

SEPARATE OPINION OF JUDGE AL-KHASAWNEH

Nigerian actions, omissions and other statements leave no room for doubt regarding recognition of Cameroonian sovereignty in Bakassi — Resort to other sources of title unnecessary, also unfortunate — Moral difficulties of reconciling protection and dismemberment of protected entity — Also not solid foundation for title — Confusion in international and colonial law regarding whether colonial power possessed territorial sovereignty — Questions of intertemporal law — Berlin Conference — Pacta sunt servanda — Normative distinction between colonies and so-called colonial protectorates not addressed adequately — Bakassi not a terra nullius in 1884 — No real support from Western Sahara Advisory Opinion on question of title in colonial protectorates — Agreement in question crucial — Max Huber clearly wrong — Confusion of inequality in status and weakness in power — Sweeping generalization — Eurocentric approach to international law — Extreme interpretation of constitutive theory of recognition — Unsupported by relevant State practice — Examples from British practice — A distinction between colonies and protectorates constant feature of United Kingdom practice — Also at Berlin Conference — Colonial protectorates fictitious sub-categories invented by commentators — Intertemporal law — simple but in fact elusive — Concept of protectorates classic concept traceable to Ulpian — Examples from Moslem practice — Elements of guardianship — Berlin Conference practice a deformation of classical concept — Intertemporal law should be checked against the objectives of classical concept and not deformed practice — Protection excludes ownership — Practice cannot overrule pacta sunt servanda — Further confusion in intertemporal law from combining evolutionary and static elements — Dropped from law of treaties — Circumvented in Court jurisprudence — Belated intent of Parties — Or reading modern rules and values into instruments of the past — Rejected in European Court of Human Rights jurisprudence — Abandoned in international criminal law, truncated concept — Cannot legitimize transfer of Bakassi in 1913 — Relevance of title of 1884 Treaty — Deductions to be made from title — Broad consistency with other judgments called into question — International law and not colonial law decisive — Treaty text means no sovereignty transfer — No inference to be drawn from British administration — Administration and protection can co-exist — Situation altered in 1913 — Presumption against incidental loss of sovereignty — Passivity of Kings and Chiefs — Failure to protest — Volenti non fit injuria — Only this reason for concurrence with part of Judgment dealing with relevant articles of 1913 on Bakassi.

1. The reasons that led me to concur with the majority view regarding the apurtenance of the Bakassi Peninsula to Cameroon are adequately

reflected in paragraphs 214 to 216 of the Judgment, namely that in the period leading to its independence in 1961 and since then till the early 1990s, Nigeria, by its actions and omissions and through statements emanating from its officials and legal experts, left no room for doubt that it had acknowledged Cameroonian sovereignty in the Bakassi Peninsula. It goes without saying, therefore, that I associate myself with the reasoning in this part of the Judgment. What needs to be said, however, is that this was all the Court needed to do, and all it should have done, to dispose satisfactorily of the issue of territorial sovereignty over Bakassi in Cameroon's favour.

2. Instead the Court chose, quite unnecessarily, to revert to the question of the validity of the 1913 Agreement between Great Britain and Germany under which the former ceded the entire territory of the Kings and Chiefs of Old Calabar — which territory corresponds to the Bakassi Peninsula — to Germany without the consent of those Kings and Chiefs, notwithstanding that Great Britain had entered earlier into a Treaty of Protection with them in 1884 under which, in return for their agreeing and promising “to refrain from entering into any correspondence, Agreement or Treaty, with any foreign nation or Power, except with the knowledge and sanction of Her Britannic Majesty's Government”, Her Majesty would extend Her “favour and protection” to them. It must be noted here that the 1884 Treaty was concluded by the British Consul expressly as the representative of Queen Victoria.

