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# The Right to Self-Determination of a People: A Twailian Analysis of ICJ Decisions in Cameroon v. Nigeria, East Timor, and Western Sahara Cases

Ngozi Sunday Nwoko

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**THE RIGHT TO SELF-DETERMINATION OF A PEOPLE: A  
TWAILIAN ANALYSIS OF ICJ DECISIONS IN CAMEROON V.  
NIGERIA, EAST TIMOR, & WESTERN SAHARA CASES**

**NGOZI SUNDAY NWOKO**

**A THESIS SUBMITTED TO THE FACULTY OF GRADUATE STUDIES  
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS  
FOR THE DEGREE OF  
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TORONTO, ONTARIO**

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## ABSTRACT

The various post-colonial armed conflicts bedeviling Third World States have claimed numerous lives and properties, drained its resources, displaced millions and have put the territory's development move on the reverse gear. This thesis, from the theoretical perspective of Third World Approaches to International Law ("TWAIL") is a contribution to the various on-going discussions on the roles that colonialism played in triggering bitter conflicts, confusion, and unhealthy rivalries amongst Third World peoples. Not losing sight of the internal dimensions to these conflicts, the thesis also examines the degree of contributions by some power-drunk and despotic Third World governments to these conflicts. The artificiality of the colonial imposed boundaries and the misrepresentation that characterized the series of treaties between the Third World and the colonial powers are still haunting the former colonies. After many decades of attaining independence, the West African States of Cameroon and Nigeria were assailed by conflicts largely connected with land and maritime borders between the two States. In North Africa, the people of Western Sahara in their struggle for self-determination are on a warpath with the Kingdom of Morocco. In the south-east Asian island of East Timor, its right to self-determination from Portugal was truncated by neighboring Indonesia and was only realized in 2002. The Berlin Conference remains till date one of the greatest undoing of the Third World by the imperialists in the light of the degree of ignorance, mockery, and mischief with which Third World territories were shared and colonized.

This thesis uses the ICJ judgments in the three disputes highlighted above to analyze the various conflicts in these former European colonies and concludes that the imperialists, having unduly exploited the inadequacy, *Eurocentricity*, and unfairness of international law, used the Berlin Conference and the colonial project to inaugurate and institutionalize the trend of civil conflicts across the Third World.

# Dedication

This thesis is dedicated

to

OUR GOD ALMIGHTY who has been my benefactor, Ebenezer, and *numero uno*

And

My parents – ELDER APOLLOS N. NWOKO & DEACONESS HELEN NWOKO who  
have little or no education themselves, yet places so much value on it.

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## **LIST OF ABBREVIATIONS**

AD	After Death
AU	African Union
BAMOSD	Bakassi Movement for Self-Determination
BC	Before Christ
FRETILIN	Revolutionary Front for an Independent East Timor
GTA	Green Tree Agreement
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
MEND	Movement for the Emancipation of Niger Delta
NSGT	Non-Self-Governing Territories
PCA	Permanent Court of Arbitration
REP	Reports
SESS	Session

SADR	Sahrawi Arab Democratic Republic
SCAPO	Southern Cameroons Peoples Organization
TWAIL	Third World Approaches to International Law
UN	United Nations
USA	United States of America

## **THEORETICAL FRAMEWORK, METHODOLOGY AND ROADMAP OF THE THESIS**

This work employs legal analysis in the issues that it investigated to drive home its points. It largely draws its methodological approach and inspirations from Third World Approaches to International Law (TWAIL) – a liberating intellectual movement that has its roots in the anti-colonial movement which arose partly in response to decolonization and the end of direct European colonial rule over non-Europeans.<sup>1</sup> TWAIL is an intellectual, ideological, and political reconstructive movement that aims at demolishing and unseating the inappropriate ways that international law is being used by the West as a tool for dominating, subordinating, annihilating, and dehumanizing the Third World. TWAIL employs constructive intellectual criticisms aimed at transforming international law into a system based on justice, fairness, and equality rather than racialized hierarchies. TWAIL as a liberating intellectual movement seeks to eradicate “the conditions of under-development in the Third World”.<sup>2</sup> The *TWAILian* perspective is apt for the inquiry that this thesis embarks upon on the basis that it explores the historical, legal, colonial, and socio-political structures, institutions, actors, and processes of international law vis-à-vis the peoples of the Third World. TWAIL is a methodological tool employed by scholars in analyzing international law, its institutions, and modus operandi. In accordance with the *TWAILian* project and objective, this thesis is both “reactive and proactive”.<sup>3</sup> It is reactive to the extent that it identifies, exposes, and responds to the historical and colonial factors that gave rise to some of the conditions in the post-colonial Third World.

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<sup>1</sup> See Makau Mutua “What is TWAIL?” (2000) 94 Am. Soc. Int’l L. 31 at 31; Antony Anghie “What is TWAIL: Comment” (2000) 94 Am. Soc. Int’l L. 31 at 39; See also Obiora Chinedu Okafor “Critical Third World Approaches to International (TWAIL): Theory, Methodology, or Both?” (2008) 10 Int’l Comm. L. Rev. 371.

<sup>2</sup> See Mutua “What is TWAIL?” supra note 1 at 31.

<sup>3</sup> See Mutua “What is TWAIL?” supra note 1 at 31.

It is proactive because it canvasses for the conditions of liberation, independence, and peaceful co-existence of Third World peoples.

The major part of the research involved reviews of primary and secondary materials. On primary materials - ICJ decisions, colonial treaties, and agreements, Statute of the ICJ, UN Charter, UN Resolutions, and other international instruments were reviewed and analyzed. Secondary materials like scholarly books, journal articles, and newspaper reports were also relied on.

Therefore, this study uses the ICJ decisions in three cases namely: Cameroon/Nigeria border dispute; the Western Sahara case; and the East Timor case to examine and analyze the conflicts that have plagued these Third World States. The thesis identifies Berlin as the birthplace of many of the socio-political instabilities that are being experienced in the Third World, when in 1884/85, the Europeans converged in Germany to resolve their differences pertaining to the sharing formula of Third World territories. This work attempts to establish a nexus between the colonial encounter and the series of conflicts that have made the peaceful co-existence of the people elusive and retarded development in the territory.

Although there are a couple of other disputes of various characters between Third World States that have also been decided by the World Court, the three cases that are being examined in this work are selected based on the following criteria:

- i. The States and territories selected are former colonies of European States of Great Britain, Germany, France, Spain, and Portugal, respectively. However, the history of East Timor as a decolonized State is somewhat and significantly peculiar in the sense that when Portugal decolonized East Timor in 1975, Indonesia invaded the island few months later and re-colonized it until 2002; and

- ii. The struggle for the realization of the right to self-determination reverberates in all the three cases.

For the inhabitants of the disputed Bakassi Peninsula, their crusade for the exercise of right to self-determination is just at its fledgling stage. In Western Sahara, their journey to self-determination appears endless having lingered for about four decades while that of East Timor has been successfully realized.

This study will be preceded by a general overview of the research problems. This part of the work will enhance our understanding of the historical, socio-political, and legal developments and issues that snowballed into series of conflicts. Structurally, the thesis will proceed in the following order. An attempt will be made to depict what pre-colonial Africa looked like before the arrival of the imperialists. Here, some of the socio-political structures and arrangements in various Empires and Kingdoms across the continent will be highlighted with an objective of demonstrating that Africa had various popular and organized governments and engaged in commercial and diplomatic relations and thus contributed to the development of international law.

Thereafter, it will examine the land dispute between Cameroon and Nigeria and attempt to discover the nature and history of various treaties and agreements between the colonial powers and indigenous Kings. The role of this part of the inquiry will be to discover the factors that gave rise to the signing of those treaties, the understanding of the local Chiefs concerning the treaties, and how they were constructed by the World Court in order to arrive at the decision in the case. More particularly, it will consider the fate of the affected population in the disputed territory and their clamour to be given the right to choose the State they wish to belong to.

On the other hand, the thesis will attempt to excavate how the foundational seed of instability was sown in the North African territory of Western Sahara by one of the imperialists. It will strive to demonstrate how, for about four decades, the decolonization project for the people of Western Sahara is struggling to see the light of the day, with no success, owing to the economic and political interests of some world powers and the re-colonization strategy by a Third World State. The role of this part is to show, among other things, the legacy of instability bequeathed to North Africa by the imperialists and how some Third World leaders have continuously acquiesced to this destructive inheritance.

With regard to the successful exercise of a right to self-determination, the next part of the thesis will look at the struggles that led to the realization of independence by the island of East Timor. Here, it will explore the ambiguities and uncertainty of self-determination evident in the manner that the ICJ pronounced that: “the principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court ...” and yet declined jurisdiction in the same case.

At the end of the above inquiries and analysis, the thesis will make its findings, conclusions, and recommendations and will go ahead to call on the United Nations and its organs as well as Third World leaders and the led on the need for the peaceful co-existence of the people and development of the territory and the possible ways to achieve these.



## CHAPTER ONE

### THE RIGHT TO SELF-DETERMINATION OF A PEOPLE: A TWAILIAN ANALYSIS OF ICJ DECISIONS IN CAMEROON V. NIGERIA, EAST TIMOR, & WESTERN SAHARA CASES

#### 1.1 INTRODUCTION, GENERAL OVERVIEW, AND STATEMENT OF RESEARCH PROBLEM

At the heat of the nineteenth century European exploration and exploitation of the Third World markets and peoples, Portugal sold the idea of convening an international conference to its fellow imperialists so as to avoid the possibility of bloodshed that could arise from territorial disputes amongst the colonial Powers.<sup>4</sup> Presided over by the then German Chancellor Otto von Bismarck, fourteen European States met at Berlin from November 15, 1884 to February 26, 1885 in order to settle the perceived differences as to who gets what within them. Europe therefore unilaterally and artificially divided Africa amongst itself, and consequently ‘legalized’ and institutionalized the acquisition of territory in the continent.<sup>5</sup> At Berlin, the hairs of the Third World peoples were shaved in their absence and without their consent. The Europeans *midwived* the socio-political destabilization and bloodshed in the Third World at the Berlin Conference.

“Despite all such attempts to exclude the African from the Conference, however, the identity of the African native became the central preoccupation of its deliberations over the question of systematizing territory”.<sup>6</sup> In the indigenous and traditional Third World setting,

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<sup>4</sup> Although Anghie argues that “France and Germany first developed the idea of holding the Conference; invitations were issued in three stages, first to Great Britain, Belgium, the Netherlands, Portugal, Spain, and the United States; later to Austria, Russia, Italy, Denmark, Sweden and Norway; and finally to Turkey”. See Anghie, *supra* note 4 at 91, footnote 198.

<sup>5</sup> At the end of the Berlin Conference, the European colonialists signed a treaty that is today known as the General Act of Berlin, 1885. This Act, among other things, legalized the European occupation of African territories.

<sup>6</sup> See Anghie, *supra* note 4 at 94.

the act of drawing lines to demarcate boundaries was neither permissible nor common practice. Before the arrival of Europeans, indigenous frontiers in the Third World used to be naturally and traditionally identified. “The notion of boundary line, however, was not known in Africa, while the use of frontier zones was widespread. Reasons for this include the lack of demographic constraint and the existence of large number of natural separation zones, such as deserts and forests”.<sup>7</sup> Between most African traditional communities, boundaries as lines separating States did not exist. There were frontiers in the form of zones of varying width. Unhealthy forests and deserts usually provided the frontiers of separation found in Africa...distinct cultural and political groups lived and operated side by side.<sup>8</sup> It was probably at Berlin that the ignorance, hypocrisy, deception, and exploitative tendencies of European colonialists about the Third World played out most.

Having been blinded by political and economic gains, the colonialists apparently gave no regard whatsoever to the cherished diversities, heterogeneity, history, and realities of the colonial subjects. Various units of ethnic groups were coerced to co-habit in the same geographical territories with one another. The peoples of the Third World never participated in the division of their boundaries. The wishes and aspirations of Africans were not sought and obtained. “The products of this colonial fiat had little or no resemblance to pre-colonial territories and political identities. The colonial project proceeded as if Africa was a tabula rasa for the inscription of colonial values, whims, and interests. It was by colonial fiat that decisions were made as to whether a part of one ethnic group was to fall into Nigeria or

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<sup>7</sup> See Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* (New York: Oxford University Press, 1986) at 27.

<sup>8</sup> See J.C. Anene, *The International Boundaries of Nigeria 1885-1960: The Framework of an Emergent African Nation* (London: Longman Group Limited, 1970) at 5.

