 to delimit their respective spheres of interest (NC-M, Chapter 7; and see below, paragraph 1.52);

(6) those Anglo-German agreements concluded between 1885 and 1893 and which entered into force adopted the Rio del Rey as the line of division between British and German spheres of interest in the region, but did not otherwise deal with the boundary in the region of the Bakassi Peninsula; while subsequent Anglo-German discussions up to 1913 which covered that region did not lead to agreements which ever became legally binding (NC-M, paragraphs 7.1-7.33, 8.1-8.19);

(7) the Treaty of 11 March 1913 between Great Britain and Germany had in part the purported effect of transferring the Bakassi Peninsula to Germany (NC-M paragraph 8.24);

(8) The Bakassi Peninsula did not belong to Great Britain, which therefore (since *nemo dat quod non habet*) could not transfer it to another State (NC-M, paragraphs 8.26, 8.28-8.40; and see below, paragraphs 1.47, 1.58 *et seq.*);

(9) The relevant provisions of the Treaty were accordingly ineffective to bring about that transfer (NC-M, paragraph 8.40-8.48; and see below, paragraph 1.60 *et seq.*);

(10) the 1913 Treaty accordingly did not alter sovereignty over Bakassi, the original title to which survived the Treaty, maintaining the *status quo ante* (NC-M, paragraphs 8.41-8.42);

(11) no transfer of sovereignty resulted from the subsequent history of the Bakassi Peninsula up to the Independence of Nigeria in 1960, during which period that area continued to be under the authority of the Kings and Chiefs of Old Calabar and of the Nigerian regional and local government system (NC-M, Chapter 9; and see below, Chapter 2).

(12) After Nigeria (and Cameroon) attained independence in 1960 Nigeria continued to administer Bakassi, and its original title to the Bakassi Peninsula was confirmed by historical consolidation, acquiescence and recognition (NC-M, Chapter 10; and see below, Chapter 3).

B. The situation before the conclusion of the 1913 Treaty

(i) The City States of Old Calabar

[The location of the City States of Old Calabar is shown on Fig 1.1.](#)

1.6 The role of the original title vested in the Kings and Chiefs of Old Calabar appears clearly from the relevant passages in the *Counter-Memorial* of Nigeria, as follows:

"The title of Nigeria to Bakassi was originally a title vested in the Kings and Chiefs of Old Calabar. The original title of Old Calabar was not affected by the Anglo-German Treaty of 11 March 1913 (as explained in Chapters 8 and 9) and was eventually absorbed in the emerging entity of Nigeria. By the time of Independence in 1960 the original title to Bakassi vested in Nigeria as the successor to Old Calabar.

The four bases of the Nigerian claim to title over the Bakassi Peninsula are as follows:

(1) Long occupation by Nigeria and by Nigerian nationals constituting an historical consolidation of title and confirming the original title of the Kings and Chiefs of Old

Calabar which title vested in Nigeria at the time of Independence in 1960.

(2) Effective administration by Nigeria, acting as sovereign, and an absence of protest.

(3) Manifestations of sovereignty by Nigeria together with the acquiescence by Cameroon in Nigerian sovereignty over the Bakassi Peninsula.

(4) Recognition of Nigerian sovereignty by Cameroon."

1.7 In the *Reply* the Government of Cameroon attacks the "pre-colonial" titles invoked by Nigeria on several bases. In the first place, Cameroon contends that the location of the City States is problematical, and that the influence of the City States extended to the north and west of Bakassi: see the *Reply*, pages 246-249, paragraphs 5.21 to 5.33.

1.8 For the sake of argument, it may be supposed that this is true. But it would make no difference to the legal position, which is that the United Kingdom and other States of the relevant period recognised the City States as treaty partners and, consequently, as having international legal personality.

1.9 The *Counter-Memorial* presents ample evidence of the treaty-making practice of the States in the relevant period. Evidence is presented of seventeen treaties concluded between the British Crown and the Kings and Chiefs of Old Calabar: see NC-M, pp. 71-74, paragraphs 5.11-5.13. In the *Reply* Cameroon simply ignores this evidence.

1.10 It is also clear that from time to time the individual City States made agreements with each other. See for example the Agreement between Henshaw Town and Duke Town (Annex NC-M 15).

1.11 Further agreements are to be found in the pages of the Foreign Office Confidential Print, No.2193: see Annex NR 1.

1.12 The *Reply* quotes various passages from the historian Professor Anene: see the *Reply*, pp. 247-8. However, Professor Anene was not addressing the issue of international legal personality and in his monograph he shows little or no interest in such matters.

1.13 The *Reply* shows no awareness of the general tendency of European States to make treaties with African dynasties. This tendency and the relevant practice is described in scholarly detail by Professor Alexandrowicz, *The European African Confrontation: A Study in Treaty Making*, Leiden, 1973, pp. 94-105 (and see also Alexandrowicz, Hague Academy, *Recueil des Cours*, Vol. 123-I, 1968, pp. 165-82). Professor Alexandrowicz refers also to the extensive French practice and emphasises that most of the treaties entered into with African rulers were real and not personal treaties: see *The European*

African Confrontation, pages 94-96. Thus the practice alluded to by Nigeria in the *Counter-Memorial* is by no means exceptional.

1.14 Cameroon also fails to invoke any principle of inter-temporal law according to which African States and Rulers did not have a treaty-making capacity.

1.15 In the *Counter-Memorial* Nigeria has invoked reputable evidence, including expert opinion, to establish that the Bakassi Peninsula was at the material time a dependency of Old Calabar: see NC-M, pp. 74-5, paragraphs 5.15-5.19. In its *Reply* Cameroon contends that Bakassi did not belong to Old Calabar: see the *Reply*, pp. 252-4, paragraphs 5.42-5.48. Moreover, Cameroon does not seek to examine the materials adduced by Nigeria either generally or individually. Cameroon confines its response to citations from the *Western Sahara* case and the *Eritrea/Yemen* Arbitration (Phase I). The passages quoted by Cameroon are in very general terms and relate to regions with histories which bear no similarity to the conditions in the Bight of Bonny in the eighteenth and nineteenth centuries.

1.16 In the submission of Nigeria the assertions of Cameroon must be rejected in view of its persistent habit of ignoring the precise items of evidence presented by Nigeria in the *Counter-Memorial*.

(ii) Pre-protectorate circumstances

1.17 Cameroon seeks to belittle the relevance of what it refers to as "pre-colonial titles" (RC, paragraphs 5.49-5.60), and criticises Nigeria's emphasis on historic considerations (RC, paragraph 1.49). Cameroon's observations are mistaken; there can be no doubt that the pre-protectorate circumstances of the Bakassi region *are* very relevant to the correct appreciation of subsequent events, including particularly the 1884 Protectorate Treaty and the Anglo-German Treaty of 11 March 1913.

1.18 Nigeria would observe, first, that the correct term for the period before 1884, when the Protectorate Treaty was concluded, should be "pre-protectorate" rather than "pre-colonial". This is not just a question of terminology (although even questions of mere terminology should be treated correctly) but reflects a point of substance. This is that the Nigerian territories under consideration in the present context were never colonies of Great Britain, but were territories under British protection. Cameroon prefers to ignore this distinction, and to treat the territories as British colonies and Great Britain as having in relation to them the extensive sovereign authority possessed by a colonial power in relation to its colonies. But this is totally misleading, and, as was demonstrated in Nigeria's *Counter-Memorial* and is further explained later (below, paragraph 1.22 *et seq.*), is neither in fact nor in law a correct representation of the British protectorate over the relevant Nigerian territories.

1.19 In addition to Cameroon's misrepresentation of the true nature of Great Britain's relationship with the Nigerian territories under its protection, Cameroon's attempt to disregard the pre-protectorate history of the region is misplaced. It no doubt suits

Cameroon's purpose to try to ignore that history, since it runs completely counter to the main thrust of Cameroon's case and demonstrates that the Bakassi area was well within the limits of the territories subject to the authority of the Kings and Chiefs of Old Calabar.

1.20 Nigeria has drawn attention to the pre-protectorate history of the region because it is directly relevant to the question of title *at present* in dispute.

(1) First, any question of present title has to be seen not as a self-contained issue standing apart from all that has gone before, but must rather be seen as part of a historical continuum.

(2) Second, the pre-protectorate circumstances of the region are directly relevant to the determination of the territorial extent of the territories subject to the authority of the Kings and Chiefs of Old Calabar, which in turn is a necessary prerequisite for any finding as to the extent of the territories coming within the scope of the Protectorate Agreement of 1884.

(3) Third, contrary to Cameroon's implication, Nigeria does not assert that historical considerations take the place of relevant legal considerations; Nigeria's position is rather that historical considerations are complementary to those legal considerations, and in particular are part of the context in the light of which they fall to be applied.

1.21 Cameroon's attempt to ignore pre-protectorate circumstances, and even circumstances arising before the conclusion of the Anglo-German Treaty of 11 March 1913, is an understandable response to the fact that those circumstances undermine Cameroon's argument as to the alleged rightfulness of Cameroon's claims to Bakassi. But that cannot be allowed to obscure the facts that the historical considerations put forward by Nigeria *are* relevant to the questions of present title now before the Court, and that by wishing to omit all mention of them Cameroon has put before the Court a very inadequate and partial account of the nature of the present dispute over Bakassi.

(iii) The British Protectorate

1.22 Cameroon has sought in the *Reply*, (paragraphs 5.61-5.91) to analyse the nature of protectorates as comprising either 'international' protectorates (paragraphs 5.69-5.73) or 'colonial' protectorates (paragraphs 5.74-5.88). Cameroon places Nigeria in the latter category, as a 'colonial protectorate'. Cameroon completes this part of its argument by asserting that a 'colonial' protectorate is in international law equivalent to a colony (paragraph 5.91), that the 'colonial' power in a 'colonial' protectorate can cede the protectorate's territory (paragraphs 5.89-5.91), and that the particular incidents of individual protectorate arrangements (other than the basic distinction between 'colonial' and 'international' protectorates) are primarily of internal and constitutional significance and have no effect on the international plane (paragraphs 5.92-5.125).