3. Reversion to those treaties was not only unnecessary as I stated earlier, it was also unfortunate, for the attempt at reconciling a duty of protection on the one hand with, on the other, the subsequent alienation of the entire territory of the protected entity — regardless of whether that entity possessed international legal personality or not — cannot be an easy matter, not only due to the moral difficulties that such an attempt would entail, but also, as a matter of law, because the distinction between colonies, protectorates and the so-called “colonial protectorates” is steeped in confusion both under international law and under the laws of the colonial Powers themselves, the confusion arising mainly from the fact that it was considerations of pragmatism and political convenience that determined the status of those territories, though problems of nomenclature are also a contributory factor. Needless to say, such confusion engenders doubt as to whether the colonial/protecting Power possessed or even claimed title.

In addition, if the Judgment is to constitute a legally and morally defensible scheme, it cannot merely content itself with a formalistic appraisal of the issues involved. Such issues include the true scope of intertemporal law and the extent to which it should be judged by contemporary values that the Court ought to foster; an ascertainment of State practice at the relevant time and the role of the Berlin Conference

on West Africa of 1885; the question, whether that practice — assuming it permitted the acquisition of title in the so-called colonial protectorates — could be invoked in an African case when no African State had participated in the formation of such alleged practice; the relevance of the fundamental rule *pacta sunt servanda* on the passing of title and the normative value to be attached to the consistent practice of the colonial Power in question (Great Britain) of distinguishing between colonies on the one hand and protectorates on the other. Only when a serious attempt has been made to analyse this host of relevant and interrelated considerations can it be said that the question repeatedly and forcefully posed by Sir Arthur Watts as counsel for Nigeria — Who gave Great Britain the right to give away Bakassi? And when? And how? — would be answered. To my mind, the Judgment, by taking for granted such premises as the existence of a category of protectorates indistinguishable from colonies, or the right of colonial Powers to deal with African potentates on the basis that the fundamental rule *pacta sunt servanda* does not exist, has failed to answer that question. To the extent that these are central issues in this case and have implications that go beyond it, I feel I must append my thoughts on them in a separate opinion.

4. It is evident that the Bakassi Peninsula was not a *terra nullius* when Great Britain entered into a Treaty of Protection with the Kings and Chiefs of Old Calabar in 1884. As Judge Dillard cogently summarized the matter in his separate opinion in the *Western Sahara* case: “[a]s was cryptically put in the proceedings: you do not *protect* a *terra nullius*. On this point there is little disagreement.” (*Advisory Opinion, I.C.J. Reports 1975*, p. 124.) Yet it was also in that Advisory Opinion that the Court implied, at least *prima facie*, that, even if the territory in question was not a *terra nullius*, this would not in itself preclude the colonial Power from acquiring a *derivative* root of title, as opposed to an *original* title, which could be obtained only by occupation (presumably effective occupation of *terrae nullius*) (*ibid.*, p. 39, para. 80). In the present case, the Judgment has relied mainly on that passage (paragraph 205) in support of the contention that, the absence of a *terra nullius* status notwithstanding, Great Britain had in fact acquired sovereignty to the Bakassi Peninsula through a derivative root of title. *Prima facie*, *Western Sahara* may seem to lend support to such a proposition. Though it should not be forgotten that the passage cited was an *obiter dictum*. *Secundo facie*, however, the support lent seems negligible indeed, for in that instance the Court was not enquiring whether Spain held valid legal title but was answering a distinct, specific question: Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)? Indeed in paragraph 82 of that Opinion the Court expressly declined to pronounce upon “the legal character or the legality of the titles which led to Spain becoming the administering Power of Western Sahara” (*ibid.*, p. 40, para. 82), even though there was much