Benin”.<sup>9</sup> There was no free and genuine expression of the will of the people. A forum where the future and co-existence of a large group of people were discussed had no representation from the subjects of discussion. The Berlin Conference appears to be the height of disregard and derision of the Third World by the Europeans. The fact that African peoples were not represented at the Conference is pregnant with meanings. ...the colonial powers demonstrated a brazen show of nonchalance, even contempt, for the interests of Africans, given their failure to engage the latter in any meaningful dialogue or consultation”.<sup>10</sup> It is this nature and character of the division of boundaries in the Third World by the Europeans that makes the whole exercise fundamentally illegitimate and unpopular and has largely given rise to the spate of civil and armed conflicts in the region.

However, the conflicts in the Third World are not only the products of colonial invasion of the territory. On their own part, Third World leaders have no doubt fanned the embers of destabilization of the territory. Apart from bad governance and corruption, they hide under the doctrine of *uti possidetis* to resist every attempt by the governed to determine their socio-political destiny. There are lots of disconnect and distrust between African States as political institutions and the citizenry. The needed socio-political cohesion is regrettably lacking. These anti-self-determination behaviors by Third World leaders have triggered armed conflicts across the region with their monumental losses.

Since the mid 1970s, tensions had been building up between Nigeria and Cameroon regarding sovereignty over the oil-rich Bakassi Peninsula until they finally culminated into armed conflicts that claimed lives and properties and displaced many others. The first major

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<sup>9</sup> See Ikechi Mgbeoji, *Collective Insecurity: The Liberian Crisis, Unilateralism, & Global Order* (Vancouver: University of British Columbia Press, 2003) at 27.

<sup>10</sup> See Dakas C.J. Dakas, *International Law on Trial: Bakassi and The Eurocentricity of International Law* (Jos, Nigeria: St. Stephen BookHouse Inc., 2003) at 22 & 35.

use of direct violence in the form of military conflict took place on May 16, 1981. On that day, Cameroon's national radio network service announced that three Nigerian military patrol boots had violated Cameroon's territorial sovereignty by intruding into Bakassi up to the Rio del Rey River and opened fire on the Cameroonian Navy. Cameroonian soldiers responded and in the battle that ensued, five Nigerian soldiers were killed.

Taking the matter<sup>11</sup> to the International Court of Justice in 1994 did not imply an automatic end to the armed conflict. Till date, various degrees of fighting continue to break out even after the determination of the case since 2002. One of the major incidents broke out in February 1996 when deploying an additional 1000 troops, Nigeria invaded and occupied Bakassi. This time, it seemed as if a full-fledged military combat was imminent in spite of the fact that the case was already before the ICJ. By May 1996, more than 50 Nigerian soldiers had lost their lives and several others taken prisoners. It was reported that in March 2013, there was an attack on Efut Obot Ikot which is one of the villages in the Bakassi Peninsula. According to reports, the attack which was alleged to be as a result of disputed fishing rights and payment of taxes left 5 people dead, 17 others missing, and 1,900 displaced.<sup>12</sup> In October 2002, the ICJ ceded the disputed Bakassi Peninsula to Cameroon and since then, sovereignty over the Peninsula has been vested in the Republic of Cameroon but skirmishes are still occurring in that territory necessitating the clamor by the Bakassi people for their right to self-determination.

Whereas the legal battle might have been won and lost at The Hague, several other challenges connected with the boundary dispute and the main issues that gave rise to it all merits an inquiry and thus forms part of the discourse in this thesis. Here, the thesis attempts

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<sup>11</sup> Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), Judgment, [2002] ICJ Rep 303.

<sup>12</sup> See the Nigeria's Vanguard Newspaper report of 7 April 2013 titled: "*Deaths in Bakassi: Nigerians in Ceded Territory accuse Cameroon of Breaching Pact*" available at <http://www.vanguardngr.com/2013/04/deaths-in-bakassi-nigerians-in-ceded-territory-accuse-cameroun-of-breaching-pact/>.

to establish a nexus between the series of unconscionable treaties/agreements entered into between African Kings and the Europeans and the civil conflicts that have been threatening the co-existence of the two African States. The extent of the legal logic and soundness of the reasoning in the ICJ judgment in the Cameroon v. Nigeria border dispute is analyzed.

The right to self-determination is one principle of international law that has been enmeshed in so much controversy and politics owing largely to its character and tendency of altering the existing boundaries of a sovereign State. Nevertheless, the principle of self-determination of peoples, as a liberating principle “has been recognized by the UN Charter and in the jurisprudence of the ICJ, and it is one of the essential principles of contemporary international law”.<sup>13</sup> In the separate opinion of Judge Dillard in the *Western Sahara case*, “it is for the people to determine the destiny of the territory and not the territory the destiny of the people”.<sup>14</sup> Whereas the ICJ decisions in some of the Third World countries marked a significant shift in the various disputes, current events show that they have not been able, especially in the Nigerian and Western Sahara cases, to eliminate tension.

It is worrisome that since the commencement of the United Nation’s decolonization process across the Third World in the 1950s and 60s, some of the territories are still under foreign occupation and regional (re)colonization. The socio-political and legal logjam currently experienced in the North African territory of Western Sahara forms part of the inquiry in this thesis. Western Sahara, a territory that is rich in natural resources and hence economically and politically strategic to French, Spanish, and Moroccan interests - the people there have not been successful in their struggle to self-determine their political, economic, and social future. Since the 1975 Advisory Opinion of the ICJ concerning the Western Sahara’s socio-political stalemate, the people of Western Sahara are still under foreign

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<sup>13</sup> Case Concerning East Timor (Portugal v Australia), Judgment, [1995] ICJ Rep 90 at 29.

<sup>14</sup> Western Sahara Case, Advisory Opinion, [1975] ICJ Rep 12 at 122.

domination by neighboring Morocco. The Kingdom of Morocco has been frustrating all the moves by various stakeholders towards the conduct of an effective referendum in Western Sahara and yet surprisingly and ridiculously continues to sit in the World body as a member to deliberate on global peace and equality. In this vein, this thesis evaluates the “recovery mission” argument by The Kingdom of Morocco concerning the territory of Western Sahara. It traces the unilateral partition of the Mediterranean borders by France and the subsequent cession of the Sahara to its imperial ally – Spain; an act that the King of Morocco considered an assault on the prestige of the Sultanate.

The domination of East Timor (officially known as *Timor-Leste*) by Portugal as the colonial Power lasted for over four hundred years – about the longest in the history of the Third World peoples. When in 1975 the Imperialists retreated, East Timor was invaded by its neighboring Indonesia who massacred and brutalized the human population in the island until 2002 when the people realized their right to self-determination with the assistance of the United Nations.

In using the colonial encounter and the principle of right to self-determination in international law to analyze the ICJ judgments in these three disputes, this thesis is divided into six chapters. The present chapter is the introductory part that gives an overview of the discourse that forms the entire study. Chapter two of the thesis focuses on the emergence of States in Africa. It is the overall objective of this chapter to situate the socio-political structure of pre-colonial and colonial African Kingdoms and Empires in the context of Arabian and European colonization. It examines the status quo ante that prevailed in Africa before the invasion of the continent by imperialists and demonstrates that Africa, contrary to the fables by the Europeans, contributed to the development of international law via commercial and diplomatic relations. The thesis attempts here to deconstruct the “civilizing mission” theory of the European Imperialists by demonstrating that Africa was already

sophisticated and civilized prior to their arrival. It highlights the nature and character of some Empires and Kingdoms in Africa and demonstrates how organized and popular they were.

The judgment of the International Court of Justice (“ICJ”) in the land and maritime dispute between Cameroon and Nigeria forms the nucleus of the discussion in chapter three. The introductory part serves as the gateway to the entire chapter. It introduces the people of Bakassi Peninsula, the nature of the disputed territory, and the peoples of Cameroon. The chapter proceeds to highlight the nature of the World Court at The Hague and gives a background to the dispute brought before it by Cameroon by situating the colonial encounter in the context of the various treaties entered into between the colonial Powers and the local Kings in the two States. Here, the thesis argues that the import of the treaties was nothing more than the protection of the colonial subjects contrary to the interpretation given to it by the ICJ and the weapon of dispossession that the imperial powers turned them to. It proceeds to outline the facts of the dispute, the legal issues involved, and the arguments of the two necessary State parties before the ICJ. The thesis brings out the holdings of the Court in the dispute and argues that the various treaties and agreements relied on by the ICJ to reach its conclusion were misinterpreted by the Court having not deciphered the intentions of the contracting parties from the ordinary and literal meanings of the words used. The thesis decries the disregard by the Court of the fate of the human population in the Bakassi Peninsula and submits that the judgment, far from being fair, succeeded in deepening the state of restiveness in the territory. For the territory to experience lasting peace, the chapter concludes by making a case for the realization of a right to self-determination by the people of Bakassi.

Chapter four is devoted to the analysis of the Advisory Opinion of the ICJ in the lingering dispute in Western Sahara. The objective of the chapter is to unmask the ignoble roles played in the nineteenth century by France and Spain in the balkanization of the

frontiers of the Mediterranean and its Sultanates in North Africa and to use relevant international instruments to argue for the right to self-determination in Western Sahara. A combination of that anti-Third World act by the colonialists and the illegal annexation of Western Sahara by the neighboring Morocco have brought the Third World to this present socio-political quagmire. The chapter examines the politics of economic interests being played by various States over the natural resources located in Western Sahara.

Chapter five analyzes the Case Concerning East Timor between Portugal and Australia. It outlines the legal issue in the dispute and dissects the arguments of Portugal and Australia. It examines the politics of re-colonization in the Third World by Indonesia and the windy road to the realization of the right to self-determination by the East Timorese.

Chapter six is a summary of arguments in the thesis, concluding remarks, and some recommended/proposed courses of action.

In sum, the common theme of this thesis is that the colonial encounter succeeded in bastardizing the peaceful co-existence of the Third World peoples and on the other hand introduced a tie that bound the colonial Powers in unity. By exhuming the historical factors to the conflicts, this research establishes a chain between the European commercial and political invasion of the Third World, the subsequent violence to the natural frontiers of the people, and the conflicts ravaging the territory. The thesis concludes that there could be dire socio-political consequences where a fundamental decision concerning a group of people – like the cession of a territory is taken without their consent or regard to their history and future. Such an arbitrary decision has the semblance of curtailing a peoples' right to self-determination. There is a need for a UN-organized referendum for the Bakassi inhabitants. To this end, the UN as a world body that strives to foster enduring peace across the globe should work with the governments of Cameroon and Nigeria to achieve this purpose. With the uncertainty that has hitherto characterized the application of self-determination and the need for the growth of



international law in this area, it is high time that the ICJ took the bull by the horn to pronounce some degree of certainty on this principle.

## CHAPTER TWO

### PRE-COLONIAL AFRICA, EMERGENCE OF AFRICAN STATES, AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW

#### 2.0 Introduction

Owing to the fact that a balanced analysis of this discourse requires a demonstration of what Africa looked like during pre and post European colonial encounter, this chapter reflects on the status quo ante that prevailed in Africa before the Europeans set their feet in the Third World soil. It also highlights the socio-political structure of pre-colonial and colonial Africa in the context of Arabian colonization and various political Empires and kingdoms in Africa. This chapter attempts to puncture the long and widely held but erroneous notion spread by the West that pre-colonial Africa had no history, did not contribute to the development of international law, and knew no organized socio-political and administrative setting. It argues that even before the periods of 6<sup>th</sup> and 7<sup>th</sup> centuries, Africa already had a number of well-structured Empires and kingdoms that were conducting remarkable international relations with European countries. As Basil Davidson notes: “Some of these [African] States were the contemporaries of early medieval Europe, and may at times be accounted superior to it in civilization”.<sup>15</sup> Even Pfaff concedes that “...but it seems fair to say that when the Europeans first came to Africa there were coherent, functioning societies of varying degrees of sophistication, some of great political subtlety and artistic accomplishments...This was destroyed by colonialism”.<sup>16</sup> Apart from the Egyptian and Ethiopian civilizations, which the

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<sup>15</sup> See Basil Davidson, *The Lost Cities of Africa* (Boston: Atlantic Monthly Press, 1970) at 79. For another coherent demolition of the superficial and mischievous claim of lack of political and administrative structure in Africa by the colonialists, see also Walter Rodney, *How Europe Under-developed Africa* (Nairobi: East African Educational Publishers, 1989) at 242.

<sup>16</sup> See William Pfaff “A New Colonialism? Europe Must Go Back into Africa” (1995) 74 *Foreign Aff.* 2 at 3 & 4.

West acknowledges but denies their black African origin, other parts of the continent have long histories of developed State-societies. In West Africa, the Soninke kingdom has been traced to 300 A.D., as were the Tekrur and Madingo Kingdoms in Senegal and Mali, respectively. Between the ninth and sixteenth centuries, writers and travelers documented the sophisticated States and Kingdoms of ancient Ghana, Mali, Songhai, Benin, and others. Many of these States engaged in inter-State relations, including commerce, sometimes with traders from the Middle East.<sup>17</sup> The chapter ends with a discussion of the general degree of politics and ambiguity that have characterized the application of self-determination in the Third World.