1.23 Nigeria takes issue with each of these assertions, but before refuting each in turn Nigeria feels it necessary to make a general observation about Cameroon's approach. This is that Cameroon's analysis is presented in terms of theoretical generality, and *at no point* gives careful consideration to the actual terms of the particular protectorate agreement which has to be applied in the present case.

1.24 It is necessary to emphasise that concepts such as 'international protectorate' and 'colonial protectorate' are the constructs of writers and commentators, in seeking to rationalise, for presentational convenience, the many varied arrangements which may come under the general heading of 'protectorate'. Those concepts have no place in the actual practice of States. States do not establish a relationship which *they* call an 'international' or 'colonial' protectorate, and from which, having given it some such label, they deduce certain consequences: they simply establish a relationship on the basis of and in the particular terms of a treaty. How others may categorise the results of their treaties is no concern of theirs.

1.25 The notion of a colonial protectorate, in so far as it had any substance, was a political rather than a legal matter. Legally, it is a contradiction in terms: the 'colonial' element was either in conflict with the terms of the treaty of protection or, being nonetheless given effect by annexation, destroyed the 'protectorate' element. As explained by Alexandrowicz, *The European-African Confrontation: A Study in Treaty Making* (1973) (a writer correctly described by Cameroon as a "specialist on these questions": RC, 5.75):¹

"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 juridically justifiable institution. It was at most a political expedient."²

1.26 It does not help in establishing the legality of the concept of 'colonial protectorate' to argue that the 'colonial' power had, as a matter of its internal law, plenary powers in relation to the protectorate. First, in many instances (and certainly in relation to Nigeria) it did not have plenary powers (see particularly below, paragraphs 1.32, 1.41, 1.46-1.47); second, the international rights and duties of the parties are governed by the treaty of protection; third, the treaty of protection with the Kings and Chiefs of Old Calabar, while imposing *some* limits upon the exercise of *some* of their international powers, did not deprive them of their international status (see particularly below, paragraphs 1.9-1.13, 1.31-1.32, 1.46); and fourth, the assumption of plenary powers would be a breach of the treaty of protection, and municipal law cannot be invoked as a justification for a breach of a treaty obligation.

1.27 Nor does it help establish the concept of a 'colonial protectorate' by adducing arguments based on the transfer under a treaty of protection of all or virtually all the rights of sovereignty of the protected State. Thus it is irrelevant in the present case to argue that the transfer to a protecting State of a right of cession of the protected State's territory shows that the protected State is fully under the sovereignty of its protector, thereby justifying the use of the term 'colonial protectorate' (RC, paragraph 5.89). The fact is that the Kings and Chiefs of Old Calabar granted no such right to Great Britain: see e.g. paragraph 1.46 below. At least in the case of Nigeria, the transfer of rights to Great Britain was less extensive than that which occurred in many other cases, and conclusions drawn from the situation of other protected States (even if correct in principle and in relation to them) are of no application in the present situation.

1.28 The argument comes back to the essential point: the nature of Great Britain's rights in relation to the Kings and Chiefs of Old Calabar, and their status under the protectorate, depends not upon generalisations drawn from the works of commentators examining a varied range of protectorates, but exclusively upon the precise, particular terms of the Treaty of Protection of 1884 (Annex NC-M 23). The relationship established by States through their treaties with the protected State is governed, as a matter of their internal and constitutional law, by the terms of that law as applied to the particular treaty in question; and the relationship is governed, on the international plane, solely by the actual terms of the particular treaty into which they have entered, as properly interpreted and as it may be amended from time to time. Those terms must be respected since not only do they establish the limits upon the protecting State's powers, but they are at the same time the very basis for such powers as are conferred upon it. It is those terms which must be examined in order to reach a conclusion as to the incidents attaching to any particular protectorate arrangement. The need to look at the terms of each particular treaty establishing a protectorate relationship is clearly established,³ and is wholly consistent with the general judicial approach of considering only the facts and circumstances of the

particular case before the Court and reaching decisions relating solely to those particular facts and circumstances.

1.29 Against that general background, Nigeria will now turn to the several arguments advanced by Cameroon. First, Cameroon seeks to apply its artificial classification of protectorates to the circumstances of the Nigerian protectorate in such a way as to classify it as a so-called 'colonial protectorate'. Cameroon has managed to reach that conclusion without any consideration of the terms of the 1884 Treaty between Great Britain and the Kings and Chiefs of Old Calabar. There is, however, no basis in that Treaty to justify such a conclusion. Nigeria has in its *Counter-Memorial*⁴ already examined the relevant provisions of that Treaty, and nothing in those provisions serves to attribute to the Nigeria protectorate a 'colonial' character. Nigeria notes, in passing, that Cameroon has not dissented in any way from the analysis of the Treaty's terms given in paragraphs 6.37-6.65 of Nigeria's *Counter-Memorial*.

1.30 Without repeating in detail the points there made by Nigeria, it is convenient to summarise them briefly here:

(1) the 1884 Treaty established British protection over the territories in question, and Great Britain did not acquire territorial sovereignty or other title over them (NC-M, paragraph 6.37);

(2) The notion of a 'protectorate' or 'protected State' was at that time, and is now, well known in international law (NC-M, paragraphs 6.38-6.44);

(3) The distinction between the acquisition of sovereignty over a colony and the establishment of a Protectorate was well known to the British Government at the time (NC-M, paragraphs 6.45-6.60);

(4) The legal nature of any particular Protectorate depends upon the terms by which it was established (NC-M, paragraphs 6.61-6.62);

(5) the terms of the 1884 Protectorate Treaty establish that the Kings and Chiefs of Old Calabar retained their separate international status and rights, including their power to enter into relationships with other international persons, although under the Treaty that power could only be exercised with the knowledge and approval of the British Government (NC-M, paragraphs 6.63-6.65).

1.31 It is to be noted that the negative way of expressing this last restriction (i.e. in effect, *not* to enter into international relations except with British approval) necessarily implies not only that the power to enter into such relations continues to exist and can be exercised when that approval is given, but also that the power existed before the Protectorate Treaty placed restraints upon its exercise, and further that, but for the restriction imposed, it would have continued in full even after the establishment of the protectorate.

1.32 Cameroon's assertion that in international law a so-called 'colonial protectorate' is equivalent to a colony is without foundation. Not only is the very concept of 'colonial protectorate' as something distinct from an 'international protectorate' an artificial construct without basis in the practice of States (and is thus without basis in customary international law),⁵ but it flies in the face of the provisions of the 1884 Treaty, both taken literally and as read in their context. Not only did the 1884 Protectorate Treaty not take away from the Kings and Chiefs of Old Calabar their residual power to enter into international relations,⁶ but, for example, it imposed no restriction on their power to alienate their territory,⁷ left them largely free to settle their international differences for themselves,⁸ and left essentially unaffected their sovereignty over their internal affairs.

1.33 Whatever may be said by commentators (or Cameroon) about this alleged general concept of 'colonial protectorate', it has no relevance for the Nigeria protectorate: it is what it is, namely the product of a relationship established by a particular Treaty, the specific terms of which govern the nature of the relationship established by it. Those terms speak only of 'protection', and nowhere of anything resembling some form of colonial status.

1.34 The internationally distinct character of the Protectorate was evident from the British practice in relation to passports. Persons coming from the Protectorate were issued with a "British Protected Person" passport and not a British passport such as was issued to persons coming from the colonial areas of Nigeria.

1.35 Similarly, the extension of treaties by the United Kingdom to its various dependent territories treated the Protectorate both as separate from the United Kingdom and as a distinct entity from the Colony. A typical example of many such instances arose in relation to an Anglo-Belgian Convention concluded in 1932 (Annex NR 2).

1.36 These last two points demonstrate the incorrectness of any argument that once a treaty of protection has been concluded it establishes a future relationship between the protected and protecting States which is exclusively internal rather than international. While in some respects their future relationship will have an internal dimension, it by no means follows that it has an *exclusively* internal character. Everything turns on the terms of the particular treaty of protection - always bearing in mind that protectorate status originates in a manifestly international act (a treaty), that the essence of protectorate status is not one of annexation by the protecting State but rather of extending its protection to a weaker (and still continuing) State, and that the presumption is always against any loss of or restrictions upon sovereignty.

1.37 The situation is no different if the Nigeria protectorate is considered from the point of view of the internal and constitutional law of Great Britain and Nigeria. This matter has been dealt with in Nigeria's *Counter-Memorial*, at paragraphs 6.72-6.89.

1.38 In English law, the exercise of Great Britain's powers in relation to the Nigeria Protectorate (and other protectorates) was regulated by the Foreign Jurisdiction Acts. As the title of those Acts provides, the powers exercised by Great Britain were those

exercised in relation to a *foreign* country. The powers in question are those which, in accordance with the preamble to the Acts, the Crown has acquired by treaty, capitulation, grant, usage, sufferance and other lawful means: it is thus only *those* particular powers which are to be exercised in accordance with the provisions of the Acts, since the Acts could not unilaterally give the Crown greater powers internationally than it had been granted by the treaty of protection. It is thus only those treaty-based powers which the Crown may lawfully hold and exercise in relation to the (foreign) protected State "as if" they had been acquired by cession or conquest, i.e. as if it were a colony. This language clearly shows that a protected State is not, in English law, a colony either in law or in fact. Indeed, English legislative measures right through the period 1854-1960 carefully and consistently distinguished between British colonial territory in Nigeria and the protectorate (NC-M, paragraphs 6.66-6.83).

1.39 In applying the provisions of this domestic legislation to the British Crown's powers in relation to protected States, the Courts have acknowledged that the substantive extent of the Crown's powers is governed by the treaty of protection, and is limited.