material before it on this precise question as well as requests to answer it. Moreover, when the Court said that “in the case of such territories (territories that are not *terrae nullius*) the acquisition of sovereignty was not generally considered as effected unilaterally through ‘occupation’ of *terra nullius* by original title but through agreements concluded with local rulers” (*I.C.J. Reports 1975*, p. 39, para. 80), it was referring in general to agreements that had the effect of passing title from those rulers who possessed it on the basis of original title to the new administering/protecting Powers, who through such agreements acquired derivative title. Clearly the crucial factor is the agreement itself, and whilst it is entirely possible that such agreements vested sovereignty in the newcomers it is equally possible that they did not, in which case sovereignty was retained by the local ruler under an agreed scheme of protection or administration. These are questions of treaty interpretation and of the subsequent practice of the parties and cannot be circumvented by the invention of a fictitious sub-category of protectorates termed “colonial protectorates” where title is assumed to pass automatically and regardless of the terms of the treaty of protection to the protecting Power, for that would be incompatible with the fundamental rule *pacta sunt servanda* and would lead to what has been termed “institutionalized treaty breach”, a situation that no rule of intertemporal law has ever excused. It would also blur the distinction that the Court was trying to make between title automatically assumed on the basis of effective occupation on the one hand, and title assumed on the basis of agreement with local rulers on the other.

5. If the Court’s Advisory Opinion in the *Western Sahara* case does not furnish the basis for the proposition that agreements of protection with local chiefs are always the source of valid title acquired through derivative roots, could such a proposition be safely advanced on the basis of passages from arbitrator Max Huber’s often quoted Award in the *Island of Palmas* case (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. II, pp. 858-859), for at least there that learned and renowned judge spoke with dogmatic certainty leaving nothing to possible interpretations? The problem with Max Huber’s analysis however is not its lack of clarity but rather that it is clearly wrong.

In the first place he starts from the premise that because such agreements are not between equals they are: “rather a form of internal organisation of a colonial territory on the basis of autonomy for the natives . . . And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations.”

Such an approach is a confusion of inequality in status on the one hand and inequality in power on the other. That local rulers and chiefs were weak is apparent from their agreeing to enter into treaties of protection, but this does not detract from the fact that they had the capacity to enter into treaty relations.

Secondly, it is characterized by its sweeping generalization, the assumption being that the local chiefs or rulers, no matter how valid and old their title and how clear the display of their sovereignty and the degree of their organization and regardless of the terms of the Treaty of Protection in question, are deemed to have become virtual colonies or vassal States under the suzerainty of the protecting colonial Power even if — as was not uncommon — control over them was nominal and even if in subsequent dealings with the metropolitan State they continued to be treated as retaining some sovereignty, for example, for the purposes of sovereign immunity, or by being dealt with by the Foreign Ministry of the colonial Power. It is difficult to understand how a local ruler would be considered to be entitled to absolute sovereign immunity and to have been divested of his territorial sovereignty at one and the same time. See, for example, *Mighell v. Sultan of Johore* [1894] QB 149 and *Sultan of Johore v. Abubakar Tunku Aris Bendahar and Others* [1952] AC 318. These cases are all the more relevant since they related to local rulers in the same region that Max Huber was dealing with in the *Island of Palmas* Award, i.e. South-East Asia, and were decided by the courts of the same metropolitan State that entered into a treaty of protection with the Kings and Chiefs of Calabar.

Thirdly, such an approach is clearly rooted in a Eurocentric conception of international law based on notions of otherness, as evidenced by the fact that there were at the time in Europe protected principalities without anyone seriously entertaining the idea that they had lost their sovereignty to the protecting Power and could be disposed of at its will. Intertemporal law is general in its application, its underlying rationale and unity of purpose being time (*tempore*) as its name implies, not geography, and cannot be divided into regional intertemporal law, all the more so when no State in the concerned region, be it sub-Saharan Africa or South-East Asia, participated in its formation.

Fourthly, Max Huber's approach is based on an extreme interpretation of the theory of constitutive recognition. A theory, suffice it to say, that remains no more than a theory and has as many opponents as it has adherents.

6. Lastly, it is doubtful — and this is not without irony — that Max Huber's generalization about suzerainty and vassalage with regard to the so-called colonial protectorates is supported by the State practice of the time. To the "local rulers" the notion that they had given up their sovereignty upon entering into a treaty of protection or a treaty of commerce

and friendship which were sometimes of the same ilk, would be astonishing¹. This is not to suggest that there were no cases when such loss of sovereignty ever took place, but that it is again a question of treaty interpretation and subsequent practice of the parties. Similarly, for the protecting Powers themselves, in many cases they were not seeking colonial title but merely spheres of influence or dominance, or domination in the sense of *power and jurisdiction* and not in the sense of *territorial dominion*.