## **2.1 The Arabian Colonization of Africa**

The first social, economic, and political assaults against Africa by way of colonialism were launched by the Arabs. In its bid to spread Islam, expand its military, and ultimately gain economic control, the Arabs in a war-like manner invaded Africa through Egypt, Tunisia, Libya, Algeria, and Morocco as well as the Empires of Ghana, Mali, and Songhai. This was during the Umayyad caliphate.<sup>18</sup> The Arab invasion of North Africa in the 7<sup>th</sup> century accounts for the adoption of Arabic as the official language and Islam as the main religion, and thereby thrusting alien customs in almost all the North African States today. The Arab colonization of Africa with its introduction of Islam and occupation of North Africa by Arabs from Arabia marked the first damaging phase in the history of the African continent. In some

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<sup>17</sup> Makau wa Mutua “Why Redraw the Map of Africa: A Moral and Legal Inquiry” (1994-1995) 16 Mich. J. Int’l L. 1113 at 1129. See also Basil Davidson, *The Lost Cities of Africa*; Cheikh Anta Diop, *Pre-Colonial Black Africa*.

<sup>18</sup> The Umayyad is the Islamic ruling dynasty of the Caliph from 661-750AD located in the present day Damascus, Syria. It is believed that they descended from Mecca.

existing African States today, extremism and fanaticism in the garb of Islam have regrettably proved to be a source of destabilization of the society and polity. The Arab colonialists made good fortune from slave trade in south-east Africa by selling their victims and that was a significant destructive factor in the continent. In their bid to form strong alliances and enhance the flourishing of trade between the Egyptians and the Arabians including Iraq, the Arabians constructed a canal to link these territories.

## **2.2 The Ghana Empire**

Located in the present day Mauritania and Mali, the Ghana Empire was reputed for its trans-Saharan trade in gold, ivory, and salt and consequently its commercial relations with North Africa, the Middle East, and Europe. As an organized monarchical government, taxes were collected by the Empire on goods. It had an established Army. “The capital was already a cosmopolitan and international city with Arab quarters and mosques. It had a large number of jurists and scholars. The Empire first opened itself to the world at large through commerce; it already enjoyed international repute...”<sup>19</sup> But Arab merchants made good fortune in slave trade in Ghana Empire. The Ghana Empire was later conquered by the Sosso who consequently submitted to the Mali Empire.

## **2.3 The Empire of Mali**

This was one of the renowned and wealthy Empires that reigned in Africa with sovereignty over a large territory. The emperor, Mansa Musa was recorded to have “exchanged embassies with Morocco, maintaining commercial and diplomatic ties with Egypt, Portugal, and Bornu”.<sup>20</sup> It is strongly believed that the Empire had a well organized administration because

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<sup>19</sup> See Cheikh Anta Diop, *Pre-Colonial Black Africa: A Comparative Study of the Political and Social Systems of Europe and Black Africa, from Antiquity to the Formation of Modern States* (Brooklyn, New York: Lawrence Hill Books, 1987) at 91.

<sup>20</sup> See Diop, *supra* note 19 at 92.

Emperor Musa was recorded to have made “a celebrated pilgrimage to Mecca during the periods of 1324-1325”.<sup>21</sup> This suggests that the Empire had international exposure and probably moved with an entourage. It operated an organized fiscal regime. This made it possible for Custom duties and taxes to be paid by merchants on their trades. The Empire of Mali maintained significant dignity in its relationship with Europe.

## **2.4 The Songhai Empire**

The Songhai Empire was one of the largest Islamic empires in history and was located in the present day Niger and Burkina Faso. The Empire had an organized administration with mayors and provincial governors and a thriving commercial city of Timbuktu. There was a regulated economy as well as an effective criminal justice system with Islamic principles. There was a conventional university with scholars and skilled workers from Spain, Morocco, and Egypt. There were political, cultural, and diplomatic ties between the Empire and the Islamic world. Songhai Empire is recorded to be the first West African ruler to accept the exchange of ambassadors with Islamic States. The Empire was later conquered by Morocco.

## **2.5 The Mossi Empire**

The Mossi Empire named after an ethnic tribe in the present day Burkina Faso reigned in the 12<sup>th</sup> century pre-colonial Africa and its Emperor was Moro Naba. It was one of the oldest and prestigious Kingdoms in West Africa. This was a highly structured and hierarchical political system with a constitution that provided, inter alia, for the process of nomination and election of the leaders of the Mossi nation including the Emperor. The Mossi Empire had what we

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<sup>21</sup> Diop, Supra note 19 at 93.

refer to in some present day political settings as an electoral college.<sup>22</sup> In effect, the people had a known voting pattern and ascendancy to the throne of the Empire was not automatic. The Nacomse are the ruling class and the Emperor is at the apex political hierarchy. The Mossi Empire had a very effective governmental structure with a Minister of Finance who was in-charge of the treasury of the Empire, a Mayor whose role included “introducing ambassadors and distinguished visitors”,<sup>23</sup> an Army, as well as a legal system in place where people could seek redress. The character of this Mayoral position and role in the Emperor’s palace are indicative of the fact that there were diplomatic relations between the Empire and other parts of the world.

## **2.6 The Kanem-Bornu Empire**

The Kanem-Bornu Empire was in existence in the present day Chad, Nigeria, some parts of Niger, and Libya with remarkable urban elite. The Arabs penetrated the Empire with Islam but this was not without resistance from the people who preferred their traditional beliefs and practices. This Empire had an established governance structure with special advisers and an organized Army. There was an active diplomatic relations between Kanem-Bornu and Tripoli as well as Egypt. Kanem-Bornu relying on Islamic law introduced some legal and administrative reforms and the Empire had international exposure as he made frequent visits to Mecca on pilgrimage. The Empire had a strong system of trade and economy and therefore participated in commercial activities in the trans-Saharan route. Government generated its revenue from tribute and customs duties.

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<sup>22</sup> See Diop, *supra* note 19 at 43.

<sup>23</sup> See Diop, *supra* note 19 at 44.

The foregoing lends credence to the fact that prior to colonialism, Africa already had well-established socio-political and administrative structures in forms of monarchical or quasi-monarchical governments. The peoples had “Constitutions” that served as guides on how governance ought to proceed. There were provincial governors, advisers to the governments, and many offices had tenure. Diop notes that “...but one can say without exaggeration that throughout the middle ages, Europe never found a form of political organization superior to that of African States”.<sup>24</sup>

## **2.7 Africa, Self-Determination, and Uti Possidetis**

*“In the hands of would-be States, self-determination is the key to opening the door and entering into that coveted club of statehood...In the Third World, we see an increasing number of States, notably in Africa, to whom self-determination acted as midwife at their birth into the international community, which are now engaged in the wholesale destruction of any semblance of either internal or external commitment to that concept”.*<sup>25</sup>

The acquisition of sovereignty by the Third World was an extra-ordinarily significant event; and yet, various limitations and disadvantages appeared to be somehow peculiarly connected with that sovereignty. In any event, Third World sovereignty appeared quite distinctive as compared with the defining Western sovereignty.<sup>26</sup> As Okafor noted, “The direct inheritance and preservation of the legacy of the colonial State, as well as the continuing construction of the post-colonial State on the incubus of its predecessor, has had important implications for the legitimacy of the post-colonial African State...the illegitimacy of the post-colonial State, in the eyes of the populations and groups that composed it, was

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<sup>24</sup> See Diop, supra note 19 at 100.

<sup>25</sup> Antonio Casesse, *Self-Determination of Peoples: A Legal Reappraisal* (UK: Cambridge University Press, 1995) at 6.

<sup>26</sup> See Anghie, supra note 4 at 2.

inherited by the post-colonial State, and intensified by the somewhat dismal performance of many post-colonial African States”.<sup>27</sup>

‘Many African States that exist today are themselves by-products of nationalist struggles in which the demand for self-determination, legitimated as an international norm, played a primary role in the transition from subordinate status to sovereignty. The de-legitimation of the colonial order in the international arena led to the institutionalization of the principle of self-determination’.<sup>28</sup> Yet, the process of the emergence of States in Africa has been engulfed in the miasma and caldron of controversy centering on the principle of territorial integrity of the parent States.

By way of a definition, a State in international law is to possess a “permanent population”, “a defined territory”, “a government”, and “the capacity to enter into legal relations with other States”.<sup>29</sup> The least controversial mode of State creation is where consent of the parent State is given and this is rarely the case. Consent may be given politically, prior to the declaration of independence, or subsequently, after the declaration of independence has been issued.<sup>30</sup> Across the continent of Africa, the history of emergence of African States have been characterized by violence, wars, displacements, gross human rights abuse, hunger, and diseases leading to under-development.

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<sup>27</sup> See Obiora Chinedu Okafor, *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa* (The Hague, Netherlands: Martinus Nijhoff Publishers, 2000) at 33.

<sup>28</sup> See Casesse, *supra* note 25 at 32.

<sup>29</sup> See Article 1 of the Montevideo Convention on the Rights and Duties of States, 1933, which was signed at Montevideo, Uruguay on December 26, 1933 but took effect on December 26, 1934.

<sup>30</sup> Jure Vidmar “South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States” (2011-2012) 47 *Tex. Int’l. L. J.* 541, P. 545-46 (“After a lengthy civil war, Eritrean independence was accepted by the Transitional Government of Ethiopia...Although the internal political situation at that time was very complicated, it is nevertheless notable that from the perspective of international law, Eritrea became independent upon the previous consent of its parent State”).



Over time and across the region of Africa, the concepts of sovereignty and self-determination have played significant but opposite roles in the process of emergence and failure of States in the region. The emergence of States as a legal, political, and social phenomenon in Africa represents one of the major political developments and yet a source of conflict in the region owing largely to the selfish ambitions of political leaders. As Mgbeoji notes, “At the formal end of colonialism, the first generation of rulers in many post-colonial States tended to perpetuate the militarized concept of State security to secure their tenuous hold on power. Effective control over the newly ‘decolonized’ territories became a license to pillage the State and oppress the citizenry....The rule of ‘big men’ and thugs converted colonies into personal fiefdoms...By an adroit mixture of coercion and corruption of the domestic order and deft manipulation of the international security paradigm, tyrants held sway in their respective domestic domains”.<sup>31</sup>

The governments as institutions of the States hardly “conduct themselves in compliance with the principle of equal rights and self-determination of peoples”.<sup>32</sup> This posture of some African States does violence to the proviso to the Declaration on Principles of International Law as it relates to the right to self-determination:

Nothing in the foregoing paragraphs [referring to the right to self- determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus

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<sup>31</sup> Ikechi Mgbeoji “The Civilized Self and the Barbaric Order: Imperial Delusions of Order and The Challenges of Human Security” in Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens, eds. *International Law and the Third World: Reshaping Justice* (New York: Routledge-Cavendish, 2008) at 154-55.

<sup>32</sup> See the proviso to the UN General Assembly’s Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV), UNGSOR, 25<sup>th</sup> Sess, Supp No 85, UN Doc A/8082 (1970) 121.

possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or color.<sup>33</sup> [Emphasis added].

Many governments in the continent are not people-oriented and so serve the interest of only the privileged few in offices. They do not reckon with the plights of the governed but continually amass wealth for themselves and these have exacerbated the agitation for self-determination.

The 1960s witnessed a harvest of emergence of African States. On the other hand, the early 1960s and 1990s also recorded a couple of unsuccessful attempts at self-determination and secession in Africa with the likes of Biafra, Ogoni and Zango-Kataf in Nigeria; the Katanga of Zaire – situations that claimed millions of lives in Africa. In many States of the continent, the hydra-headed challenges of civil wars, starvation, domination, displacement, dehumanization, and under-development largely and systematically orchestrated by the vestiges of colonialism and leadership challenges by Africans are crystal-clear. These recurring socio-political and religious crises have left Africa limping on the ladder of development, peace, and unity in the international plane. ‘...a historical, holistic and contextual examination of the norms and practices of African state-building will reveal that many of the problems associated with the present worrisome situation in Africa have roots in the structure of African states, as well as the frequent attempts by such states to amalgamate coercively Africa’s multitude of pre-existing political formations’.<sup>34</sup>

The closing of the political and economic shops of the Europeans in African soil was greeted with so much excitement by the former colonies. Africans had great hope for the rapid development of the continent. The joy of political and social independence resonated in

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<sup>33</sup> See GA Res 2625 (XXV), supra note 32.