"In Kenya Colony the jurisdiction of the British Crown in unlimited; but in the Kenya Protectorate it is only limited. It is limited to such jurisdiction as the Crown has acquired by treaty, capitulation, grant, usage, sufferance and other lawful means": *Nyali Ltd. v. Attorney-General* [1956] 1 QB 1, 14 (Court of Appeal: quoted at NC-M, paragraph 6.82).

Moreover, in English law throughout the period of the protectorate over Nigeria, protected States not only retained their separate international personality but enjoyed sovereign immunity from the jurisdiction of the English courts: *Mighell v. Sultan of Johore* [1894] QB 149; *Duff Development Company Ltd. v. Government of Kelantan* [1924] AC 797; *Sultan of Johore v Abubakar Tunku* [1953] AC 318.

1.40 A separate question is whether, in the event of a breach by the Crown of the treaty of protection, those affected by the breach have a remedy in the English courts. The answer may well be not, because of the English procedural rule that the Crown's acts of State⁹ (which include the making of treaties) are non-justiciable, and that treaties may not be relied on directly in English Courts. This essentially procedural rule of non-justiciability in domestic law is, of course, quite distinct from the separate and substantive issue of whether the act in question was in truth a breach of the treaty of protection. At the international level that substantive question *is* justiciable, and the appropriate legal consequences *can* be drawn from a finding that action taken was in breach of the relevant treaty.

1.41 An essential element in Nigeria's argument is that Great Britain had no power under the 1884 Treaty of Protection to cede territory without the consent of the Kings and Chiefs of Old Calabar. As far back as the eighteenth century it was acknowledged that the powers of the protecting State were limited by the terms of the treaty of protection: should the protector

"assume a greater authority over the [protected] one than the treaty of protection or submission allows, the latter may consider the treaty as broken, and provide for its safety according to its discretion".¹⁰

1.42 In this context, a situation which arose in 1890 in relation to the British Protected State of Brunei is very relevant. Brunei became a British protected State by virtue of a Treaty concluded between Great Britain and the Sultan of Brunei in 1888.¹¹ That Treaty granted Great Britain more extensive rights and authority over Brunei than were granted by the Treaty of 1884 with the Kings and Chiefs of Old Calabar. In particular, so far as concerns relations with other States, the Treaty with Brunei provided, in Article III -

"The relations between the State of Brunei and all foreign States, including the States of Sarawak and North Borneo, shall be conducted by Her Majesty's Government, and all communications shall be carried out exclusively through Her Majesty's Government, or in accordance with its directions;..."

Under the 1884 Nigerian protectorate treaty Great Britain's powers in relation to dealings with other States¹² were less than those it possessed under the 1888 Treaty with Brunei: in effect, whereas the Kings and Chiefs of Old Calabar could have their own dealings with foreign States so long as they had the consent of the British Government, Brunei's dealings with foreign States could *only* be conducted *by* Great Britain.

1.43 Yet when, in 1890, Great Britain was negotiating with The Netherlands for the settlement of a territorial dispute in Borneo by the adoption of a compromise boundary line which might have involved conceding in negotiation land which arguably belonged to the Sultan of Brunei, the Foreign Office was of the view that

"... it would appear doubtful whether Her Majesty's Government would be justified in accepting such a definition of the boundaries on behalf of the States concerned without having previously obtained the consent of the Rulers of those States".

On consulting the Law Officers of the Crown, Great Britain's Attorney-General advised that

"... if any of the territory proposed to be given to the Dutch under the boundary compromise is in fact part of the possessions of Brunei or Sarawak, Her Majesty's Government would not be justified in accepting such a definition, so as to bind the Rulers of those States without their consent."¹³

1.44 This attitude was consistent with that adopted by the King's Advocate, Sir Herbert Jenner, in 1833, in relation to the Ionian Islands (under British protection). He advised that the power of alienating any part of the protected territory was not such as necessarily belongs to the protecting State (see McNair, *International Law Opinions* (1956), Vol. 1, p. 39). The position was complicated by the Islands having been placed under British protection by a treaty with other States. In the event the Islands were transferred by Great Britain to Greece only after the consent of the other treaty parties *and* of the Ionian Islands had been obtained.

1.45 Given the undoubtedly correct conclusion reached in relation to Brunei, which was a protected State which had granted to Great Britain virtually complete authority over its external relations, a similar conclusion in relation to a protected State which had *not* granted to Great Britain such absolute control over its external relations is an *a fortiori* case.

1.46 Comparison between the Nigeria and Brunei treaties of protection is revealing in other respects, showing the Kings and Chiefs of Old Calabar to have been subject to a lesser degree of control than that exercised over an otherwise broadly equivalent protected State:

(1) Thus the Brunei treaty required all differences between the Sultan of Brunei and the Government of any other State to be settled by the decision of the British Government (Article III); the equivalent provision in the treaty with the Kings and Chiefs covered only disputes between the Kings and Chiefs themselves, and between them and British and foreign traders, and neighbouring tribes (Article IV).

(2) The Brunei treaty prohibited Brunei from ceding or otherwise alienating Brunei territory (Article VI); no such prohibition applied to the Kings and Chiefs of Old Calabar. Thus not only were the Kings and Chiefs able to have direct dealings with foreign States but they were also under no specific restraint in ceding their territory if they had wanted to do so: had they wanted to cede Bakassi they could have done so within the framework of the Treaty of Protection, and had no need to rely on Great Britain to do it for them.

1.47 It is thus clear from the terms of the 1884 Treaty that Great Britain's authority in relation to the Kings and Chiefs of Old Calabar did not include the power to conclude on their behalf treaties alienating their territory, that such a treaty concluded by Great Britain was not a treaty authorised in accordance with the treaty of protection, and that it was therefore not made by Great Britain within the scope of its authority. The 1913 Anglo-German Treaty was thus in relevant part out with the treaty-making power of Great Britain, and that part was not binding on the Kings and Chiefs of Old Calabar.

1.48 Cameroon argues that the Nigerian and neighbouring protectorates had their frontiers changed by the protecting State without local consent (RC, paragraphs 5.101-5.111). This argument refers to two kinds of frontier changes: first, various changes to internal constitutional boundaries affecting the Nigerian protectorates (RC, paragraphs

5.102-5.106), and second, various changes to the international boundaries with neighbouring States (RC, paragraphs 5.107-5.110).

1.49 So far as concerns internal changes to the territorial limits of the various Nigerian territories, three considerations have to be borne in mind:

(1) The various territories in what is now Nigeria did not all have the same status: there was a distinction between colonies and protectorates, and of the latter some were under British protection by virtue of treaties with the local Rulers, while others came under British protection in other ways, such as by virtue of proclamations.

(2) The terms of the different protectorates were thus themselves different, and actions which might be inconsistent with the terms on which one protectorate was exercised would not necessarily be inconsistent with the terms of others.

(3) All the protectorates had in common that they were under the protection of Great Britain. Whatever changes might be made in internal administrative arrangements, the protectorates remained under British protection and were not being given away to some other State: whatever administrative changes might have been made, the whole territory of the Kings and Chiefs of Old Calabar placed under British protection by the Treaty of Protection of 1884 remained throughout the period up to Independence under the protection of the British Crown.

1.50 In the light of these considerations, it is quite wrong to conclude that the making of *internal* administrative changes shows that, in the particular case of Bakassi, there was nothing unlawful in making the kind of *external* territorial change involved in purporting to cede to Germany a part of the territory belonging to the Kings and Chiefs of Old Calabar. Such a purported cession was not within the powers vested in Great Britain by the terms of the particular treaty in point, namely the Treaty of Protection of 1884, and would have involved not the protection of that territory by Great Britain but its transfer out of British protection.

1.51 So far as concerns the changes to international boundaries Cameroon cites in this respect the transfer of Katanu and Appa to France by virtue of an 1889 Anglo-French Treaty (RC, paragraph 5.107) and the Anglo-French arrangements and treaties of 1890, 1898 and 1904 concerning the territorial extent of the Kingdom of Sokoto (RC, paragraphs 5.108-5.111). These territorial dispositions are beside the point in the context of the issues at present calling for decision by the Court.

1.52 By comparison with the situation of Bakassi after the conclusion of the Anglo-German Treaty of March 1913, those instances involved different protectorate arrangements, with different terms and involving different parties, and different international arrangements with different backgrounds and involving different parties. The Court is not called upon to decide upon those different matters. Contrary to what Cameroon says at paragraph 5.111 of the *Reply*, nothing which the Court may decide in the present case to the effect that the purported transfer of Bakassi to Germany was in

breach of the Treaty of Protection of 1884 will have any effect upon Nigeria's borders with other States not involved in the present proceedings.

1.53 Cameroon seeks to argue that Nigeria's claim to Bakassi involves a return to an earlier (i.e. pre-protectorate) situation, and that (citing the recent Award of the Arbitral Tribunal in the *Eritrea/Yemen* case¹⁴) such a doctrine of 'reversion' finds no place in international law (RC, paragraphs 5.56-5.59). There are, however, significant differences between the circumstances with which that Arbitral Tribunal was dealing and the circumstances now before the Court. There, the attempt was being made to assert the revival of an earlier (Yemeni) sovereign title upon the demise of an admitted subsequent (Ottoman) sovereign title over the territory in question. In effect the Tribunal held that the earlier title had been completely extinguished by the subsequent Ottoman title, so that with the demise of that intervening Ottoman title there was nothing in the way of a Yemeni title which could thereupon be revived. In the present case the situation is different. There is no admitted intervening sovereignty over the Bakassi Peninsula: first, because Great Britain itself, being only a protecting State, never had sovereignty over protectorate territory; second, because there was no lawful transfer of territorial sovereignty to Germany; third, because Mandatory and Trusteeship powers did not themselves possess sovereignty over the territories subject to their administration; and fourth, because no activities by Cameroon served to establish that Cameroon had acquired sovereign title to Bakassi. In summary, this is not a matter of seeking, after Independence, to upset by reference to a pre-protectorate title a territorial limit validly established by the protecting State in agreement with a third State: it is rather a matter of seeking to assert, after Independence, the ineffectiveness *ab initio* of a territorial limit and transfer of territory purportedly agreed by the protecting State, and the consequent *continuation* of (and not reversion to) the title originally vested in the Kings and Chiefs of Old Calabar.