7. To be sure, treaties of protection were sometimes a first step towards the development of a full colonial title, or as they have been described, “a legal lever for acquiring an inchoate title to territory: a title capable of being perfected more or less at leisure” (D. J. Latham Brown, “The Ethiopia-Somaliland Frontier Dispute”, *International and Comparative Law Quarterly (ICLQ)*, Vol. 5, pp. 254-255) but until that happened and in the absence of provisions which may be interpreted as conveying title, they remained a lever and no more. Some examples from State practice will serve to illustrate the point, all the more so in view of the fact that they were contemporaneous with the Congress of Berlin era.

(a) In 1885 the British Foreign Office gave its view that

“a protectorate involves not the direct assumption of territorial sovereignty but is ‘the recognition of the right of the aborigines, or other actual inhabitants to their own country, with no further assumption of territorial rights than is necessary to maintain the paramount authority and discharge the duties of the protecting power’” (FO 403/9, No. 92 (14 January 1885) cited by Malcolm Shaw, *Title to Territory in Africa*, footnote 155, p. 283).

(b) In 1884 a number of treaties were concluded with local chiefs in Bechuanaland, where internal and external sovereignty gradually passed to the protecting Power: Great Britain. In the following year a British protectorate was made a crown colony and its governor exercised jurisdiction over the protected territory as well. Nevertheless, a British court in *R. v. Crewe* maintained the distinction between colonies on the one hand and protectorates on the other,

¹ Sometimes a treaty of protection was called a treaty of friendship in the local language, for example, the 1887 Treaty of Ucciali between Italy and Ethiopia was denounced later by Menelik the Ethiopian Emperor on the ground that the Italian and Amharic texts differed. In the Italian text the Emperor “consents to avail himself of the Italian Government for *any* negotiations which he may enter into with other powers or governments”, the Amharic text reads “may use” the Italians as intermediaries. The Emperor of Ethiopia saw the treaty as one of friendship, the Italian Government, on the other hand, viewed it as a treaty of protection. (A. H. M. Jones and E. Monroe, *History of Ethiopia*, pp. 139-140.)

L. J. Vaughan Williams noting that the “the Bechuanaland protectorate is under His Majesty’s dominion in the sense of *power and jurisdiction*, but is not under his dominion in the sense of *territorial dominion*” ([1910] 2 KB 603-604, cited by Malcolm Shaw, *Title to Territory in Africa*, footnote 161, p. 283; emphasis added).

- (c) In 1884 and 1886 respectively agreements were signed between Great Britain and the Chiefs of five Somali tribes. In the first series of agreements the Somali Chiefs covenanted not to alienate their territory unless to the British Government. In the second (consisting of five agreements), they agreed and promised to “refrain from entering into any correspondence, Agreement or Treaty with any foreign nation or Power, except with the knowledge and sanction of Her Majesty’s Government”. For their part the British Government undertook “to extend to them and to the territories under their authority and jurisdiction the gracious favour and protection of Her Majesty the Queen Empress”. In 1897 the Somali tribes’ grazing areas were ceded by Great Britain to Ethiopia. After the defeat of Italy in World War II those territories were placed under the British Military Administration for Somalia. In 1954 that administration was withdrawn from those territories in accordance with a treaty negotiated *de novo* between Great Britain and Ethiopia which in effect upheld the 1897 Treaty over the agreements with the Somali Chiefs, though with some guarantees for the grazing rights of the Somali tribes. The inconsistency between the cession to Ethiopia in 1897 of what the Somalis regarded as their traditional land and the earlier treaties of protection was the subject of a debate in the House of Commons where, we are told by a commentator (D. J. Latham Brown, *op. cit.*, pp. 254-255), that the Secretary of State for the Colonies regretted “the treaty of 1897 but, like much that has happened before, it is impossible to undo it”. While the words of one Member of Parliament were more telling:

“the tribal elders voluntarily placed themselves under British protection. They sought it for the maintenance of their independence, the preservation of order and other good and sufficient reasons. In short there seems to be argument that at no time was any territory transferred. Consequently, it was not in our power to give away that which we did not possess.”