<sup>34</sup> Okafor “Re-Defining Legitimate Statehood” supra note 27 at 19.

the hearts of Africans. To them, the realization of independence coupled with abundant human and natural resources in various African States marked the beginning of a great and pleasant turnaround in the socio-political and economic activities of the continent. But alas, ‘Political independence was not followed by economic independence. A hostile global economy marginalized Africa and contributed to the failure of the post-colonial State’.<sup>35</sup> To date, it is saddening that some parts of Africa have not really fared well in the international economic landscape. The juridical statehood attained with the decolonization of the colonial State has in the last four decades proven inadequate.<sup>36</sup> There is little doubt that the only significant change at independence was not the restructuring of the State but the changing of the guard, the replacement of white by black faces in the State house.<sup>37</sup>

There are lots of disconnect and distrust between African States as political institutions and the citizenry. The needed political cohesion is lacking. Human and structural factors have been responsible for this disconnect. The continued crises in the African continent can be traceable to the “inability of the post-colonial African State to shed its colonial past, re-configure itself, and attract the primary allegiance of its constituent socio-cultural groups”.<sup>38</sup> For many African States, the moment of independence was also a moment of crisis because the post-colonial State was a direct successor and inheritor of the colonial State.<sup>39</sup> To date, some provisions of English laws still form part of the corpus juris in some former British colonies in Africa. ‘At independence, flags and personnel changed in most

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<sup>35</sup> See Mutua, *supra* note 17 at 1113.

<sup>36</sup> Mutua, *supra* note 17 at 1119.

<sup>37</sup> Abiola Irele “The Crisis of Legitimacy in Africa” *DISSENT*, Summer 1992, 296, cited in Mutua, *supra* note 17 at 1145.

<sup>38</sup> Okafor “Re-Defining Legitimate Statehood” *supra* note 27 at 33.

<sup>39</sup> Obiora Chinedu Okafor “After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa” (2000) 41 *Harv. Int’l L.J.* 503.

African States, but hardly any change occurred in the conduct of the business of governance. Having inherited flawed structural organizations, the post-colonial State lost an opportunity to shed its inherited illegitimacy'.<sup>40</sup>

The post-colonial African States adopted some models of development that were the brainchild of the colonialists. Okafor noted that “the structural crises currently facing these post-colonial States stem from their structural illegitimacy. Such illegitimacy has derived, for the most part, from their lack of affinity with constituent sub-State groups and their origins as external impositions rather than organic entities created through an internal process of consensus-building.”<sup>41</sup> The imperialists bequeathed to the post-independence regimes an established set of governing institutions designed to exploit indigenous people through strict authoritarian means, whose power in the colonial era was checked only by the sensitivities of the mother country. In hindsight, that inheritance did not augur well for the good governance of post-independence States, whose governments lost any check whatsoever on their authority. At independence, the former colonies typically adopted Western-style constitutions...<sup>42</sup> African States were divided along ethnic lines and consequently experienced civil wars as different ethnic groups fought for control of the State. Many African States engaged in human rights violations and brutalities against the populace.<sup>43</sup> This is partly owing to the fact that ‘...the right to self-determination was exercised not by the victims of

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<sup>40</sup> Okafor, *supra* note 39 at 511.

<sup>41</sup> Okafor, *supra* note 39 at 503.

<sup>42</sup> James C. Owens “Government Failure in Sub-Saharan Africa: The International Community’s Options” (2002-2003) 43 *Va. J. Int’l L.* 1003 at 1007.

<sup>43</sup> Antony Anghie “The Evolution of International Law: Colonial and Post-Colonial Realities” in Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens, eds. *International Law and the Third World: Reshaping Justice* (New York: Routledge-Cavendish, 2008) at 45.

colonization but their victimizers, the elites who control the international State system... the instrument of narrow elites and their international backers.<sup>44</sup>

Relying on the doctrine of *uti possidetis* in international law, most African leaders are unfavorably disposed to any attempt at the emergence of any other State within their territories. African leaders have used military, political, and socio-economic might to suppress the voices and aspirations of constituent groups who attempt to exercise the right to self-determination or secession. They guard their sovereignty jealously. This posture of African leaders has led to bitter consequences of civil conflicts and wars that have claimed millions of lives, witnessed gross human rights abuses, and led to under-development across the continent. The cases of some parts of Nigeria, Eritrea, Liberia, Sierra Leone, Former Zaire, Southern Sudan; the Hutu/Tutsi of Rwanda and Burundi, Casamance of Senegal, among others, come to mind. The strict application of *uti possidetis* (itself a colonial bequest) in Africa has contributed in destabilizing the continent rather than uniting it.

In this chapter, the study has attempted to highlight how advanced, organized, and popular many pre-colonial African States were even before the arrival of the colonial powers. It has also considered how the clamour for the right to self-determination has been orchestrated by Third World leaders. In the next chapter, it will be examining and analyzing how the colonization of Africa by the Europeans in Cameroon and Nigeria succeeded in institutionalizing unhealthy ethnic rivalry and conflicts between the two States.

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<sup>44</sup> Mutua, *supra* note 17 at 1116,18.

## CHAPTER THREE

### BAKASSI PEOPLE, ICJ DECISION, AND THE RIGHT TO SELF-DETERMINATION

#### 3.0 Introduction

*We have been engaged in drawing lines upon maps where no white man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were.*<sup>45</sup>

*In those days we just took a blue pencil and a rule, and we put it down at Old Calabar, and drew that blue line to Yola...I recollect thinking when I was sitting having an audience with the Emir [of Yola], surrounded by his tribe, that it was a very good thing that he did not know that I, with a blue pencil, had drawn a line through his territory.*<sup>46</sup>

The above quotes are the accounts of two top former British officials on how the land and maritime borders between Cameroon and Nigeria were arbitrarily and unilaterally delineated in ignorance and disregard of the history, dynamics, and natural geography of the Niger are-later christened Nigeria. The above quotes reveal how the colonial powers gave no regard to the diversities and heterogeneity of Sub-Saharan Africa. The economic and political

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<sup>45</sup> Being part of a speech made by the then British Prime Minister, Lord Salisbury, at a Mansion House Dinner, after signing the Anglo-French Convention of 1890 which formed the international boundaries between Nigeria, Dahomey (in the present day Benin Republic), Niger, and Chad Republics, cited in J.C. Anene, *The International Boundaries of Nigeria 1885-1960: The Framework of an Emergent African Nation* (London: Longman Group Limited, 1970) at 3.

<sup>46</sup> See *The Geographical Journal*, vol. xxviii, Proceedings, March 9, 1914, being a speech made to the Royal Society by a former Commissioner and Consul-General who effectively participated in the delimitation of the boundary between Nigeria and Cameroon, cited in J.C. Anene, *The International Boundaries of Nigeria 1885-1960: The Framework of an Emergent African Nation* (London: Longman Group Limited, 1970) at 4.

invasion of Africa by the colonial powers in the nineteenth century has acquired notoriety for the lasting ‘legacy’ of catastrophe that it has continued to leave on the peoples of the continent. “The African territories which have attained independence and national sovereignty cannot, in a strict sense, be regarded as national States; they do not embrace one people with a common language, a common past, and a common culture; they are indeed the arbitrary creations of alien diplomats. The manner in which European nations descended on Africa during the closing years of nineteenth century in their scramble for territory was bound to leave a heritage of artificially contrived borderlines which now demarcate the emergent African States”.<sup>47</sup> After many decades of attaining Statehood, it is poignant that Africa’s existence has been assailed by conflicts largely connected with land and maritime borders among its constituent States. This chapter provides background information to the underlying colonial and post-colonial factors that gave rise to the Cameroon versus Nigeria border dispute. It seeks to understand the role that the colonial project and its administrators played in the various disputes currently plaguing many African States using Cameroon and Nigeria as a focus. It examines how the Berlin Conference of 1884-85 under the auspices of some privileged European States and their subsequent artificial division of African boundaries succeeded only in institutionalizing conflicts and confusion in the Third World – in this case, Cameroon and Nigeria. It is the argument here that this ‘unhappy legacy of colonialism’<sup>48</sup> has largely crippled development and rendered elusive the possibility of peaceful co-existence in these parts of Africa. This perspective and approach will hopefully assist in grasping how the issues in the Cameroon v. Nigeria border dispute evolved *ab initio*. This chapter introduces the people of Bakassi of Nigeria as well as the character of the disputed Peninsula called Bakassi. It also introduces the people of Cameroon that shares common boundary with

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<sup>47</sup> See Anene, *supra* note 8 at 1.

<sup>48</sup> See Anene, *supra* note 8 at xvi.

Nigeria. It proceeds to outline the facts of the Cameroon v. Nigeria border conflict as decided by the International Court of Justice (“ICJ”) and the historical background to the conflict. Whereas the Cameroon v. Nigeria case was a three-pronged issue, namely – land boundary claim, a maritime delimitation claim, and a States responsibility claim; this study will largely concentrate on the land boundary claim. This is because the fundamental issue about the dispute basically centers on sovereignty over the Bakassi Peninsula. The analysis of the legal issues and the ICJ decision follow.

### **3.1 The People of Bakassi and the Disputed Peninsula**

The people of Bakassi are mainly the Efik, Efut, Ibibio, and Anang that forms part of the present day Calabar in Cross River State and some parts of Akwa Ibom State of Nigeria. Predominantly farmers and fishermen, the population of the people of Bakassi is estimated to be from 150,000 to 300,000. The Bakassi Peninsula is an amphibious environment with abundance of water, fish stocks, and mangrove vegetation. Fishing is the major commercial activity in the Peninsula. Transportation around the Peninsula is by water. Bakassi Peninsula is located at the extreme eastern end of the Gulf of Guinea consisting of the Bight of Bonny and Bight of Benin, and it is strongly believed to be rich in high grade crude oil deposits.<sup>49</sup> The total area of the Peninsula is approximately 700 square kilometers. The map below depicts Bakassi Peninsula bordering Nigeria and Cameroon.

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<sup>49</sup> See “*Nigeria, Cameroon Plan Joint Oil Exploration in Bakassi*” on <http://www.thisdaylive.com/articles/nigeria-cameroon-plan-joint-oil-exploration-in-bakassi/87812/>





*The map of Bakassi Peninsula bordering Nigeria and Cameroun*

### 3.2 The People of Cameroon

The Republic of Cameroon, with a population of over 19 million is located in central Africa and it shares border with Nigeria to the north and southeast, Chad to the northeast, and Equatorial Guinea to the south, among others. Cameroon's coastline lies at the Bight of Bonny, part of the Gulf of Guinea, and the Atlantic Ocean. Previously a German colony (known as *Kamerun*) and later a French Mandate Territory, Cameroon have over 200 ethnic and linguistic groups. French and English are the official languages. The French-administered part of Cameroon gained independence in 1960. The Anglophone Southern part of the British Cameroons merged with it in 1961.

### 3.3 The Nature of the International Court of Justice

It is the purpose of the United Nations ("UN") to *inter alia*,

“maintain international peace and security, and to that end: to take effective and collective measures for the prevention and removal of threats to peace, ...and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”.<sup>50</sup>

By virtue of the Charter of the United Nations and the Statute of the International Court of Justice ("ICJ"), the ICJ was established in June 1945 as the principal judicial organ of the United Nations to succeed the Permanent Court of International Justice.<sup>51</sup> However, its

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<sup>50</sup> See Article 1 of the Charter of the United Nations, 26 June 1945, Can TS 1945 NO 7. The Statute of the ICJ is an integral part of the Charter.

work did not commence until 18 April 1946 when it held its inaugural public sitting. The ICJ sits at the Peace Palace at The Hague, Netherlands. However, the Court can sit and exercise its functions elsewhere whenever the Court considers it desirable.<sup>52</sup> The Court is charged with the responsibility of settling, in accordance with the principles of international law, legal disputes brought before it by member States of the UN and to give advisory opinions on questions of law referred to it by some UN organs and specialized agencies.<sup>53</sup> As a world Court, the ICJ has a dual jurisdiction and hence assumes jurisdiction in contentious cases brought before it by States and advisory jurisdiction at the instance of international organizations. The first case was brought before the ICJ in May 1947. The Court is composed of 15 Judges representing the principal legal systems of the world who are elected for terms of office of nine years each by the UN General Assembly and the Security Council. The full Court sits except when it is expressly provided otherwise in its Statute. However, the Court is properly constituted by nine Judges.<sup>54</sup> The ICJ has a Registry which oversees the administrative duties of the Court. The Courts official languages are English and French. The sources of law that the ICJ applies are international treaties and conventions in force, international custom, the general principles of law, and judicial decisions and the teachings of the most highly qualified publicists. In the light of the foregoing and for the purpose of the present study, the ICJ occupies a unique and significant position in the task of resolving post-colonial territorial disputes in the Third World. In some cases, the Court has contributed positively in the peaceful resolution of disputes between warring States. But in some other

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<sup>51</sup> See Art. 7. Para. 1 and Art. 92 of the Charter of the United Nations, *supra* note 49. Chapter XIV of the Charter generally provides for the establishment, structure, composition, jurisdiction, etc. of the ICJ.

<sup>52</sup> See Art. 22 of the Statute of ICJ.