C. The Anglo-German Treaty of March 1913

(iv) The 1913 Treaty

1.54 Nigeria first recalls that in its *Counter-Memorial* Nigeria drew attention to the fact that various Anglo-German agreements which pre-dated the Treaty of 1913 were concerned not with the distribution of territorial sovereignty but with the allocation of 'spheres of influence' only (NC-M, paragraphs 7.5-7.33). Nigeria also drew attention to the fact that, contrary to the position adopted by Cameroon in its *Memorial*, a number of the potentially relevant pre-1913 Anglo-German 'agreements' never in fact entered into force or otherwise became legally binding for Great Britain and Germany (NC-M, paragraphs 8.1-8.19), in which context it is to be noted that the Treaty of March 1913 made no reference in its preamble or elsewhere to any earlier agreement between the parties. Nigeria notes that Cameroon does not take issue with either of these points, and indeed expressly agrees with the second of them (RC, paragraph 5.119).

1.55 In its consideration of Nigeria's arguments relating to the Anglo-German Treaty of 11 March 1913 Cameroon notes, and does not dissent from, Nigeria's statement that no

boundary pillars were erected in the Bakassi area by the 1905-1906 Boundary Commission (RC, paragraphs 5.115-5.116). Cameroon seeks to reject the drawing of any conclusion from that fact, contending instead that as the boundary was defined by means of natural landmarks there was no need to erect artificial boundary markers (RC, paragraph 5.116): and Cameroon goes on to assert that it was not aware of any precedent requiring the erection of pillars in the bed of a boundary river. However, the erection of boundary pillars *in the bed of* a boundary river is not the only way of erecting markers to show the course which a boundary follows along the course of a river. Thus markers may be placed on the bank of a river, with an inscription that the course of the boundary follows a specified course through the middle of the adjacent river. Examples, of which Cameroon is well aware, are afforded by pillar 101, referred to in paragraph 18 of the Anglo-German Demarcation Agreement of April 1913, where the boundary itself is in the thalweg of the Magbe River, and pillars 89 and 91 (referred to in paragraph 16 of the same Agreement) which mark river junctions where the boundary itself follows the thalweg. Consequently, the absence of boundary markers further south, in the Bakassi area, *is* relevant, since it shows that there was no precise agreement as to the course of the boundary in that area.

1.56 Cameroon seeks to argue that in any event Great Britain and Germany were fully agreed upon the course of the boundary from Cross River to the sea (RC, paragraph 5.117). However:

(1) both the British and German statements relied upon in this context by Cameroon assert that the boundary in that region had already been marked with boundary pillars by the 1905-1906 Boundary Commission, whereas as just noted those pillars did *not* extend into the Bakassi area; and

(2) the Anglo-German 'agreements' underlying this alleged unity of intention on the part of the two Governments never entered into force and were never legally binding for the two States (above, paragraphs 1.5(6), 1.54).

1.57 Cameroon further seeks to argue that, although admitting that it was only with the Treaty of 11 March 1913 that Anglo-German understandings as to the course of the boundary became legally binding,¹⁵ nevertheless previous Anglo-German behaviour was sufficient to give their understandings legal force (RC, paragraphs 5.120-5.121). Nigeria cannot share the view that where draft treaty texts are expressly stated to be subject to ratification but in the event are not ratified, nevertheless those texts and actions taken in connection with them are to be treated as if they had been ratified and had acquired full legal force and effect. Whatever the reasons may have been for their non-ratification - and they were various in each case, and differed for the two States involved - the incontrovertible fact is that they were unratified. It was *only* when the Treaty of 11 March 1913 was ratified that a legally binding text came into existence, and it was accordingly only then that the legal deficiencies of the part of that text dealing with the Bakassi Peninsula came into the open as the legal basis for this part of the present case. Those legal deficiencies centre on the application of the rule that *nemo dat quod non habet*.

(v) *Nemo dat quod non habet*

1.58 Cameroon's attempt to deal with this argument is singularly unpersuasive. It may be noted that Cameroon refers to this argument in the *Reply*, paragraph 5.125, and says that in substance it is dealt with elsewhere in the *Reply*, citing paragraph 2.24 *et seq.* and paragraph 5.19 *et seq.*, and referring to a limited (but unspecified - simply "below") subsequent treatment of the topic, which appears to be the passage at paragraphs 5.162-5.169. Several points about this treatment "elsewhere" of this matter may be made.

(1) Paragraph 2.24 *et seq.* does not deal at all with the substance of Nigeria's argument. It merely sets out Nigeria's argument, and then goes on to deal with certain consequential matters (which are themselves dealt with below, at paragraph 1.60 *et seq.*) without at any point addressing the merits of the *nemo dat* argument itself.

(2) Paragraph 5.19 *et seq.* concern the application (or as Cameroon would have it, non-application) of the *nemo dat* rule, rather than the rule itself. Thus Cameroon

(a) seeks to show that Nigeria has failed to establish a "Calabar" title to Bakassi by questioning whether the "Kings and Chiefs of Old Calabar" constituted an entity in international law and whether the Bakassi Peninsula fell under their authority (RC, paragraphs 5.19-5.48): Nigeria has refuted these Cameroonian arguments in this *Rejoinder*, at paragraph 1.6 *et seq.*;

(b) argues the irrelevance in principle of pre-colonial titles (RC, paragraphs 5.49-5.60): Nigeria has rejected this Cameroonian argument in this *Rejoinder* (above, paragraph 1.17 *et seq.*); and

(c) relies on certain alleged distinctions in the natures of different kinds of protectorate (RC, paragraphs 5.61-5.111): Nigeria has demonstrated the incorrectness of Cameroon's arguments in this *Rejoinder* (above, paragraph 1.22 *et seq.*).

1.59 Thus Cameroon's arguments may be summarised as being in effect that -

(1) The "Kings and Chiefs of Old Calabar" did not have international personality and did not have territorial sovereignty over Bakassi;

(2) Great Britain as the protecting power did have territorial sovereignty; and

(3) therefore Great Britain had the legal power to agree with Germany a boundary which left Bakassi on the German side of the boundary.

It seems implicit in this line of reasoning that in Cameroon's view the *nemo dat* argument does not apply to the 'Bakassi provisions' of the March 1913 Anglo-German Treaty.

1.60 The unsoundness of this reasoning has been amply demonstrated by Nigeria in the various paragraphs of this *Rejoinder* referred to in paragraph 1.58 above. But in addition Nigeria notes that Cameroon nowhere denies

(1) that "*nemo dat quod non habet* is a well-established principle of law and of legal logic - one of the general principles of law recognised by civilised nations", as shown by Nigeria in NC-M, paragraphs 8.28-8.40; or

(2) that where that principle applies it leads to the consequences which Nigeria attributes to it, namely that the ensuing Treaty "was to that extent ineffective to achieve the purported transfer of territorial sovereignty" (NC-M, paragraph 8.40).

1.61 Since Cameroon does not dispute the existence of the *nemo dat* rule and has failed to establish that it is inapplicable in the present circumstances, it follows that the rule, and the consequences flowing from its application as described by Nigeria, hold good in relation to the Anglo-German Treaty of March 1913.

(vi) Severability of defective treaty provisions

1.62 Cameroon devotes considerable space to disputing Nigeria's argument that the defective provisions of the Anglo-German Treaty of March 1913 are to be severed from the rest of the Treaty and regarded as in law ineffective.

1.63 Thus Cameroon argues (RC, paragraph 2.22) that "Le droit international présume que les traités délimitant une frontière posent une frontière permanente, définie et complète en l'absence de preuves manifestes du contraire".¹⁶ However, no such presumption exists.

(1) A boundary fixed by treaty is "permanent" only in the sense that it lasts until it is lawfully changed. The same may be said of virtually any state of affairs established by a treaty. In particular, a treaty-based boundary may be changed by the express or implied consent of the parties (including their subsequent practice), or by a subsequent process of historical consolidation (as to which, see below, Chapter 3).

(2) Similarly, a treaty-based boundary is only as "defined" as the terms of the treaty stipulate. If those terms do not define the boundary adequately, then the boundary is in fact and in law ill-defined and is not by virtue of some alleged presumption rendered well-defined.

(3) So too, a treaty-based boundary is only as "complete" as the terms of the treaty prescribe. If a treaty fails, either by its terms or by virtue of some legal defect, to deal with the boundary in its entirety, then the treaty's prescription of the boundary will be incomplete, and the resulting lacuna is not filled by some such presumption of completeness as that postulated by Cameroon.

In all these respects it is the actual terms of the boundary treaty which are important, not some alleged presumption.

1.64 In pursuit of that opening fallacious argument, Cameroon also suggests that Nigeria's argument that the defective provisions of the Anglo-German Treaty of March 1913 must be severed from the rest of the Treaty amounts to Nigeria 'picking and choosing' amongst the treaty provisions by which it now regards itself as bound: it is said that parties to a treaty "ne peuvent choisir les dispositions du traité qui doivent être appliquées et celles qui ne doivent pas l'être, elles ne sauraient faire un tri ("pick and choose")"¹⁷ (RC, paragraph 2.27), that Nigeria cannot "choisir parmi les dispositions d'un traité frontalier celles qui lui conviennent, alors qu'il reconnaît ce traité comme un document juridique valide"¹⁸ (RC, paragraph 2.34), and that Nigeria's position is of "chercher à amputer certaines dispositions d'un traité en vigueur afin de se libérer des obligations qu'il choisit de ne pas respecter"¹⁹ (RC, paragraph 2.35). The impression which Cameroon gives of Nigeria seeking, on some arbitrary basis, to 'pick and choose' amongst applicable treaty provisions is a wilful misrepresentation of Nigeria's position. Nigeria is not exercising some arbitrary 'choice' in this matter: rather, Nigeria is, in one particular respect affecting some 36 kilometres of a 1800 kilometre boundary, drawing a very specific legal consequence from the legal situation which it considers exists. Moreover, that specific legal consequence - namely, the severability of the defective treaty provisions from the remainder of the treaty - is one which is accepted in the Vienna Convention on the Law of Treaties 1969 in the provisions of Article 44 which Cameroon regrettably failed to draw to the Court's attention (below, paragraph 1.71).