Whilst in the event the cession was in practice confirmed by the 1954 Treaty, this was done by circumventing the maxim *nemo dat quod non habet* but not by denying it or by pretending that Great Britain had acquired title. Instead the alleged superior character of an international treaty over agreements with the Somali Chiefs, together with the lack of their delineated territorial expanse, were cited in an

endeavour to explain the inconsistency between the different treaty obligations undertaken to the Somali Chiefs and Ethiopia, respectively. At any rate, there was at least an attempt at a rationale, which is sadly missing in our Judgment, which states with full-throated ease that the 1884 Treaty of Protection did not preclude the transfer of Bakassi to Germany merely because it established a colonial protectorate.

- (d) British colonial policy during the relevant period was marked by a consistent insistence on distinguishing between colonies and protectorates. Upholding such a distinction was a major aim of British diplomacy in the Berlin Conference, where it triumphed over imperialist latecomers intent upon achieving nothing less than the threshold of effective occupation and who, moreover, derided the concept of protection as “*prises de possession sur le papier*”. It is reasonable to assume that such a distinction was not insisted upon for purely formal or descriptive motives, but for pragmatic reasons that have been commented upon extensively by historians (Robinson and Gallagher, *Africa and the Victorians: The Official Mind of Imperialism*, 1961). Whatever these motives might have been, what matters is that a normative differentiation was attached to this distinction and was reflected in British practice².

8. It would appear, therefore, that support for the contention that treaties of protection in sub-Saharan Africa allowed generally for the transfer of sovereignty to the colonial/protecting Power cannot be safely established by reference to the *Island of Palmas* Award nor to the alleged practice of the Berlin Conference era, a practice from which, at best, no firm inferences can be drawn and which in fact supports retention of a normative distinction between colonies and the so-called colonial protectorates and the consequent upholding of the maxim *nemo dat quod non habet*.

9. So far I have attempted to demonstrate that the existence of a category of protectorates, the so-called “colonial protectorates”, where the protecting Power was free to dispose of the protected territory at will, is a proposition that neither State practice nor judicial precedent supports and is, in all probability, no more than a fiction existing in the minds of some commentators who try to find *ex post facto* legitimization for unfathomable and illegal facts by the invention of sub-categories where normally applicable rules do not operate. Be this as it may, let us assume, *arguendo* — if only for the sake of completeness — that the Berlin Con-

² *Oppenheim's International Law*, Sir Robert Jennings and Sir Arthur Watts (eds.), 9th ed., Vol. I, p. 269; footnote 9 contains a list of British practice and court decisions generally supportive of a distinction between colonies and the so-called colonial protectorate.

ference on West Africa did sanction such behaviour as evidenced by the State practice emanating from it. Could this practice be invoked in an African dispute when no African State has participated in the formation of such practice? To my mind the answer must be clearly in the negative, and it matters not that the present dispute is between two African States. What is material is that the argument used by counsel for one State — Cameroon — is rooted in the alleged legitimacy of this practice which is claimed to be opposable to the other Party.

10. A further question is the extent to which the operation of the rule (or principle) of intertemporal law³ should shield such practice from judicial scrutiny taking place at a much later time when other rules of international law, regarding the sovereign equality of States, self-determination, non-discrimination and to some extent (for this area is sadly only rudimentarily developed, both from the procedural and the substantive aspects) the rights of indigenous peoples, have to be appraised by judges called upon to decide a contemporary dispute.

11. Let me start by recalling that the concept of the intertemporal law is an irretrievably elusive one. At first sight it looks simple. To quote Max Huber once more: “A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when such a dispute in regard to it arises or falls to be settled.” (*RIAA*, Vol. II, p. 845.)