<sup>53</sup> See Art. 96 of the Charter of the United Nations, *supra* note 49.

<sup>54</sup> See Art. 25 of the Statute of ICJ.

instances, the Court's decisions have recorded some human rights abuses and armed conflicts.

### **3.4 Historical Background to the Dispute**

*“Africa was sliced up like a cake, the pieces swallowed up by five rival nations – Germany, Italy, Portugal, France and Britain (with Spain taking some scraps) – and Britain and France were at each other’s throats”.*<sup>55</sup>

To understand the present we must look into the past and to understand the future we must look into the past and the present. Therefore, for the sake of clarity, it is helpful to point out that the boundary dispute between Cameroon and Nigeria is an offshoot of a historical framework in the nineteenth and early twentieth centuries which arose as a result of the colonialists' act of dividing Africa amongst themselves, the changes in the status of relevant territories under the League of Nations mandate system, the UN trusteeships, and later Africa's accession to independence.<sup>56</sup> This history largely forms part of various conventions and treaties, diplomatic exchanges, administrative instruments, maps of the period, et cetera all of which were tendered in evidence to the Court by the parties to it. As Anene noted, “In view of the British and German entrenched positions in Calabar and Duala respectively, the

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<sup>55</sup> See Thomas Pakenham, *The Scramble for Africa 1876-1912* (New York, Random House Publishers, 1991) at xxii.

<sup>56</sup> The Mandate System of the League of Nations was an international regime created for the purpose of governing the territories – stretching from the Middle East and Africa to the Pacific – that had been annexed or colonized by Germany and the Ottoman Empire, two of the great powers defeated in the First World War. The Mandate System was aimed at promoting self-government and, to some extent, to integrate previously colonized peoples into the international system as sovereign and independent nation-States. The UN trusteeship arrangement succeeded the Mandate system after the Second World War. The trusteeship system ended in 1961. See Antony Anghie “Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations” (2002) 34 N.Y.U. J. INT’L L. & POL. 513 at 514-5; See also Mutua, supra note 17 at 1137-38.

eastern end of the Nigerian coast was bound to become a subject of controversy between the two Powers. The neck and neck race for treaties between Hewett and Nachtigal had already created considerable confusion as to respective spheres of influence of the European Powers involved”.<sup>57</sup> In the case of the Cameroons territory, for example, Britain had intended to acquire the region but before it had acted Germany signed a treaty with the local chief placing the territory under its protection.<sup>58</sup>

In the Third World regions, territory was basically acquired by way of entering into agreements of cession with local Chiefs and Kings. The Europeans’ inordinate scramble for Africa set the stage for series of conflicts and dispute of various dimensions and proportions across the continent. To the Europeans, “Africa, in the rhetorical metaphor of imperial jingoism, was a ripe melon waiting carving in the late nineteenth century. Those who scrambled fastest won the largest slices and the right to consume at their leisure the sweet, succulent flesh. Stragglers snatched only small servings or tasteless portions; Italians, for example, found only desserts on their plates”.<sup>59</sup> “In the successive phase of the European partitioning of Africa, the lines demarcating spheres of interest were often haphazard and precipitately arranged. The European agents and diplomats were primarily interested in grabbing as much African territory as possible, and were not unduly concerned about the consequences of disrupting ethnic groups and undermining the indigenous political order.”<sup>60</sup>

In accordance with the functional socio-political organization of pre-colonial Africa, Bakassi as an already existing kingdom as early as 1450 was a constituent part of the Old

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<sup>57</sup> See Anene, *supra*, note 8 at 47.

<sup>58</sup> See Shaw, *supra* note 7 at 39.

<sup>59</sup> See Young Crawford’s “The Heritage of Colonialism” IN *Africa in World Politics*.

<sup>60</sup> See Anene, *supra* note 7 at 3.

Calabar administrative and political enclave together with the Southern Cameroons. In the pre-colonial era, the city states of the Calabar region constituted an acephalous federation having independent entities with international legal personality; hence, it could enter into legal relationships with other international persons. In the colonial period, the Europeans entered into numerous treaties with indigenous rulers who were exercising control over identifiable areas of territory. "...a number of treaties of protection were signed consistent with traditional practice, i.e. granting the protecting State powers in the external field and quite often determining that the local ruler was restricted in his external relations by the consent of the protecting power".<sup>61</sup> On 10 September 1884, in the course of European's scramble for Africa, Britain signed a Treaty of Protection with the Kings and Chiefs of Old Calabar. Articles 1 and 2 of the Treaty of 10 September 1884 provide that:

*Article 1: "Her Majesty the Queen of Great Britain and Ireland, &c, in compliance with the requests of the Kings, Chiefs, and people of Old Calabar, hereby undertakes to extend to them, and to the territory under their authority and jurisdiction, her gracious favor and protection".*

*Article 2: "The Kings and Chiefs of Old Calabar agree and promise to refrain from entering into any correspondence, Agreement, or Treaty with any foreign nation or Power, except with the knowledge and sanction of Her Britannic Majesty's Government".<sup>62</sup>*

The letters and spirit of the 1884 Treaty reveals that it was nothing more than a Treaty of protection contrary to the claim that it is one of annexation and acquisition of territory. The

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<sup>61</sup> See Shaw, *supra* note 7 at 47.

<sup>62</sup> See the Counter-Memorial of the Federal Republic of Nigeria dated 21 May 1999, Vol. 1, chapters 1-11 at p. 109, submitted to the ICJ in response to the Memorial of the Federal Republic of Cameroon, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=94&code=cn&p3=1>.

Treaty of Protection by Britain for economic motives was another colonial bond entered into by the Calabar monarchs with Britain to the extent that it got the local Chiefs not to enter into any kind of agreements or treaties with any other nation without the prior approval of the British Government. “...the regime of protectorates was more insidious than the regime of colonies. The regime of protectorates was a convenient mechanism employed by the colonizing powers to exploit Africa’s resources without being bogged down by the burdens of cost, manpower, etc. of local administration”.<sup>63</sup>

The Anglo-German Treaty exposes the double standard and exploitation that are reminiscent of the European and Third World colonial relationship. John Westlake’s view concerning the nature and status of the various treaties entered into between African Chiefs and European Powers reveals the mockery and misrepresentation that characterized the colonial relationship. “In Africa...an importance has sometimes been attached to treaties with uncivilized tribes, and a development has sometimes been given to them, which are more calculated to excite laughter than argument”.<sup>64</sup> Colonialism had only one hand – it was a one-armed bandit.<sup>65</sup> The Cameroon and Nigeria border dispute reflects the shrewd economic interests of the colonialists in the Third World that contributed to the under-development of the region and the development of Europe. For instance, in 1890, when Britain and Germany decided on the Rio del Rey boundary, the Germans had wanted Bakassi to be given to them mainly to enable them develop commercial shrimp fishing industry there, a request which the British Foreign Office did not approve. Consequently, Britain exercised control over the

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<sup>63</sup> See Dakas, *supra* note 10 at 38.

<sup>64</sup> See John Westlake *Chapters on the Principles of International Law I* (1894) at 149-50.

<sup>65</sup> See Walter Rodney, *How Europe Under-developed Africa* (Nairobi: East African Educational Publishers, 1989) at 223.

entire territory of Old Calabar, part of which was Bakassi. In 1913, Britain purportedly ceded the Bakassi Peninsula to Germany who later bequeathed it to France.

Southern Cameroons was a constituent part of German *Kamerun* between 1885 and 1916 until the end of World War 1 and the Treaty of Versailles that gave birth to the League of Nations. With the exit of Germany from African territory as one of the fall outs of World War 1, France and Britain were at daggers drawn as to who gets what from the booty obtained from Germany, with France carting home the larger portion of the spoil. The Berlin Conference of 1884-85 basically sought to ensure that Africa would be divided up among European powers on a systematic basis to minimize the potential for conflicts among European imperial powers.<sup>66</sup> Pursuant to the provisions of the 1946 Order in Council, the regions placed under the British trusteeship were divided into two for administrative purposes, thereby giving birth to the Northern Cameroons and Southern Cameroons. Owing to the British divide and rule system, the British Mandate system had the Northern Cameroon and Southern Cameroon under its trusteeship. Therefore, while Northern Cameroon was administered as part of the then Northern Nigeria, Southern Cameroon was administered as part of the then Eastern region of Nigeria with its headquarters in Enugu between 1922 and 1961. The people of Southern Cameroon had 13 elected representatives in the Eastern Nigeria House of Assembly.<sup>67</sup> But in August 1953, during a Constitutional Conference held in London, the Southern Cameroons through their elected representatives in the Eastern House of Assembly agitated for the right to self-determination from Eastern Nigeria – so as to become an autonomous region. Britain agreed to this agitation and consequently, Southern

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<sup>66</sup> See Antony Anghie, "Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations" (2001-2002) 34 N.Y.U. Int'l L. & Pol. 513 at 549.

<sup>67</sup> Following the devolution of more powers to the regional governments in Nigeria in 1950, various regions in Nigeria had Houses of Assembly that made laws for the good governance of their regions. The Eastern region of Nigeria had its administrative and political headquarters in Enugu.



Cameroon, by virtue of the Lyttleton Constitution of 1954 became an independent quasi-region with a regional Assembly having its capital at Buea, Cameroon. Again, on 11 February 1961, the United Nations pursuant to General Assembly Resolution 1350 (XIII) directed the British Government to organize a plebiscite for the Southern and Northern Cameroons to determine which country between Nigeria and Cameroun they would like to belong. While the people of Southern Cameroon voted to be part of the French Cameroun, the Northern Cameroon elected to become part of the Republic of Nigeria. Thus, Southern Cameroons officially became part of *La Republique du Cameroun* on 1 October 1961 while Bakassi continued to be part of Calabar in Nigeria.

### **3.5 Facts of the Cameroon and Nigeria Case**

On 29 March 1994, Cameroon instituted a proceeding against Nigeria at the International Court of Justice (“ICJ”/ “The Court”) for the determination of sovereignty over Bakassi Peninsula and the course of maritime boundary between the two States.<sup>68</sup> On 6 June 1994, Cameroon amended its application by including the question for the determination of the definite frontier between Cameroon and Nigeria from Lake Chad to the sea and prayed the Court to consolidate the applications. Nigeria filed preliminary objections to the jurisdiction of the Court and the admissibility of the application, among others. By virtue of Article 31, paragraph 3 of the Statute of the Court, Cameroon chose a Judge ad hoc, Mr Keba Mbaye while Nigeria chose Mr Bola Ajibola, both of the nationalities of their States.<sup>69</sup> On 11 June 1998, the Court ruled against the preliminary objection filed by Nigeria and found that it had

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<sup>68</sup> Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), supra note 10.

<sup>69</sup> See [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_I](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_I)

jurisdiction to adjudicate on the merits of the dispute and that Cameroon's requests were admissible.

In a bid to protect its legal rights and interests in the Gulf of Guinea which could be adversely affected by the Court's decision in the light of the maritime boundary claims advanced by Cameroon and Nigeria, Equatorial Guinea relying on Articles 62 and 82 of the Statute of Court successfully filed an application to intervene in the case. Equatorial Guinea asked the Court "not to delimit a maritime boundary between Cameroon and Nigeria in areas lying closer to Equatorial Guinea than to the coasts of the two parties or to express any opinion which could prejudice its interests in the contexts of its maritime boundary negotiations with their neighbors..."<sup>70</sup>

### **3.6 Legal Issues**

At the end of the First World War, all the territories belonging to Germany in the region, extending from Lake Chad to the sea, were apportioned between France and Great Britain by the Treaty of Versailles and then placed under British or French Mandate by agreement with the League of Nations. At the end of the nineteenth and the early part of twentieth centuries, Germany, France, and Britain entered into a number of agreements that delimited the boundaries of their respective colonies in Africa. The agreement between Britain and Germany respecting boundaries in Africa was first signed at Berlin on 15 November 1893 and supplemented by another agreement of 19 March 1906 to cover the territories from Yola to Lake Chad. It is this agreement that is generally referred to as the Anglo-German

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<sup>70</sup> See Land and Maritime Judgment, *supra*, note 13 at para. 28.

Agreement of 1906. Britain and Germany, in order to redefine the southern part of the boundary subsequently entered into two agreements for this purpose, namely:

- the Anglo-German Agreement of 11 March 1913 regarding the settlement of the frontier between Nigeria and Cameroons from Yola to the sea and the regulation of navigation on the Cross River; and
- The Anglo-German Agreement of 12 April 1913 concerning the demarcation of the Anglo-German boundary between Nigeria and the Cameroons from Yola to the Cross River.