1.65 Cameroon claims that this alleged Nigerian 'pick and choose' argument raises a point of principle, to the effect that treaties must be considered in their entirety (RC, paragraph 2.24). In support of such a principle, Cameroon quotes a passage from Lord McNair, *The Law of Treaties* (1961), p. 484. That passage, however, is not in point: it concerns the scope for making reservations, not the consequences which flow from a fundamental defect in part of a treaty. More to the point is Lord McNair's general conclusion to his Chapter on 'Severance of Treaty Provisions' that

"circumstances frequently arise which make it necessary to regard one or more of the provisions of a treaty as forming a self-contained unit and requiring separate legal treatment; for instance, in considering ... the effect of its illegality upon the remainder of the treaty, or the question of its elimination for the purpose of curing the invalidity of other provisions that might be affected by it" (at p. 484).

1.66 Cameroon then invokes Articles 26 and 44 of the Vienna Convention on the Law of Treaties 1969. However, Cameroon fails to note that by virtue of Article 4 of the Vienna Convention, that Convention does not apply to the March 1913 Anglo-German Treaty. For a rule embodied in the Convention to be applicable to the Anglo-German Treaty of March 1913 it must be shown that that rule reflects also a rule of customary international law. Nigeria accepts that, for example, Article 26 does represent a rule of customary international law.

1.67 Article 26 of the Vienna Convention stipulates that

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

In the light of this provision Cameroon concludes that since both parties accepted the Treaty of March 1913 as valid and in force it must therefore be performed by the parties in good faith.

1.68 First Nigeria must observe that no amount of 'acceptance' by Great Britain can give it a power or right in international law to dispose by treaty of territory not belonging to Great Britain but instead belonging to someone else. Were it otherwise, any State

could by 'accepting' a treaty manifestly at odds with the rights of other States confer upon itself the right to do that which is beyond its lawful powers (*cf.* the example given in the *Counter-Memorial*, paragraph 8.41, of a hypothetical treaty between France and Ireland purporting to dispose of sovereignty over the Channel Islands and Isle of Man).

1.69 But more than that, Article 26, which states a general principle of very broad application, cannot be taken to be asserting that even an invalid treaty, or invalid part of a treaty, must nevertheless be performed by the parties in good faith.

1.70 Cameroon, however, turns to the issue of the possible partial inapplicability of treaties by invoking Article 44 of the Vienna Convention, to the effect that defects in treaties may only be invoked with respect to the whole treaty, and not with respect to parts only (RC, paragraph 2.26). This Cameroonian argument is wrong - and, in being highly selective and omitting relevant provisions of the Vienna Convention, is highly inconsiderate of the Court.

1.71 Cameroon quotes Article 44, paragraphs 1 and 2.

(1) Paragraph 1 is irrelevant. It concerns only those cases where the right of a party to denounce, withdraw from or suspend the operation of a treaty is provided for in the treaty itself or arises under Article 56 of the Convention. There is no such provision in the Anglo-German Treaty of March 1913. As for the reference to Article 56, it only concerns denunciation of or withdrawal from treaties containing no provision regarding termination, denunciation or withdrawal: while the March 1913 Treaty is among those which contain no such provision, there is no question in the present case of Nigeria seeking to denounce or withdraw from that Treaty.

(2) Paragraph 2 is relevant, but Cameroon's quotation of it is disgracefully incomplete. The full text, with the omitted words emphasised, is -

"2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognised in the present Convention may be invoked only with respect

to the whole treaty *except as provided in the following paragraphs or in Article 60*".

(3) Not only did Cameroon omit to mention that there were express exceptions to the rule which it relied on, but it also omitted to set out the terms of those exceptions themselves. They are listed in paragraph 3 of the Article (the reference to Article 60, which relates to termination or suspension as a consequence of a breach of treaty, is not relevant in the present context). Paragraph 3 reads -

"3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust."

(4) As Nigeria has shown in its *Counter-Memorial* (paragraph 8.56 *et seq.*), the 'Bakassi provisions' of the March 1913 Treaty are separable. Their acceptance was not an essential basis of Germany's consent to be bound by the treaty as a whole - indeed, their acceptance, involving as it would a cession of territory to Germany, would have been contrary to Germany's own undertakings and understandings (see NC-M, paragraphs 8.44-8.45). Nor would continued performance of the rest of the Treaty be in any way unjust.

(5) For completeness Nigeria notes that paragraph 4 of Article 44 concerns only cases involving fraud or corruption, which are not relevant to the present proceedings, and paragraph 5 concerns only cases involving coercion or a conflict with *jus cogens*, which also are not presently relevant.

1.72 Thus Cameroon's attempted argument against the severability of the legally defective provisions of the Anglo-German Treaty of March 1913, based on the terms of the Vienna Convention, is seen to be both misleadingly presented and wrong. The conclusions to which this Cameroonian line of argument are said to lead (RC, paragraph 2.27) must therefore be disregarded in their entirety.

1.73 Cameroon then seeks to support its otherwise unsupported conclusions by reference to observations made in three Judgments of the Court and its predecessor (RC, paragraphs 2.28-2.31) and in one arbitral award. None provides the support which Cameroon seeks.

1.74 The *dictum* in the Permanent Court's Advisory Opinion in the *Case concerning the Treaty of Lausanne, Article 3, paragraph 2* (1925)²⁰ is unhelpful for Cameroon.

(1) It states, first, that "the very nature of a frontier and of any convention designed to establish frontiers between two countries imports that a frontier must constitute a definite boundary line throughout its length". This statement must be understood in the light of the question being addressed by the Court, which concerned the meaning of a treaty provision concerning the *future* delimitation of "the frontier between Turkey and Iraq". The Court was saying that such a formulation called for establishment of a definite boundary along the entire length of the boundary in question. The Court was not saying that every existing boundary treaty has to be understood as covering the whole boundary: that depends on the terms of the treaty. Thus even taken at face value, the Anglo-German Treaty of March 1913 did not seek to prescribe the boundary between the British and German protectorate territories "over its entire extent" - those terms were limited to the stretch between Yola and the sea; and although the Court stated that it was inherent in boundary treaties that they must provide "a precise delimitation" of the boundary, it depends on the terms of the treaty whether in any particular case the delimitation is indeed precise.

(2) The Court then went on to observe, second, that it "is, however, natural that any article designed to fix a frontier should, if possible, be so interpreted, that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier". The Court was here addressing a question of interpretation, rather than a question of substance; and it was concerned with the particular situation where a treaty itself specified part of a boundary but left the rest to be determined through some other procedure. The Court was, in effect, saying how that combined approach should be looked at overall. The desirable end-result, namely a precise, complete and definitive boundary, is to be obtained "if possible" through interpretation: in other words, the actual terms of the treaty govern, and if such an end-result is not possible by way of interpretation, so be it.

(3) Moreover, the Court's *dictum* was in no way addressing the issue of a boundary treaty which was wholly or in part invalid or ineffective.

(4) The Court's *dictum* must be seen in the light of the general context of the case. The Court was not being called on to determine a particular boundary in dispute between the States concerned, but to give an Advisory Opinion as to the nature of the decision on that matter taken by the Council of the League of Nations,²¹ a task to which it said that it would strictly confine itself, without prejudicing the merits of the problem.²²

1.75 As for the Court's *dictum* in *Sovereignty Over Certain Frontier Lands*,²³ it is again dealing with a matter of interpretation of the particular Boundary Convention before it, and not with issues of general application to all boundary treaties. The Court was concluding that any interpretation of the Convention which left part of the boundary in suspense "would be incompatible with [the parties'] common intention". This has no

bearing upon the interpretation to be given to some other treaty, or upon any question affecting the treaty's validity or effectiveness.

1.76 Turning to the passages cited from the Court's Judgment in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*,²⁴ they too do not relate to issues arising in the immediate context of the present proceedings. The Court's observations as to the aim of Article 3 of the Franco-Libyan Treaty of 1955 were self-evidently related to the terms of that particular treaty, both as regards the parties' wish to settle all boundary questions and the resulting permanence of the resulting frontier. To take those *dicta* as suggesting a much broader proposition regarding a general presumption that a boundary treaty is "définitif, complet et précis"²⁵ (RC, paragraph 2.30) is unwarranted in principle, and unjustified by the language actually used by the Court. To continue with a selection of further *dicta* about the principle of the stability of boundaries (RC, paragraphs 2.31, 2.33-2.34) does nothing to help resolve questions which arise as to the invalidity of a boundary treaty, whether in part or as a whole. The general principle that peace, stability and finality are to be encouraged in boundary settlements does not decide particular issues which call for determination in relation to specific boundary treaties, as a result of their particular terms or the particular circumstances of their conclusion. To uphold, in the name of stability, an unlawful and invalidly established boundary would be to invoke stability in order to produce precisely its opposite.

1.77 The last *dictum* relied on by Cameroon, from the 1966 Award in the *Argentine-Chile Frontier Case* (referred to by Cameroon as the *Andean Boundary case*),²⁶ is manifestly irrelevant: it states that "[s]ince the 1902 Award was a valid Award, it must be assumed to have settled the entire boundary ... in the area covered by it". The Tribunal's conclusion takes as its premise that the 1902 Award was a valid Award; in the present proceedings it is precisely that equivalent issue which is in question as regards the relevant part of the March 1913 Anglo-German Treaty.