12. At a general level, the proposition is sustainable, but when we come to enquire more closely into its operation, problems start to arise: is *appreciation* in the light of the law contemporary with the judicial act, for example, a treaty of protection, the same as *interpretation* of such a treaty in the light of contemporaneous law? Or does it merely mean that in interpreting a treaty of the past one should be mindful, in applying the time-honoured and established canons of treaty interpretation, of the temporal context that may shed light on the presumed intention of the parties and thus help ascertain it? Should such a legal act (a treaty) be interpreted against the background that the object and purpose of the treaty was the guaranteeing or upholding of a certain principle, for example, that the mandate system is a “sacred trust of civilization” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 16)? Similarly, in interpreting a

³ For different names used to connote the status of intertemporal law see T. O. Elias, “The Doctrine of Inter-temporal Law”, *American Journal of International Law*, Vol. 74, 1980, p. 285.

treaty of protection should not the law contemporary with the legal act be read against the background of the concept of protection which, like the concept of the mandate, connotes an element of guardianship⁴ traceable to the great Roman jurist Ulpian who said: “for certain purposes of the law some cities and municipalities are to be treated as minors”. A concept that therefore excludes notions of ownership. It should not be forgotten that, in appreciating the law contemporary with the 1884 Treaty, we should be mindful that the ancient concept of protection antedates the Berlin Conference; thus, to cite a few examples, Great Britain had established a protectorate over the Ionian Islands in 1814 which was maintained in accordance with the classical concept of protection which excluded any notion of sovereignty of the protecting Power, and much earlier during the Muslim Conquests many agreements of protection were concluded with local rulers in certain parts of Europe and elsewhere⁵. After 1885, State practice, to use the words of one commentator “revealed a tendency to *deform the original classic* concept of the protectorate and to convert it into an instrument of colonialism” (Alexandrowicz, *The Role of Treaties in the European-African Confrontation in the Nineteenth Century, African International Legal History*, p. 55, cited by Malcolm Shaw in *Title to Territory in Africa*, p. 47; emphasis added). Would then the operation of intertemporal law not require us as judges to appraise not just the practice but the fact that it was a deformation of the concept and practice of protection against the background that the object of the protectorate system — like the mandatory system — is a form of guardianship that by definition excludes notions of territorial ownership or territorial dominion? To my mind this is the relevant law that should be appreciated as a consequence of the rule of intertemporal law and it cannot be reduced to a mere review of a deformation, half-Kafkaesque, half-Orwellian, where friendship means interference in the internal affairs and protection means loss of sovereignty and dismemberment and the conclusion of treaties means instantaneous breach. Put differently, ascertainment of the true meaning of intertemporal law requires us to enquire into the quality of the juridical act in the light not only of

⁴ *Oppenheim's International Law*, Sir Robert Jennings and Sir Arthur Watts (eds.), 9th ed., Vol. I, p. 267.

⁵ For example, the Treaty of Tudmir of Rajab 94 AH-April 731 AD, concluded between Abdulaziz Son of Musa Son of Nusair the Umayyad Governor of Spain and Theodemir, representative of local fortress-chiefs in South-East Spain, an area encompassing the modern region of Murcia, Alicante and Valencia; the pact itself transformed *political power* from the Hispanic Visigoths to the Umayyads of Damascus, but rights in property and other rights were retained by those chiefs and their descendants. For the text of the treaty see *Negotiating Cultures, Bilingual Surrender Treaties in Moslem-Crusader Spain under James the Conqueror*, edited by Robin Burns and Paul Clivedan, p. 202. Many similar treaties of protection were entered into by the Ottomans with various principalities in Eastern Europe where dominion in the sense of power passed to the Ottomans but ownership rights and other rights were retained by the indigenous European chiefs.

the alleged practice, but in the light of the totality of the law relating to protection, i.e. with reference to its object and taking into account other rules relevant at the time. Did the practice of South Africa conform to the object and purpose of the mandate system as “a sacred trust of civilization”? And, similarly, did the practice of alienating protected territory conform to the notion that the concept of protection is based upon legally developed notions of guardianship which by definition exclude the concept that protection is synonymous with territorial ownership?