### **3.6.1 Arguments of Cameroon**

Relying on Articles XVIII to XXI of the Anglo-German Agreement of 1913, it was Cameroon's contention before the ICJ that the Anglo-German Agreement fixed the course of the boundary between it and Nigeria in the area of the Bakassi Peninsula, thereby placing the Peninsula on Germany's area of the boundary. For this reason, that upon Cameroon and Nigeria's attainment of independence in 1960, this boundary became the border between the two successor States to the colonial powers and hence bound by the principle of *uti possidetis*. It was Cameroon's contention that the 1884 Treaty between Britain and the Kings and Chiefs of Old Calabar established a colonial protectorate and in the practice of the period, there was little fundamental difference at international level, in terms of territorial acquisition, between colonies and colonial protectorates. Cameroon argued that substantive differences between the status of colony and that of a colonial protectorate were matters of the national law of the colonial Powers rather than of international law.

### 3.6.2 Nigeria's Argument

The Nigerian case concerning sovereignty over the Bakassi Peninsula was as follows:

- That the 10 September 1884 Treaty only conferred certain limited rights on Britain, and in no way did it transfer sovereignty over Bakassi Peninsula to Britain. Nigeria argued that title to the Peninsula in 1913 rested with the Kings and Chiefs of Old Calabar and continued to reside with them until 1960 when the territory passed to the Federal Republic of Nigeria by virtue of attainment of independence. It was Nigeria's argument that no amount of British activity in relation to Bakassi in the mandate or trusteeship periods could have severed Bakassi from the Nigerian protectorate. Nigeria therefore submitted that since no one could give what he does not have, Britain had no title in the Peninsula under international law to pass to Germany (*nemo dat quod non habet*). Nigeria urged the Court to hold that the Anglo-German Agreement of 11 March 1913 which Cameroon is largely relying on is ineffective to the extent that it purports to have transferred sovereignty to Germany;
- That Nigeria has had long, historical, effective, and peaceful occupation of the Bakassi Peninsula which goes to confirm and consolidate the original title of the Kings and Chiefs of Old Calabar, which title vested in Nigeria upon independence in 1960;
- That the Anglo-German Agreement of 11 March 1913 is incurably defective because it does violence to the Preamble of the General Act of the Berlin Conference of 26 February 1885;

- That under German contemporary domestic laws, all treaties providing for cession or acquisition of colonial territory by Germany shall be approved by the German Parliament - that since the Anglo-German Agreement of 11 March 1913 involved the acquisition of a colonial territory like the Bakassi Peninsula, such acquisition ought to have been approved by the German Parliament but it never received the approval of the said Parliament;
- That Article 289 of the Treaty of Versailles of 28 June 1919 provides for the revival of pre-war bilateral treaties concluded by Germany on notification to Germany by the other party. It was Nigeria's contention that since Britain took no steps under the said Article 289 to revive the Anglo-German Agreement of 13 March 1913 that it accordingly abrogated the Anglo-German Agreement of 11 March 1913.

### **3.6.3 The ICJ Decision**

The Court noted that after the First World War, Germany renounced its colonial possessions. Under the Treaty of Versailles, the German possessions of Cameroon were divided between Britain and France. In 1922, Britain accepted the mandate of the League of Nations for that part [of the former German colony] of the Cameroons which lay to the west of the line laid down in the [Milner-Simon] Declaration signed on the 10 July 1919. Bakassi was necessarily comprised within the mandate. Britain had no powers to alter the boundary nor did it make any request to the League of Nations for any such alteration. The League Council was notified and it did not object to the British suggestion that it administer Southern Cameroon together with the eastern region of the Protectorate of Nigeria.

According to the ICJ, when, after the Second World War and the establishment of the United Nations, the mandate was converted to a trusteeship, the territorial situation remained exactly the same. Therefore, for the entire period of 1922 to 1961 (when the trusteeship was terminated), Bakassi was comprised within British Cameroon. The boundary between Bakassi and Nigeria, notwithstanding the administrative arrangements, remained an international boundary. The Court rejected Nigeria's argument to the effect that until its independence in 1960, and notwithstanding the Anglo-German Agreement of 11 March 1913, the Bakassi Peninsula had remained under the sovereignty of the Kings and Chiefs of Old Calabar.<sup>71</sup>

The Court held that Germany ceased to exercise any territorial authority over Cameroun since 1916 and that Germany relinquished its title to its overseas possessions under Articles 118 and 119 of the Treaty of Versailles. Consequently, it was not necessary for Britain to take any step towards reviving the Anglo-German Agreement of 11 March 1913 with Germany. On the strength of that, the Court rejected the argument of Nigeria on that issue.

On Nigeria's historical and peaceful occupation of the Peninsula, the Court held that the invocation of historical consolidation cannot vest title of Bakassi in Nigeria considering that its occupation of the Peninsula was adverse to Cameroon's prior treaty title.

The Court concludes at paragraph 209 of the judgment that under the law at the time, Britain was in a position in 1913 to determine its boundaries with Germany in respect of Nigeria, including in the Southern section. The Court therefore upheld the validity and applicability of the entire Anglo-German Agreement of 11 March 1913 that delimited the boundary between Cameroon and Nigeria and consequently held by thirteen votes to three that "*sovereignty*

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<sup>71</sup> See Land and Maritime Boundary (Judgment), *supra*, note 13 at para. 212.

*over the Bakassi Peninsula lies with the Republic of Cameroon”.*<sup>72</sup> The Court decided by fourteen votes to two that *“the Federal Republic of Nigeria is under an obligation expeditiously and without condition to withdraw its administration and its military and Police forces from the territories which fall within the sovereignty of the Republic of Cameroon...”*<sup>73</sup> In the same vein, the Court unanimously decided that *“the Republic of Cameroon is under an obligation expeditiously and without condition to withdraw any administration or military or Police forces which may be present in the territories which fall within the sovereignty of the Federal Republic of Nigeria...”*<sup>74</sup>

On 14 August 2008, following the Green Tree Agreement, Nigeria formally ceded Bakassi to Cameroon.<sup>75</sup> Consequently, Nigerians in the Bakassi Peninsula would decide to either become Cameroonians or leave the territory.

### **3.6.4 Analysis of the ICJ Decision**

*“Perhaps nowhere is the category of peaceful settlement of disputes more imperative than in territorial and boundary disputes between neighboring States, given the potential for such disputes to escalate with destructive consequences for the States concerned”.*<sup>76</sup>

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<sup>72</sup> See Land and Maritime Boundary (Judgment), supra, note 13 at para. 325 (III)(B).

<sup>73</sup> See Land and Maritime Boundary (Judgment), supra, note 13 at para. 325 (V)(A).

<sup>74</sup> See Land and Maritime Boundary (Judgment), supra, note 13 at para. 325 (V)(B).

<sup>75</sup> Sequel to the decision of the ICJ that ceded the Bakassi Peninsula from Nigeria to Cameroon, and in a bid to set the modalities as well as the timeline for the implementation of the ruling, Cameroon and Nigeria signed the Green Tree Agreement on 12 June 2006, at Greentree, New York, under the watchful eyes of the then Secretary-General of the United Nations, Kofi Annan.

<sup>76</sup> See para. 1 of the dissenting opinion of Judge Koroma in the Land and Maritime Judgment available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=94&code=cn&p3=4>.

In the Cameroon v. Nigeria land and maritime dispute, the Court relied largely on the Anglo-German Agreement of 1913 between Germany and France. The ICJ's views in paragraph 207 of the judgment to the effects that the 1884 Treaty signed with the Kings and Chiefs of Old Calabar does not establish a protectorate and that Britain regarded itself as administering the territories comprised in the 1884 Treaty, and not just protecting them is in conflict with the view of Hewett.<sup>77</sup> For instance, in response to the request of 1 July 1884 by King Jaja of Opobo for a clarification of the word "protection" in Article 1 of the draft Treaty, Hewett's clarification of the import, object, and purpose of the Treaty is as incisive as it is helpful:

*"I write as you request, with reference to the word 'protectorate' as used in the proposed treaty that the Queen does not want to take your country or markets, but at the same time is anxious that no other nation should take them. She under[takes] to extend her gracious favor and protection, which will leave your country still under your Government".*<sup>78</sup>

This direct clarification by Hewett lends credence to the fact that Britain did not intend to annex the area or assume total sovereignty over it. Article 31(1) of the Vienna Convention on the Law of Treaties provides that "*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*". The words of the treaty are abundantly clear and should have been given their literal and ordinary grammatical meaning. With the greatest respect, it is the ICJ who clearly went on a frolic of its own to invest the 1884 Treaty of

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<sup>77</sup> Hewett was a British Consul and negotiator of the Treaties of Protection.

<sup>78</sup> See the Counter-Memorial of the Federal Republic of Nigeria dated 21 May 1999, Vol. 1, chapters 1-11 at p. 107-8, submitted to the ICJ in response to the Memorial of the Federal Republic of Cameroon, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=94&code=cn&p3=1>.



Protection with the status of cession, alienation, and dispossession. The request by King Jaja of Opobo was meant to eliminate any possibility of acting at cross purposes by the parties.

Judge Koroma, in his dissenting opinion, sees the ICJ's view and interpretation of the 1884 Treaty as "tantamount to a recognition of political reality rather than to an application of the treaty and the relevant legal principles...the approaches taken by the Court to reach its conclusions...are fundamentally flawed. The conclusion is with respect unsustainable. The findings are in clear violation of the express provisions of the 1884 Treaty and contrary to the intention of one of the parties to the 1884 Treaty - that of the Kings and Chiefs of Old Calabar. This finding, in violation of the applicable treaty and clearly in breach of the principle of *pacta sunt servanda*, is not only illegal but unjust".<sup>79</sup> It more or less seems that the ICJ in this case was, in a roundabout way, repeating and giving more life to the theory by some European scholars to the effect that organized nations of peoples of non-European lands had no sovereign rights over their territories and thus no sovereign title by means of effective occupation. The proponents of this theory see the inhabitants of non-European territories as being merely in *de facto* occupation and not *de jure* occupation hence could be acquired by any State in accordance with the requirements of international law. For instance, scholars like Westlake posits that government is the international test of civilization and that those communities who are unable to furnish a government that meet the European standard could not hold effective title to territory.<sup>80</sup> This theory, beyond the fact that it epitomizes the contempt and disdain with which Europeans viewed the Third World peoples, flies in the face of the sophisticated socio-political structure, organization, and civilization of Africans that pre-even the 6<sup>th</sup> and 7<sup>th</sup> centuries. It is a theory that does not hold water but only reveals the

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<sup>79</sup> See paras. 3 and 7 of the dissenting opinion of Judge Koroma in the Land and Maritime Judgment available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=94&code=cn&p3=4>.

<sup>80</sup> See Westlake, *supra* note 64 at 141-3.

relations of domination, subjugation, and inequality that characterized the nineteenth century European contact with the Third World. It goes to show how traditional histories of international law present colonialism and non-European peoples as peripheral concerns.<sup>81</sup>

The ICJ decision in this case goes to strengthen the conspiracy and unfairness of international law against the Third World peoples. It accentuates the fact that colonialism was central to the formation of the discipline of international law.<sup>82</sup> It depicts how an institution of international law like the ICJ could be susceptible to Eurocentric prescriptions and manipulations.

Nigeria's argument that it has had long, historical, and effective occupation of the Bakassi Peninsula which the Court dismissed as being adverse to Cameroon's treaty title appears to conflict with the principle of international law on the acquisition of sovereignty over a territory. International law requires any entity which claims sovereignty over a territory to establish that it has used and occupied the territory in question. This is the decisive test for establishing sovereignty over territory.<sup>83</sup> By placing much weight on Declarations, maps, charts, and reports, the ICJ engaged in "geographic Hegelianism".<sup>84</sup> Bakassi has been a Local Government in Nigeria and has appeared as such in the 1999 Constitution of the Federal Republic of Nigeria (as amended).

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<sup>81</sup> See Anghie, *supra* note 4 for a comprehensive account of the different phases of the colonial encounter as well as the relationship between imperialism and international law.

<sup>82</sup> See James Thuo Gathii "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography" (2011) 3(1) *Trade, L. & Dev.* 26, p. 38.

<sup>83</sup> See James Thuo Gathii "Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)" IN Antony Anghie, et al, eds. *The Third World and International Order: Law, Politics and Globalization* (Leiden, The Netherlands: Brill Academic Publishers, 2003) at 75.

<sup>84</sup> I have borrowed this expression from James Thuo Gathii to mean "ICJ's act of placing probative value on physical, geographic, and scientific evidence at the expense of Nigeria's evidence of long use and effective occupation of the Bakassi Peninsula by Nigerians. See Gathii, "Geographical Hegelianism", *supra* note 38 at 76.