1.78 Moreover Cameroon has, yet again, quoted a passage from a Judgment while omitting an important and relevant part of it. The text of the passage cited by Cameroon, with the omitted words emphasised, is:

"Since the 1902 Award was a valid Award, it must be assumed to have settled the entire boundary between Argentina and Chile in the area covered by it ... *except to the extent to which it is impossible to apply the Award on the ground*".

This passage, in full, is clearly more limited in its scope than Cameroon asserts: it shows that a boundary is only settled in the area covered by the instrument delimiting it, that that instrument must be valid, and that there is an exception where delimitation does not make sense on the ground.

1.79 So far as judicial authority for the severance of treaty provisions is concerned, more relevant than the cases cited by Cameroon are the decisions of the Court in the *South*

*West Africa Cases*²⁷ and the *Fisheries Jurisdiction Case*,²⁸ in both cases the Court accepted that treaty provisions could be severed - in the context (in the first case) of provisions of a mandate affected by the disappearance of the League of Nations, and (in the second) of provisions of a treaty affected by changes in the law.

1.80 Cameroon's final argument in this section of its *Reply* is that since Great Britain and Germany had the intention, as shown in the preamble to the Treaty of March 1913, to settle the frontier from Yola to the sea, this means that the Treaty must be interpreted as implying a precise, complete and definitive boundary (RC, paragraphs 2.32-2.33). But the issue is not the interpretation of the 1913 Treaty, but its limited substantive effectiveness. It cannot be sufficient for a party to a treaty to "intend" something and then for that something to be regarded as having been achieved notwithstanding whatever defects in the treaty there may be.

1.81 In considering possible grounds for the partial invalidity of the 1913 Treaty as alleged by Nigeria, Cameroon observes that "le seul fondement ayant un semblant de vraisemblance juridique à cette fin serait une erreur commise par la Grande-Bretagne, Etat prédécesseur du Nigéria, quant à sa capacité juridique à conclure ce traité frontalier"²⁹ (RC, paragraph 5.163).

1.82 Nigeria notes, first, that Cameroon, in re-stating Nigeria's alleged argument, appears not to have noticed that Nigeria talks of the 1913 Treaty being partially "ineffective", rather than as being partially "invalid". The two terms are not synonymous.

1.83 Second, Nigeria notes that any search for a legal basis for partial ineffectiveness having even "a semblance of legal probability" would not ignore, for example, (i) the possibility that what is here in question is not so much the search for a basis on which to find a treaty partly invalid or ineffective, but rather a subject-matter falling beyond what the parties could lawfully concern themselves with, or (ii) the possibility that the rule prohibiting a State from disposing of what lawfully belongs to someone else has the status of a rule of *jus cogens*, or (iii) the possibility that a State may not effectively conclude a treaty with another party which is inconsistent with the first State's existing treaty commitments to a third party. The view that "only" an error by Great Britain as to its legal capacity to conclude the Treaty could afford a possible basis for its partial ineffectiveness is therefore incorrect.

1.84 Exclusive concentration by Cameroon on this particular aspect of the matter is thus misconceived. All the same, Nigeria would note that the question does not concern the invocation by Great Britain of its own error in concluding the 1913 Treaty, but rather the invocation by Nigeria, after becoming independent, of error on the part of Great Britain. Great Britain had no interest in invoking that error on its own part, and indeed the March 1913 Treaty was, possibly already by 1914 but in any event after 1919 at the latest, abrogated (see below, paragraph 1.83 *et seq.*). It was Nigeria, under British 'protection', which was injured by its protector's error; but Nigeria did not contribute to the error, and did not become independent until 1960.

1.85 Cameroon makes much of Nigeria's alleged failure to raise the question of the effectiveness of the 1913 Treaty until the 1990s (RC, paragraph 5.167). But the fact is that Nigeria's continuing authority over the Bakassi Peninsula after attaining independence in 1960 was sufficiently effective and peaceful to make it unnecessary for Nigeria to consider deficiencies in the 1913 Treaty. It was only as Cameroon gradually sought to expand its presence into Nigerian territory in the Bakassi region that the legal situation needed to be given closer attention and the doubts about the 'Bakassi provisions' of the 1913 Treaty needed to be addressed, and were given public expression.

1.86 Among the relevant considerations, of course, was the purported exercise by Great Britain of a power which it did not have, namely to cede to Germany territory which belonged to the Kings and Chiefs of Old Calabar. But that was not the only consideration requiring attention. There was, for example also the failure of Germany to comply with its own legal requirements for the approval of treaties providing for the acquisition or cession of colonial territory.

1.87 Section 1, paragraph 2, of the *Schutzgebietsgesetz* ("Protected Territory Act") (at Annex NR 5) required parliamentary approval (in the form of a statute) for any acquisition or cession of colonial territory, unless what was involved was a mere boundary rectification. This requirement was added to the *Schutzgebietsgesetz* on 16 July 1912. The drafting history of this addition shows that it was intended to limit the external treaty-making power of the German Government.

1.88 Although officials in German Government Departments took the view that the provisions of the Anglo-German Treaty of March 1913 involved only boundary rectifications (NC-M, paragraph 8.45), there is room for considerable doubt about that conclusion so far as concerns the provisions affecting Bakassi.

(1) 'Rectification' means a minor alteration of a boundary of only local importance; an area the size of Bakassi cannot be seen in that light;

(2) rectification in the African context was typically a process characterised by the replacement of lines drawn in diplomatic negotiations (often without knowledge of the factual situation on the ground) by lines following a more topographically appropriate course: with Bakassi, however, what was involved was the replacement of one well-understood natural line by another, different, but equally well-understood, natural line - in both cases, the line of a river;

(3) before the March 1913 Anglo-German Treaty, the only two colonial boundary treaties concluded by Germany after the 1912 amendment to the *Schutzgebietsgesetz* and before the end of the German colonial era, namely those with France (1912)³⁰ and Portugal (1913),³¹ 28 concerned only minor deviations from an already agreed boundary; the transfer of Bakassi was, by comparison with that practice, clearly much more than such a rectification;

(4) the March 1913 Treaty shows - by its provision that if the natural boundary line in the Akpa Yafe were to change to the Rio del Rey, Bakassi would still remain German (Article 20) - that the purpose of this part of the Treaty was regarded not as a boundary rectification but as the acquisition of a specific area, i.e. Bakassi;

1.89 Consequently, as a treaty incorporating provisions involving the acquisition of colonial territory by Germany, German law at the time required the March 1913 Treaty to be approved by the German Parliament, at least so far as its Bakassi provisions were concerned. No such approval was given. This view of the German constitutional position is supported by contemporary writers (Annex NR 6).

(vii) Treaty of Versailles

1.90 Nigeria, in its *Counter-Memorial*, stated that in accordance with Article 289 of the Treaty of Versailles the Anglo-German Treaty of 11 March 1913 was abrogated, and that Cameroon did not therefore succeed to the Treaty itself (NC-M, paragraph 8.53).

1.91 Cameroon contends that this argument is unfounded, since (a) the 1913 Treaty does not fall within the scope of Article 289 of the Treaty of Versailles, (b) if the 1913 Treaty were to be regarded as falling within the scope of that Article the result would be to deny the legal effects deriving from the loss by Germany of its colonies under the Treaty of Versailles, and (c) Nigeria's argument is inconsistent with the rules on the succession of States to legal instruments with a territorial scope, in particular those fixing boundaries (RC, paragraph 5.127). These Cameroon arguments are themselves without legal foundation.

(viii) Article 289 of the Treaty of Versailles

1.92 Article 289 of the Treaty of Versailles provides in effect that bilateral treaties have to be the subject of a notification procedure if they are to be revived, and that bilateral treaties which have not been the subject of such a notification "are and shall remain abrogated". Cameroon notes (and Nigeria agrees) that Article 289 of the Treaty of Versailles is included within Part X of that Treaty, which contains the 'economic clauses' of the Treaty. Cameroon argues that the Anglo-German Treaty of 11 March 1913 is not a treaty of an economic character, and that therefore it does not come within the scope of Article 289. Nigeria disagrees with this conclusion.

1.93 The provisions of Article 289 reflected much careful consideration on the part of the allied States. In the United Kingdom a Committee was established to examine what should be the fate of bilateral and multilateral treaties with Germany. The Committee submitted a First Report on 7 August 1918,³² and a Final Report on 31 August 1918.³³

1.94 In its First Report the Committee³⁴ dealt with certain matters of general approach to the issue before it. In particular, the Committee considered the question whether the outbreak of war automatically put an end to all bilateral treaties with an enemy State (which the Committee referred to as Class I treaties). The Committee was of the opinion

that the "view most generally entertained in this country hitherto has been that the effect of war was to put an end to all such treaties" (paragraph 9). Although noting that in more modern thinking there were some exceptions (such as treaties determining what should happen in time of war - and it may be noted that the Committee did not mention boundary treaties as a possible exception), the Committee concluded that "[p]ractice, however, is overwhelmingly in favour of the older view". Consequently,

"After carefully studying the authorities and precedents on the subject, the Committee are satisfied that in the case of Class I treaties it will be convenient to adopt this rule in the general settlement at the end of the war, and to provide that only such treaties as may be specifically revived shall continue in force, all others being regarded as at an end" (paragraph 9).

This was, of course, the principle eventually enshrined in Article 289 of the Treaty of Versailles. With regard to boundary treaties, the Committee said:

"In order to avoid any questions arising as to the continued existence of boundaries as settled under previous treaties which are not revived, we recommend that a general saving should be inserted in the Treaty of Peace that, in cases where the boundaries so settled are not altered by the Treaty of Peace, the non-renewal of any treaty should not affect any such boundary" (paragraph 7).