Also relevant in appreciating the law contemporary with the legal act in question, i.e. a treaty, is the requirement that other rules of law should be taken cognizance of. Paramount among these is the fundamental rule *pacta sunt servanda*, arguably the most important rule in international law and indeed in law generally, and one which cannot be overturned by the assumed practice of some States. I am not aware that in the Berlin Conference era that rule had ceased to exist.

13. At any rate, intertemporal law as formulated by Max Huber is not as static as some would like to think, for it should not be forgotten that its elusiveness is further increased by his immediately following statement that “the existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of law” (*RIAA*, Vol. II, p. 845).

14. It is beyond the scope of this separate opinion to enter into the well-known and legitimate debate on the scope of the rule or principle of intertemporal law arising out of the combination by Max Huber of evolutionary and static elements in his formulation of the concept. Suffice it to say that the confusion was such that neither the International Law Commission, guided by its distinguished and learned Special Rapporteur on the topic Sir Humphrey Waldock, nor the Vienna Conference itself, were able to resolve the issue, with the consequence that the concept of intertemporal law was dropped from the 1969 Vienna Convention on the Law of Treaties, Article 31 of that instrument containing no expressly temporal element and merely speaking “of relevant rules of law” and Article 64 in fact following an opposite direction in the case of a subsequently emerging rule of *jus cogens*.

15. In other words, we are not faced with a simple well-defined rule capable of automatic application, but rather with a perplexing idea that was incapable of finding a place in the 1969 Vienna Convention. Nor has the concept of intertemporal law found support in judicial decisions, where it has been often overcome with the aid of a belated discovery of the intention of the parties as was the case in the *Aegean Sea* case, or by reading the provisions of modern law into the treaty, which was the

approach that the Court took in its Advisory Opinion on Namibia when it stated that: “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of interpretation” (*Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 31).

16. Furthermore, it is perhaps in the realm of criminal law that the rule of intertemporal law comes to the forefront and lends itself to delineation. This is so because the temporal aspect in the maxim *nullum crimen nulla poena sine lege* requires a precise definition, yet it was precisely in this same realm that the rule has been significantly abandoned. Thus, the operation of the rule would have acted to shield the perpetrators of grave crimes in World War II from criminalization because many of these crimes were not part of positive law, but in the event, as is well known, that protection afforded by adherence to intertemporal law was not accepted. If such was the case where the law was more precise, the concept itself more readily delineated and the consequences, criminalization, grave, I see no reason why a behaviour that is incompatible with modern rules of international law and morally unacceptable by modern values underlying those rules should be shielded by reference to intertemporal law, all the more so when the reprobation of later times manifests itself not in criminalization but merely in invalidation.

17. It would thus seem reasonable to assert that in speaking of intertemporal law, we are faced with a confusing concept the status of which as a rule, or principle, or doctrine, or rule of interpretation, is steeped in controversy and which was consciously dropped from the 1969 Convention on the Law of Treaties and consistently rejected in successive decisions of the European Court of Human Rights, not to speak of the way it was overcome by certain decisions of this Court and abandoned in the realm of grave crimes, ironically the very area where it can be said to have some delineation and coherence. In other words, it is a truncated concept on which the hopes of finding the basis for ceding Bakassi to Germany in 1913 are misplaced.

18. In paragraph 205 the Judgment draws attention to “the fact that the international legal status of a ‘Treaty of Protection’ entered into under the law obtaining at the time cannot be deduced from its title alone”. In support of this assertion the Judgment goes on to illustrate by examples:

“Some treaties of protection were entered into with entities which retained thereunder a previously existing sovereignty under international law. This was the case whether the protected party was hence-

forth termed 'protectorate' (as in the case of Morocco, Tunisia and Madagascar (in their treaty relations with France) or a 'protected state' (as in the case of Qatar and Bahrain in their treaty relations with Great Britain)."