Thus by implication the Committee was clearly of the view that although settled boundaries survived, boundary treaties themselves did come to an end as a result of war between the parties. The Committee's view thus demonstrates the falsity of Cameroon's assertion that the non-abrogation of boundary treaties was "ce qui était conforme à l'opinion juridique unanime de l'époque"³⁵ (RC, paragraph 5.139).

1.95 In its Final Report the Committee applied the general principles which it had identified in its First Report to the individual treaties falling within the scope of its remit. It put the various treaties into groups, and each treaty was given a number. Group 25 was headed "Africa". The Anglo-German Treaty of 11 March 1913 was Treaty No. 79. The Committee was

"aware that Germany may not retain her colonies, and, as the great majority of the treaties in this group are Class I treaties, the disappearance of the colonies *will naturally entail the disappearance of the treaties*. The Committee have, however, thought it desirable to consider each treaty on its merits and to report accordingly." (paragraph 45; emphasis added)

The Committee continued by observing that if the recommendation made in paragraph 7 of its First Report (above) were approved,

"it would be unnecessary to revive in the Treaty of Peace a great many of these instruments. This applies to**79**, which are mainly boundary treaties" (paragraph 46).

The Committee noted that if any of those treaties were to stand, special provision should be made to protect provisions in those treaties regarding the upkeep of boundary posts and provisions in them for joint use of boundary rivers for fishing and navigation. The Committee continued:

"The only provisions in the treaties mentioned above which would not be covered by the three general saving clauses suggested are ... parts of **79**, viz., sub-section 23, dealing with mutual rights of navigation between Akwayafe and the sea, and another part wholly in favour of Germany relating to the navigation on the Cross River. None of these provisions should be revived." (paragraph 46)

In the Appendix to the Committee's Report the entry for Treaty No. 79 concludes with the recommendation "Not to be revived", and as the reason "Boundary".

1.96 It is thus apparent that the British Government, *in accordance with their understanding of the law as it stood at that time*, intended to ensure that the Anglo-German Treaty of 11 March 1913 should be treated in the Treaty of Versailles as having been terminated. The terms of Article 289 are entirely consistent with that clear intent. Far from Cameroon being correct in asserting that "il n'a jamais été sérieusement avancé que le Traité anglo-allemand de 1913 ou que tout autre traité ayant un contenu similaire entraient dans le champ d'application de l'article 289 du Traité de Versailles"³⁶ (RC, paragraph 5.130), it was expressly the view and intention of the British Government that that should indeed be the result to be achieved. Nor was it the view of the British Government alone: Sir Cecil Hurst, who had been the Chairman of the Committee which had considered what should be the fate of Anglo-German treaties, wrote,

"speaking from memory, that committee recommended the adoption of the policy which was acted on by His Majesty's Government in the peace negotiations at Paris in 1919, *and was accepted by all the other Allies*".³⁷

1.97 Although Article 289 is included within Part X of the Treaty of Versailles, this does not mean that the Anglo-German Treaty of 11 March 1913 was excluded from its provisions:

(1) In the first place, it is not uncommon to regard treaties of almost any character as being essentially economic in their import, in so far as they can, as a general rule, be seen to facilitate relations, and particularly economic relations, between the parties.

(2) Second, if 'economic' treaties are regarded as a strictly limited group, then there would be many treaties which would fall outside the scope of Article 289 and the fate of which would not elsewhere be determined in the Treaty of Versailles - an omission so surprising as to imply that the placement of Article 289 in Part X of the Treaty was not intended to have any such effect.

(3) Third, not even Cameroon, however, suggests that the concept of 'economic' treaties is to be narrowly construed: "Il ne fait aucun doute que la notion de traité "économique" ou "commercial" a été entendue dans un sens large",³⁸ and "La disposition était même destinée à couvrir des traités de caractère économique au sens le plus large du terme, tels que ceux traitant de procédure civile ou de la protection des mineurs"³⁹ (RC, paragraph 5.142); further, "Il est ...indéniable que le champ d'application de cette disposition se limitait aux seuls traités à caractère économique, au sens large du terme"⁴⁰ (RC, paragraph 5.144). By acknowledging - correctly - that the notion of an economic treaty is to be understood in very broad terms, Cameroon's assertion that the 1913 Anglo-German Treaty was outside the scope of Article 289 loses all cogency, since -

(4) fourth, given Cameroon's acceptance of such a very broad meaning of 'economic' or 'commercial' treaties, it is clear that the Anglo-German Treaty of 11 March 1913 contained provisions of economic significance which brought it within such a broadly defined concept. That it was not solely a boundary treaty is apparent from its preamble which states that the parties were

"desirous of arriving at an Agreement respecting (1) the settlement of the frontier between Nigeria and the Cameroons, from Yola to the sea, and (2) the regulation of navigation on the Cross River."

The British Commission which examined Anglo-German treaties in 1918 noted this mention of navigation on the Cross River (set out in a separate part of the Treaty) and also the provision in Article XXIII for navigation rights on the Akwayafe River, and thought that neither should be revived (above, paragraph 1.95): this is one of the topics which Cameroon expressly accepts are included within its broad category of economic or commercial treaties (which notion, it acknowledges, included, "entre autres, des traités portant sur des questions telles que le traitement des ...communications (par ...voies navigables...)"⁴¹ (RC, paragraph 5.142). The Treaty also included provision for native fishing rights, which was clearly of economic significance (Articles XXVI and XXIX).

(5) As noted by Cameroon (RC, paragraph 5.147), Article 282, dealing with multilateral treaties, in terms deals only with certain "conventions and agreements of an economic or technical character". If Part X was, by definition, limited to economic treaties, there was no need for this express stipulation in Article 282. But having included that limitation expressly in that Article, it is all the more significant that Article 289 not only contained

no such limitation, but in terms referred to "the" (i.e. all) bilateral treaties which Allied powers wished to revive, "all others" being and remaining abrogated, and ending with the express statement that "The above regulations apply to *all* bilateral treaties or conventions ... [with] Germany ..." (emphasis added). Cameroon's attempt (RC, paragraph 5.149) to explain away the difference in wording between Articles 282 and 289 is singularly unconvincing, mostly based on hypothesis and supposition - "on peut en conclure que les rédacteurs ont estimé qu'il était inutile", "il est possible que", "le résultat d'une rédaction hâtive", "il semble que la raison principale qui a guidé cette formulation", "Si les rédacteurs du Traité de paix étaient confiants".⁴² Cameroon's conclusion (RC, paragraph 5.150) that "La terminologie utilisée à l'article 289, paragraphe 7 s'explique donc aisément"⁴³ is correct as an abstract proposition, but wrong as applied to the situation with which Cameroon is trying to deal. In drawing the distinction between Article 282, which specified the multilateral treaties with which it was dealing, and Article 289, which "ne contenait aucune disposition sur la remise en vigueur ou l'abrogation de traités bilatéraux à caractère économique"⁴⁴ (RC, paragraph 5.149), Cameroon wilfully misrepresents the provisions of the Treaty of Versailles. Article 282 dealt with specific multilateral treaties; by contrast Article 289 did not specify which bilateral treaties it was dealing with *because it was, according to its terms, dealing with "all" of them*: since it was dealing with all such treaties, there was no need to specify each individually. *This*, not Cameroon's convoluted and exaggerated argument, is the simple, clear and "easily explained" reason for the difference in language of the two provisions.

(6) The fact that the *travaux préparatoires* of the Treaty of Versailles show, in the passages referred to by Cameroon (RC, paragraphs 5.134-5.136, 5.140-5.141), that manifestly commercial treaties were included within the scope of Part X of the Treaty, does not show that that Part, let alone Article 289 which is within that Part but which contains contrary language, is limited to such manifestly commercial treaties. Cameroon's acknowledgement that the notion of 'economic and commercial treaties' must be broadly interpreted (above, sub-paragraph (3)) demonstrates that any such argument is untenable, and renders the passages quoted by Cameroon devoid of purpose in the present context.

(7) Cameroon draws attention (RC, paragraphs 5.130-5.131) to the recent proceedings in the case of *Kasikili/Sedudu Island (Botswana/Namibia)* in which no question was raised as to the legal validity of an Anglo-German Treaty of 1 July 1890 (sometimes referred to as the Treaty of Berlin: Annex NC-M 26). In Article I of the Special Agreement the parties asked the Court to determine the relevant part of the Botswana-Namibia boundary "on the basis of the Anglo-German Treaty of 1 July 1890". For the Court, therefore, the relevance of that Treaty was a 'given' and questions as to its continuing validity would not have been appropriate. As to the parties' reasons for invoking the Treaty in their Special Agreement, Nigeria (and presumably Cameroon) is in no position to comment upon the motivation of the parties in dealing with the Treaty in the way they did. Nigeria would, however, observe that if the treaty was the root of title to territory on either side of the boundary and if the parties accepted that its terms correctly delimited the boundary, then irrespective of its continuing validity there was nothing to stop them referring to it in their Special Agreement as containing the governing language for the case (in addition, of course, to their specific further mention of the rules and principles of international law).

(8) As to the quotations from the works of Lord McNair upon which Cameroon relies, it is to be noted that in his book on *The Law of Treaties* he was, in general, stating the law as it stood, in his view, in 1960, and not as it was at the time of the outbreak of the First World War in 1914. Moreover, he did not always make the distinction, which is nowadays clear and accepted (see below, paragraphs 1.102-1.103), between the *treaty* giving rise to a permanent state of affairs (such as a boundary treaty) and the *rights and obligations* to which that treaty had given rise.⁴⁵

(ix) Succession to boundary treaties

1.98 Cameroon argues that Nigeria's view that, by virtue of Article 289 of the Treaty of Versailles, the Anglo-German Treaty of 11 March 1913 was abrogated is inconsistent with the rules of international law relating to boundary treaties. Nigeria does not accept that there is any such inconsistency.

1.99 Much of Cameroon's argument as to the effect of Article 289 of the Treaty of Versailles appears to be based on the misapprehension that Nigeria is asserting that by virtue of the Treaty of Versailles the boundary established by the Anglo-German Treaty of 11 March 1913 was abrogated. Nigeria has advanced no such argument. Nigeria has simply drawn attention to the fact that, by virtue of Article 289, the *Treaty* was abrogated and that therefore Cameroon could not have succeeded to the *Treaty* itself. Cameroon has failed to take into account the distinction to be drawn between succession to the *treaty* and succession to the *boundary* established by the treaty.

1.100 If Cameroon were correctly to understand Nigeria's argument in this respect, it will be seen that much of the effort devoted by Cameroon to this issue is irrelevant. In particular, Cameroon's assertions that Nigeria's argument involves inconsistency with the provisions of the treaty concerning Germany's renunciation of its overseas territories and leads to instability (RC, paragraphs 5.152-5.156), are unfounded: it is Nigeria's contention that even though a boundary *treaty* is abrogated, the boundary itself (if lawfully established) continues to have legal force.

1.101 Cameroon's misunderstanding on this point is particularly evident in relation to its observations on Article 125 of the Treaty of Versailles, relating to the Franco-German agreements of 1911 and 1912 (RC, paragraphs 5.158, 5.160). As Cameroon notes (RC, paragraph 5.160) these agreements "included" a new delimitation of the border between French Equatorial Guinea and Cameroon. But they did more than that: they resulted in the cession to Germany of very large areas of land to the east and south of Germany's Kamerun protectorate. By Article 125 France appears to have secured the return to itself of those territories (and thus their exclusion from the area of Kamerun which was to become the French mandated territory of Cameroon). Moreover, the two agreements also contained non-territorial provisions. Thus it is apparent from the terms of Article 125 that those agreements gave rise to deposits, credits and advances in favour of Germany, and Article 125 provided that such payments made to Germany under the 1911 and 1912 agreements should be paid to France. It was therefore not a question of providing simply for the abrogation or revival of those 1911 and 1912 agreements, and it was therefore

insufficient to leave them to be dealt with solely under Article 289: rather they had to be dealt with specifically and in their particular circumstances in some special provision, i.e. in Article 125. Far from demonstrating, as Cameroon suggests, that the provisions of Article 125 show the incorrectness of Nigeria's argument about the scope and effect of Article 289, in fact the provisions of Article 125 are entirely consistent with Nigeria's view, for without some provision like Article 125 the intentions of France would not have been realised: it was one of the "special subjects" dealt with as a "particular" consequence of Germany's general renunciation of its overseas rights and interests under Article 118 (see paragraph 3 of that Article: "In particular Germany declares her acceptance of the following Articles relating to certain special subjects").

1.102 The general point about the termination of boundary treaties but not of the boundaries created by them was well made by the British Committee which was appointed to consider what should happen as regards Anglo-German treaties in the peace treaty to be concluded at the end of the First World War (above, paragraph 1.93 *et seq.*). As already noted, in paragraph 7 of its First Report, the Committee accepted that non-renewal of a boundary treaty does not affect the continuation of the boundary as such. The same view was adopted by the International Law Commission when preparing what was to become Article 11 of the Vienna Convention on Succession of States in respect of Treaties 1978. That Article provides:

"A succession of States does not as such affect:

(a) a boundary established by a treaty; or

(b) obligations and rights established by a treaty and relating to the regime of a boundary."

1.103 In its Commentary on the draft version of this Article the International Law Commission made clear that its proposed language (which in this respect was the same as that eventually adopted in the Vienna Convention) distinguished between the treaty and the boundary established by the treaty.⁴⁶ Nigeria accepts this distinction, and said so in its *Counter-Memorial*, where it observed, immediately after its assertion that Article 289 of the Treaty of Versailles confirmed the abrogation of the 1913 Anglo-German Treaty, that

"in accordance with well-established rules of international law, in so far as a boundary was lawfully established by [the 1913] Treaty, the boundary survives until lawfully changed by some subsequent act binding upon the States concerned." (NC-M paragraph 8.54).

1.104 Of course, the survival of the boundary is conditional upon the boundary having been lawfully established in the first place: the rule of survival does not serve to legitimate that which was previously illegitimate. This view was clearly expressed by the International Law Commission⁴⁷ and was also stated by Nigeria in its *Counter-Memorial* in the following terms:

"For the reasons already given, the boundary purportedly established by that Treaty in relation to Bakassi was not lawfully established, and there was therefore no consequent lawful boundary which could survive the lapse of the Treaty purportedly establishing it." (NC-M paragraph 8.54)

1 But Cameroon has incorrectly given the references to this work as cited in n. 40: the references cited in nn. 40 and 41 should be transposed.

2 At pp. 70, 70-71, 80-81.

3 See NC-M, paras. 6.39 and 6.61-6.62, citing *Oppenheim's International Law*, Vol. 1, 9th ed., 1992, pp. 267, 268, 269, and the *Tunis and Morocco Nationality Decrees* case (PCIJ, Ser. B, No. 4, at p. 27). As long ago as 1905, when the 1st edition of *Oppenheim* was published, the position was expressed in essentially the same terms as it is in the most recent edition. Thus: "Protectorate is ... a conception which ... lacks exact juristic precision, as its real meaning depends very much upon the special case... The position of a State under protectorate within the Family of Nations cannot be defined by a general rule, since it is the treaty of protectorate which indirectly specializes it by enumerating the reciprocal rights and duties of the protecting and the protected State. Each case must therefore be treated according to its own merits". (*Oppenheim* Vol. I 1st ed., 1905, p. 138).

4 NC-M, paras. 6.37-6.65.

5 No basis for that concept in treaty law has been advanced by Cameroon, nor does Nigeria know of any such treaty basis for the concept.

6 Above, para. 1.30(1).

7 Below, para. 1.46(2).

8 Below, para. 1.46(1).

9 It is to be noted that this English law rule of 'act of State' is different from the rule commonly referred to by that name, particularly in the context of decisions by US Courts.

10 Vattel, *The Law of Nations*, Book I, Chapter XVI, p. 95, New York 1863.

11 British and Foreign State Papers, Vol. 79, 1887-1888, p. 240; Parry, Consolidated Treaty Series, Vol. 171, 1888-1889, p. 207 (Annex NR 3).

12 See NC-M, paras. 6.63, 6.65. For comparison with the terms of the Treaty with Brunei, it may be recalled that the equivalent provision of the 1884 Treaty with the Kings and Chiefs of Old Calabar 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".

13 Sir Philip Currie (Foreign Office) to the Law Officers, 12 August 1890, and Attorney-General (Sir Richard Webster) to Sir Philip Currie, 13 August 1890 Annex NR 4.

14 Award of 9 October 1998, Phase One: Territorial Sovereignty and Scope of the Dispute, I.L.R. Vol. 114, p. 1.

15 Nigeria, of course, does not admit that the Treaty was legally binding in respect of its 'Bakassi provisions'.

16 "International law presumes that the treaties delimiting a boundary establish a permanent, defined and complete boundary, in the absence of clear proof to the contrary".

17 "may not choose the provisions of the treaty which do have to be applied and those which do not, they cannot 'pick and choose'".

18 "choose amongst the provisions of a boundary treaty those which suit it, whilst at the same time it recognises this treaty as a valid legal document".

19 "seeking to amputate certain provisions from a treaty in force in order to free itself from obligations which it chooses not to respect".

20 PCIJ, Ser. B, No. 12, at p. 20.

21 *ibid.* at pp. 6-7.

22 *ibid.*, at p. 18.

23 I.C.J. Reports 1959, at pp. 221-222.

24 I.C.J. Reports 1994, at p. 24.

25 "definitive, complete and precise".

26 I.L.R., Vol. 38, p. 81.

27 I.C.J. Reports 1962, p. 319.

28 I.C.J. Reports 1973, p. 3.

29 "the only basis having a semblance of legal probability for this purpose would be an error by Great Britain, Nigeria's predecessor State, in respect of its legal capacity to conclude this boundary treaty".

30 Agreement Regarding the Delimitation between Togo and the French Possessions in Dahomey and in the Sudan, 12 September 1912, and the Additional Provisions of 28 September 1912.

31 Agreement Concerning the Affiliation of the Islands Situated on the Rowurna River (East Africa), 20 March 1913.

32 Annex NR 7.

33 Annex NR 8.

34 The Committee's membership included Mr. C J B (later Sir Cecil) Hurst, legal adviser at the Foreign Office (and later to be a Judge, and President, of the PCIJ). At the conclusion of its work Mr. Hurst was the Chairman of the Committee.

35 "in line with the unanimous legal opinion of the time".

36 "it has never been seriously suggested that the 1913 Anglo-German Treaty or any other treaty with a similar content should fall within the scope of Article 289 of the Treaty of Versailles".

37 Annex NR 9.

38 "There is no doubt that the notion of an "economic" or "commercial" treaty was understood in broad terms".

39 "The provision was even intended to cover economic treaties in the broadest sense of the term, such as those dealing with civil procedure and the protection of minors".

40 "It is ... undeniable that the scope of this provision was limited to treaties of an economic nature in the broad sense of the term".

41 "amongst others, treaties relating to questions such as the treatment of ... communications (by ... navigable waterway...)".

42 "one can conclude that the authors considered it unnecessary", "it is possible that", "the result of hasty drafting", "it appears that the principal reason which guided this wording", "If the authors of the Peace Treaty were confident".

43 "The terminology used in Article 289, paragraph 7, is therefore easily explained".

44 "did not contain any provisions on the revival or abrogation of bilateral treaties of an economic nature".

45 The first passage quoted in RC, para. 5.137, illustrates this confusion, in stating that "*rights* of a permanent character... such as ... a boundary *treaty* ... are not affected by the outbreak of war between the contracting parties".

46 Yearbook of the Int. Law Commission, 26th Session, 1974, Vol. II Pt. 1, Commentary on Draft Article 11, p.196 *et seq.*, esp. paras. 18-20 at pp. 201-202.

47 See below, para. 15.47(9).