19. This reasoning calls for two comments: Firstly, whilst it is true that the international legal status of a "treaty of protection" cannot be deduced from its title alone, that title must nevertheless have some impact, for we can instantly glean from the title that the entity in question was not a *terra nullius* given that "you do not protect a *terra nullius*". We can also safely deduce from the title that the subject-matter was protection and not colonial title. We can further deduce that the entity in question had the capacity to enter into treaty relations and, unless we start from the false premise that one party to a treaty can unilaterally determine the international status of the other, we can also deduce that the treaty has international legal standing.

Secondly, the Judgment seeks to distinguish between this case and other cases where it had occasion to pronounce on the existence of an international legal personality of the protected party: Morocco and Tunisia with regard to France and Qatar and Bahrain with regard to Great Britain, but again this argues that the so-called colonial protectorates are part and parcel of protectorates in general and do not constitute a sub-category unless the will of one party, the protecting Power, is decisive. Moreover, in the case of Qatar and Bahrain these sheikhdoms were not independent States when Britain entered into treaty relations of protection with them but Ottoman dominions ruled under the suzerainty of the Ottoman Empire by local chiefs. The same is true of Tunisia. It would be ironic for the Court to decide that those who were under Ottoman suzerainty were in fact sovereign because it suited practical considerations of British policy that they should be so seen, and not those chiefs who were under no one's sovereignty or suzerainty when Great Britain entered into treaties of protection. Not only would this make colonial law and not international law the determining factor, it would also raise doubts regarding the broad consistency of the Court's decisions.

20. Leaving aside the question of title, the plain words of the treaty — and it is a mercifully brief one — leave no room for doubts that what was at issue was nothing but "favour and protection" in return for agreeing not to enter into treaties with other Powers without British sanction. There is no reference to a transfer of territorial sovereignty, either by calling it a cession or otherwise to use the terminology employed by the Court in the *Western Sahara* Advisory Opinion in paragraph 80. The lack of any intent to transfer territorial sovereignty can be safely arrived

at by reference to the maxim *inclusio unius exclusio alterius* and by the fact that it was protection and not ownership that was the subject of that treaty.

21. The situation was not altered by the fact that Great Britain in fact went on to administer the territory in question (Judgment, para. 207) for this was exactly the same situation in the Bechuanaland Protectorate referred to above (see para. 7 above) but where, nevertheless, a British court maintained the distinction between a colony on the one hand and a protectorate on the other, or to use its exact words: “a protectorate under his Majesty’s dominion in the sense of *power* and *jurisdiction* it was not under his dominion in the sense of *territorial dominion*” (emphasis added). Moreover, the administration of a protected State can perfectly co-exist with protection. Nor was the situation altered by the British decision to incorporate the territories of the Kings and Chiefs of Old Calabar into the Niger Coast Protectorate. The situation did alter, however, in 1913 when Great Britain ceded present-day Bakassi to Germany, for what the Kings and Chiefs had consented to was British and not German protection and because, moreover, that cession implied powers associated with territorial sovereignty that Great Britain did not possess.

22. There is a strong presumption in international law against the incidental loss of sovereignty, but it is a rebuttable presumption, and whilst the case of the Kings and Chiefs of Old Calabar was not weakened by the treaty itself, their subsequent behaviour certainly has had that effect. It is said that the God of sovereignty is a jealous God but apparently not in Bakassi, for, in reflecting on this case, one cannot but notice an extreme passivity and inaction on their part that managed to rebut the presumption. Apart from a single trip in 1913 to London, when a delegation sent on their behalf discussed matters relating to land tenure, they remained silent in the face of momentous events that had an impact on their status. Most notably, their failure to protest at the cession of their territory to Germany under the 1913 Agreement leaves me with no choice but to conclude that they had given their consent to that transfer *volenti non fit injuria*. It is for this reason alone — and not the surrealistic interpretation of the Treaty of 1884 or the reference to a fictitious sub-category of colonial protectorates, nor the equally fictitious reference to a form of intertemporal law that would shield a deformed practice of the concept of protection from invalidation — that I have voted in favour of point III (A) of the *dispositif* relating to those provisions of the 1913 Agreement that deal with Bakassi.

(Signed) Awn AL-KHASAWNEH.