Europe's economic and political adventure in Africa has proved to be catastrophic to the continent. It has continued to pose threats of various dimensions to the peaceful co-existence of Africa. It is surprising that the ICJ did not see beyond the issue of vesting the title of the Peninsula to Cameroon. In a well-considered judgment, the socio-economic and political future of the inhabitants of the territory should have enjoyed priority over (or at least rank *pari passu*) with the issue of title. Till date, the Court's decision succeeded in displacing and conferring alien and refugee status to thousands of Nigerians living in the Bakassi Peninsula. The Court's decision will stand in history as one that compromised the human and socio-political rights of the inhabitants of Bakassi Peninsula. The socio-economic and political dislocation that the Court's decision inflicted on the Bakassi population is counter-productive and antithetical to Africa's quest for peace, unity, and development. Numerous Nigerians who occupied the Bakassi Peninsula before the Court's decision have been compelled as a consequence of the decision to become foreigners and refugees on their ancestral and historical land contrary to their desires. As at October 2014, it is estimated that 3,200 Bakassi people displaced as a result of the ICJ's judgment are still in refugee camp.<sup>85</sup> This number includes men, women, and children who now live in squalor and unhealthy conditions and whose hope of getting basic education appears dim. The ICJ decision showed no regard whatsoever to the people who have occupied their cherished ancestral lands and have shared common values, cultures, identity, religion, languages, and systems of education for centuries. The Court's decision has foisted a state of confusion and uncertainties on the Bakassi inhabitants in the light of the displacement and relocation that it has necessitated.

The ICJ decision in the Cameroon v. Nigeria boundary dispute stands in history as one that exposed the Bakassi inhabitants to the whims and caprice of the Cameroonians

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<sup>85</sup> See the News Agency of Nigeria's report of 14 October 2014 available at <http://www.nannewsnigeria.com/3200-bakassi-people-still-refugee-camp-sen-ita-giwa>.

gendarmes who allegedly invades the civilian population - looting their properties and raping their women. For instance, it was reported that in March 2013, there was an attack on Efut Obot Ikot which is one of the villages in the Bakassi Peninsula. According to reports, the attack which was alleged to be as a result of fishing rights and payment of tax left 5 people dead, 17 others missing, and 1,900 displaced.<sup>86</sup> This is apparently in gross violation of part of the Court's unanimous decision which "takes note of the commitment undertaken by the Republic of Cameroon at the hearings that faithful to its traditional policy of 'hospitality and tolerance', it will 'continue' to afford protection to Nigerians living in the [Bakassi] Peninsula and in the Lake Chad area".<sup>87</sup> If these allegations of hostilities and unlawful acts are established against Cameroon, the Court's decision does not provide for any penal measure or reparation. Since the decision was given by the Court, it has continued to further fratricidal rivalry between the parties in the Peninsula.

The present reality on ground is that the ICJ decision in *Cameroon v. Nigeria* land and maritime dispute has proved to have fallen short of stemming the tide of carnage and bloodletting that has become a recurrent feature in post-colonial Africa. How could the sovereignty of a people be successfully transferred by treaties, conventions, and Court decisions without giving regard to the interest and fate of the human population? The ICJ decision has once again echoed the charge against international law of its undemocratic nature. Flowing from the fact that the Peninsula has hitherto been occupied by Nigerian nationals and Cameroon's declaration that there are over three million Nigerians in Cameroon, the decision prides itself as one that has no regard to the interest and welfare of the Bakassi people as well as one that promotes continual conflict and unrest in the Bakassi

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<sup>86</sup> See the Nigeria's Vanguard Newspaper report of 7 April 2013 titled: "*Deaths in Bakassi: Nigerians in Ceded Territory accuse Cameroon of Breaching Pact*" available at <http://www.vanguardngr.com/2013/04/deaths-in-bakassi-nigerians-in-ceded-territory-accuse-cameroun-of-breaching-pact/>.

<sup>87</sup> *Land and Maritime Boundary (Judgment)*, supra, note 13 at para. 325 (V)(C).

Peninsula. In reality, the Court's decision regrettably undermines Article 2, paragraph 3 of the UN Charter which provides that *"all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"*. As Judge ad hoc Ajibola stated it in his dissenting opinion: *"A clear picture of the situation in Lake Chad is that the inhabitants have been living at large regardless of where the boundary lies, and some of them have been there for many years. It is precisely a situation like this that calls for justice in favor of these inhabitants, most of whom owe allegiance to Ngala local government in Nigeria and their Nigerian Bulamas (Chiefs)"*.<sup>88</sup> The decision is far from deepening our understanding of the principles of public international law. By virtue of the ICJ decision, the control and management of land, including the sea are vested in Cameroon thereby depriving the Bakassi people of their source of livelihood – fishing and disconnecting them from their historical ways of life.

The ICJ's decision in Cameroon v. Nigeria is a reflection of the role that international law and its institutions played in the colonization of Africa and are seemingly playing in its neo-colonization. In handing down its decision in this case, the Court which is an organ of the United Nations and an institution of international law has demonstrated its predatory character of advancing colonial legacies and projects. By virtue of the Court's decision, the ICJ as an institution of international law has spoken in a clear way that it has all that it takes to be used as an instrument of dehumanizing the Third World. International law has once again allowed itself to be used to "legitimize colonial exploitation". The ICJ's decision here is an indication that the "ghost of Berlin Conference"<sup>89</sup> is still haunting the Third World. In the case of ceding a territory by one State to another, the concerned States 'are duty-bound to

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<sup>88</sup> Para. 49 of the dissenting opinion of Judge Ajibola.

<sup>89</sup> See Nsongurua J. Udombana "The Ghost of Berlin Still Haunts Africa! The ICJ Judgment on the Land and Maritime Boundary Dispute Between Cameroon and Nigeria" (2002) 10 Afr. Y.B. Int'l L. 13.

ascertain the wishes of the population concerned, by means of a referendum or plebiscite, or by any other appropriate means that ensure a free and genuine expression of will'.<sup>90</sup>

In the light of the status of *jus cogens* in international law, any inter-State agreement (for instance, the Green Tree Agreement 'GTA')<sup>91</sup> that is contrary to the will of the population concerned would fall foul of the principle of self-determination. If the population inhabiting a territory that is to be transferred is not consulted before the exercise, then 'the treaty providing for the transfer of territory would be contrary to *jus cogens* and therefore could be declared null and void (if, of course, one of the contracting parties raises the issue before the International Court of Justice, under Article 66(a) of the Vienna Convention on the Law of Treaties)'.<sup>92</sup>

In the estimation of the international community, the Cameroon v. Nigeria border dispute has been legally resolved but the decision is laced with practical difficulties. Considering the fact that the decision to cede Bakassi did not give regard to the freewill of the people who are indigenous to Nigeria, contemporary events in the world suggests that the dispute over Bakassi Peninsula might not have been conclusively determined on the basis of the Anglo-German Treaty and the ICJ decision. In view of the tensed atmosphere that the ICJ

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<sup>90</sup> See Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (UK: Cambridge University Press, 1995) at 190.

<sup>91</sup> Sequel to the ruling of the International Court of Justice ("ICJ") that ceded the Bakassi Peninsula from Nigeria to Cameroon, and in a bid to set the modalities as well as the timeline for the implementation of the ruling, Cameroon and Nigeria signed the Green Tree Agreement on June 12, 2006, at Greentree, New York, under the watchful eyes of the then Secretary-General of the United Nations, Kofi Annan. Other witnesses to the GTA were Germany, France, Britain, and USA. The GTA provides particularly in its Article 3(2) that "*Cameroon shall not force Nigerian nationals living in the Bakassi Peninsula to leave the zone or change their nationality; respect their culture, language and beliefs; respect their right to continue their agricultural and fishing activities; protect their property and customary land rights; not levy in any discriminatory manner any taxes and other dues on Nigerian nationals living in the zone; take every necessary measure to protect Nigerian nationals living in the zone from any harassment or harm*".

<sup>92</sup> See Cassese, *supra* note 90 at 193.

decision has been generating in the Peninsula, “international law might be on trial”. For instance, Scotland decided, though unsuccessfully, to revisit the Union treaty with England after 300 years. Again, the events in Crimea vis-à-vis the Russian population in Crimea have exposed the challenges in not affording the people the opportunity to exercise their right to self-determination. In the 1990s, Iraq led by Saddam Hussein attempted to reclaim Kuwait. These events go to buttress that it is difficult to alienate a people from their heritage, root, and ancestry. The restiveness in the Bakassi Peninsula sends a message to the international community that it is against public policy to arbitrarily uproot a people from their ancestral lands and expropriate their properties with impunity. It may not be surprising if the leaders of another generation in Nigeria decide to re-visit the issue and this, with its security and humanitarian consequences, could pose a challenge for the Third World and the UN. This is because the ICJ decision in this case has the tendency to create “bad blood and eternal acrimony” between the two States.

### **3.7 The Bakassi Peoples’ Clamor for the Right to Self-Determination**

*“Had the new African States decided upon independence to embark upon a general rearrangement of territorial borders, as at one time seemed not improbable, the question of the nature of the colonial acquisitions would be of little actual value. However, the colonially defined frontiers were reaffirmed and upheld. Therefore, the process of colonial delimitation and title remains relevant, particularly with respect to the large number of boundary disputes existing in modern Africa. The parties to such conflicts invariably base their*

*claims upon European treaties and the validity and extent of such treaties can have important repercussions today”.*<sup>93</sup>

In obedience to the ICJ decision, Nigeria as a State has renounced its sovereignty over Bakassi Peninsula. However, the Nigerian inhabitants in the Peninsula have rejected the decision as they strongly consider the Peninsula their ancestral land, hence opposed to the plan of being relocated to Cameroon. Government must be based on the consent of the governed lest its legitimacy will be brought to question. “People should be ruled by their own consent, should play commensurate roles in government, should have a government of their choice and should determine their political, economic and social future”.<sup>94</sup> People should be free to choose their sovereign and no longer to be battered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game.<sup>95</sup> Coincidentally but regrettably, the import of the ICJ decision has found the people of Bakassi in a situation where they are battered from Nigeria to Cameroon with no regard to their socio-political, economic, and legal rights and interests.

The alleged incessant harassment of the inhabitants of Bakassi by Cameroonian authorities presumably in the course of the latter’s exercise of sovereignty over the territory, and the socio-economic dispossession and displacement of the people have largely prompted the people of Bakassi’s agitation for self-determination. Consequently, on 9 July 2006, in what appears to be an exercise of the right to self-determination, and sensing that their future looks bleak, some groups of Bakassi and Niger-Delta indigenes organized themselves under

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<sup>93</sup> Malcolm Shaw, *supra* note 7 at 30.

<sup>94</sup> U.O. Umozurike, *Introduction to International Law* (Ibadan, Nigeria: Spectrum Law Publishing, 1993) at 55.

<sup>95</sup> Woodrow Wilson’s speech of 11 February 1918 in W. Wilson, *War and Peace, Presidential Messages, Addresses and Public Papers (1917-1924)*, ed. R.S. Baker and W.E. Dodd, vol. 1, New York and London 1927, p. 182 cited in Cassese, *supra* note 90 at 19-20.



the umbrella bodies of the Southern Cameroons Peoples Organization (SCAPO), Bakassi Movement for Self-Determination (BAMOSD), and the Movement for the Emancipation of Niger Delta (MEND) and declared a “Democratic Republic of Bakassi”. But again, the right to self-determination does not inure to a people automatically. Being what it is – an expression of the popular will, machineries need to be put in place such as an organized plebiscite where the concerned people will freely express their desires towards this end as one of the prerequisites to the realization of self-determination. This is because since the principle of self-determination was formulated in the second half of the eighteenth century, it has been partly understood as a criterion to be used in the event of territorial changes of sovereign States that interested populations should through plebiscites have the right to choose which State to belong to.<sup>96</sup>

The right to self-determination of a people is one principle of international law that has been enmeshed in so much controversy, ambiguity, and politics owing largely to its character and tendency of altering the existing boundaries of a sovereign State and its vagueness in international documents. For instance, there are various judicial and scholarly formulations of ‘a people’. One of the purposes of the UN is “*to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take the appropriate measures to strengthen universal peace*”.<sup>97</sup> Article 1 of the International Covenant on Civil and Political Rights provides that: “*All peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development*”.<sup>98</sup> The African Charter on Human and Peoples Rights provides that: “*All peoples have the right to existence. They*

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<sup>96</sup> See Cassese, *supra* note 90 at 32.

<sup>97</sup> See Art. 1 Para. 2 of the Charter of the United Nations.

<sup>98</sup> See International Covenant on Civil and Political Rights, GA Res 2200A (XXI), UNGAOR, 1966.

*shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen*".<sup>99</sup> Flowing from the above provisions, the components of the right to self-determination is that the concerned people should freely pursue their economic, social, and cultural development and enjoy fundamental human rights. These provisions are broad as it does not restrict the right to self-determination to only colonized or oppressed peoples but encompasses all peoples. However, they fall short of defining who qualifies as "all peoples". In what appears to be close to the meaning of a people, the Permanent Court of International Justice (the predecessor to the ICJ) gave a feature of a people seeking self-determination as "*a group of persons living in a given a country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other*".<sup>100</sup>

The Supreme Court of Canada also gave a clue to the meaning of 'a people' when it held that:

*"It is clear that a people may include only a portion of the population of an existing States. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "State". The juxtaposition of these terms is indicative that the*

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<sup>99</sup> See Art. 20 para. 1 of African (Banjul) Charter on Human and Peoples Rights, 1986.

<sup>100</sup> See Case of the Interpretation of the Convention Between Greece v Bulgaria (1930), Advisory Opinion, PCIJ (Ser F) No 17 at 3.

*reference to “people” does not necessarily mean the entirety of a State’s population”.*<sup>101</sup>

As Okafor noted, the essential criterion for delimiting a people is their feeling of belonging, a common consciousness and a desire to maintain one distinct identity.<sup>102</sup> Umozurike notes that *“self-determination applies to all peoples, whether in metropolitan or colonial territories and whether they are minorities or majorities. It applies to all people with an identifiable interest that may be geographical, cultural, professional or other; the larger the number of people involved, the easier it is to identify their right”.*<sup>103</sup> Therefore, it is submitted that the people of Bakassi who occupy common geographical location and share common history, origin, culture, linguistics, race, religion, interests, and destiny satisfies the requirements that should attract the right to self-determination in international law. Additionally, the agitation of the Bakassi people to the right to self-determination does not appear to do violence to the sovereignty of Cameroon nor Nigeria, neither does it significantly impair the frontiers of any of the two States. The territorial dispute between Cameroon and Nigeria highlights the grave consequences of the acts of Europeans whose acts of dividing Africa was devoid of the appreciation of the heterogeneity, values, and dynamics of the continent. In the context of boundaries, lines and maps are things of obscurity to African territories. Boundaries were identified by features like trees, rivers, mountains, etc. Even Malcolm Shaw agreed that “In the process of the European colonization of Africa, ethnic considerations were, in general, ignored and the colonies and protectorates included within their borders, with few exceptions, large numbers of different, often antagonistic

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<sup>101</sup> See Reference Re Secession of Quebec [1998] 2 S.C.R., para. 124.

<sup>102</sup> See Obiora C. Okwu-Okafor “Self-Determination and the Struggle for Ethno-Cultural Autonomy in Nigeria: The Zangon-Kataf and Ogoni Problems” (1994) ASICL Proc. 6 at 94.

<sup>103</sup> See Umozurike, supra note 94 at 56.

tribes, while dividing others between different jurisdictions”.<sup>104</sup> However, Shaw quickly made a volte face by saying that: “this should not be taken to mean that no account was taken of local conditions in the delimitation of colonial frontiers in Africa. While some 30 per cent of the total length of African borders follows geometrical lines and thus would appear to have been established irrespective of local conditions, the majority of the borders were delimited, partly at least, in the light of some indigenous factors”.<sup>105</sup> This appears to be in defense of the Europeans’ destabilization of Africa and a cover up, or at best an afterthought. The manner of demarcation of African boundaries by the Europeans was a calculated attempt to foster peace amongst the warring factional States of nineteenth century Europe and destabilize Africa.

This chapter has attempted to demonstrate how the Europeans brazenly balkanized and mutilated African borders and the attendant socio-economic and political challenges such act has continued to pose on the peaceful co-existence of the continent. It has also dissected the ICJ judgment in the Cameroon v. Nigeria border dispute, its reasoning, and post-effects on the peaceful co-existence of the peoples of Bakassi Peninsula. The next chapter will be examining the lingering struggle for the realization of the right to self-determination, ‘suspended decolonization’, and the colonial legacy of instability in the North African territory of Western Sahara.

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<sup>104</sup> See Shaw, *supra* note 7 at 50.

<sup>105</sup> Shaw, *supra* note 7 at 50.

## CHAPTER FOUR

### SELF-DETERMINATION, ‘SUSPENDED’ DECOLONIZATION, AND THE COLONIAL LEGACY OF INSTABILITY IN WESTERN SAHARA

#### 4.0 Introduction

*“We rebelled against the English; we rebelled against the French...  
We rebelled against those who colonized our land and tried to enslave  
us...  
We repeated the red revolutions many times and we continued with our  
white revolutions over a number of years...  
And for this we endured so much suffering, sustained so many losses,  
and sacrificed so many lives...  
[But]  
When we finally gained our liberty, we began to sanctify the borders  
they had instituted after they had divided our land...And we forgot that  
these borders were but the boundaries of the ‘solitary confinement’ and  
the ‘house arrest’ which they had imposed upon us!”<sup>106</sup>*

The right to self-determination of a people is one principle in international law that is continually characterized by a clash between two other powerful sets of principles in the domain of international law— sovereignty and territorial integrity of existing States. The tension between these competing forces has generated and will continue to generate strife and

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<sup>106</sup> Abu Khaldun Sati’ al-Husri, al-‘Uruba Awalan [Arabism first] (1995), quoted in Michelle L. Burgis, *Boundaries of Discourse in the International Court of Justice: Mapping Arguments in Arab Territorial Disputes* (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2009) at 1.

periodic doctrinal eruptions. Its ideological origins render it a multifaceted but also an extremely ambiguous concept. It has been instrumental in the principal tremors, even quakes, of contemporary international relations.<sup>107</sup> “It is the right of all peoples to freely determine their political status and to freely pursue their economic, social and cultural development”.<sup>108</sup> “It is a phrase loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost thousands of lives...”<sup>109</sup>

From the Northwestern geographical front of Africa, the territory of Western Sahara was one of the destinations of European commercial and political explorations and exploitations of Africa clothed in the garb of colonialism. The economic crisis in Spain largely spurred it into taking up Colonies in Africa. “The first phase of [European contact with the Third World peoples] took place through trading companies which confined their activities principally to trade; as they gradually adopted a more intrusive role in the governance of the non-European State in order to further their trading interests, more demands were made on non-European States, which were compelled under threat of military action to make increasing concessions to the interests of the traders”.<sup>110</sup> In Portugal and Spain, perhaps more than in any other European State, colonies were seen as a condition for economic survival. Spain used the Moroccan and Saharan territories to advance its economic interests by floating shipping, railway, mining, and fishing firms through the now insolvent

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<sup>107</sup> See Cassese, *supra* note 90 at 1.

<sup>108</sup> Andrew K. Coleman, *Resolving Claims to Self-Determination: Is there a Role for the International Court of Justice?* (Oxon, London: Routledge Publishers, 2013) at 1.

<sup>109</sup> Robert Lansing, Woodrow Wilson’s Secretary cited in Andrew K. Coleman, *Resolving Claims to Self-Determination: Is there a Role for the International Court of Justice?* (Oxon, London: Routledge Publishers, 2013) at 3.

<sup>110</sup> See Anghie, *supra* note 4 at 84-85.

Spanish company – *Compania Transatlantica*.<sup>111</sup> These were after the Arab invasion of Western Sahara and the disruption of the way of life of its people with the introduction of Islam and Arabic. After the Berlin Conference of 1884-85, the North African territory of Western Sahara, formerly known as Spanish Sahara, was one of the few ‘juicy scraps’ that fell for Spain as a colony from 1884 to February 1976. By the summer of 1886, Spanish geographers and scientist had traversed the length and breadth of the territory of Western Sahara making topographical and geographical findings regarding the richness of the territory. Owing to their nomadic lifestyle and difference from the settled and regulated life that the colonialists were imposing on the people, the colonial encroachment and intrusion of Western Sahara by Spain after the Berlin Conference was not without fierce resistance by the indigenous Saharawi people. However, with French military assistance, Spain was able to prevail and gain full control over the territory. Thus, Spain took Western Sahara as its colony in 1884. But in 1974, Spain bowed to pressure by the General Assembly of the United Nations for a referendum aimed at decolonizing the people, hence withdrew as a colonial Power from the Sahara.<sup>112</sup> On account of the vacillating stance of Morocco and Mauritania, the proposed referendum which was aimed at realizing the right to self-determination of the people of Western Sahara was technically aborted or suspended. Sensing that the persistence of a colonial situation in Western Sahara jeopardizes the fragile stability and harmony in this part of Africa, the UN General Assembly by virtue of Resolution 3292 of 13 December

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<sup>111</sup> See Forster, Mommsen, Robinson, eds., *Bismarck, Europe, and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition*, (United Kingdom: Oxford University Press, 1988) at 226.

<sup>112</sup> On 16 December 1965, the General Assembly of the United Nations adopted its first resolution over the then Spanish Sahara requesting that Spain should take all necessary measures to decolonize the territory, while entering into negotiations on problems relating to sovereignty. Between 1966 and 1973, the General Assembly adopted seven more resolutions over the territory stating the need to hold a referendum on self-determination.

1974,<sup>113</sup> sought the opinion of the ICJ regarding the status of Western Sahara at the time of Spain's colonization of the territory in 1884.

About forty years ago, the ICJ, in the Western Sahara Advisory Opinion,<sup>114</sup> affirmed the right to self-determination of the people of Western Sahara, but the realization of this right has hitherto remained a mirage. Morocco, supported by USA, France, and Spain (as well as the Arab League) continues to be in *de facto* occupation of two thirds of Western Saharan territory including all the major cities and natural resources. On the other side of the conflict is the Polisario Front, a liberation movement having its base in Algeria and whose main aim is the independence of Western Sahara proclaimed the Sahrawi Arab Democratic Republic ("SADR") in 1976 and enjoys the support of Algeria and Russia. The SADR controls about 20-25% of Western Saharan territory. Whereas SADR has been a member of the African Union ("AU") since 1984 and currently maintains diplomatic relations with about 40 States in the world – mainly in Africa and Latin America, Morocco ceased to be a member of AU in 1984 after staging a walk out in protest of the admission of SADR into the Union. The decision of AU to admit SADR into its fold is hinged on the Union's "absolute dedication to the total emancipation of the African territories which are still dependent"<sup>115</sup>, "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence"<sup>116</sup>, "to eradicate all forms of colonialism from Africa"<sup>117</sup>; its conviction that "it is the inalienable rights of all people to control their own destiny"<sup>118</sup>; and

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<sup>113</sup> GA Res 3292 (XXIX) of 13 December 1974.

<sup>114</sup> See Western Sahara Case, *supra* note 13.

<sup>115</sup> Article III para. 6 of OAU (now AU) Charter.

<sup>116</sup> Article III para. 3 of the OAU (now AU) Charter.

<sup>117</sup> Article III para. 1(d) of the OAU (now AU) Charter.

<sup>118</sup> Preamble of the OAU Charter.



that colonially inherited borders are sacrosanct. In 2007, the Kingdom of Morocco proposed a self-governing status under Moroccan sovereignty with some degree of autonomy for the people of Western Sahara. The proposal was laid before the UN Security Council but was met with opposition from the Polisario Front.

The conflict in Western Sahara appears to have defied all regional and international tonics. This appears to be traceable to Spain's wrong course of action in handing over the territory to Morocco and Mauritania instead of following the course of decolonization mapped out by the UN General Assembly and affirmed by the ICJ. The Kingdom of Morocco appears to be delighted in taking undue advantage of the Sahara people apparently due to economic interests as well as to boost national pride. Regrettably, the Third World is now faced with modern but internal colonization.

This chapter examines the colonial legacy of instability systematically designed and orchestrated by Spain and France in the territory of Western Sahara and North Africa at large. In the light of the colonial encounter with Western Sahara, this chapter uses the Advisory Opinion of the ICJ in the Western Sahara territorial dispute to interrogate the bizarre and reprehensible status quo existing in the area. To what extent, if any, has the ICJ Advisory Opinion in the Western Sahara dispute given significance to the right to self-determination of the concerned people? Since the right to self-determination entails the right of a people to participate in their own government, to what extent is this self-imposed sovereignty by Morocco on the people of Western Sahara respectful of this right? This chapter explores and analyzes the roles of the various *dramatis personae*<sup>119</sup> in the whole legal, socio-political, and economic imbroglio. What are the factors that Morocco is relying on to lay claim to the Saharan territory? How can the people of Western Sahara be extricated from the fangs of

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<sup>119</sup> The United Nations, The Kingdom of Morocco, Mauritania, the African Union ("AU"), Algeria, Spain, France, USA, and Russia.

modern and internal colonialism? It attempts to address the question of whether there is a responsibility expected to be borne by the UN beyond the submission of a question for advisory opinion to the ICJ and beyond forming various special decolonization committees, regardless of the fact that the ICJ's advisory opinion lacks a binding character. Are there some interest-based politics going on at the Security Council over the Western Sahara impasse? Could this be another instance of a failure of international law?

### **4.1 Historical Background**

The disputed territory of Western Sahara is located in North Africa in the coast of the Atlantic Ocean. It is bordered by Morocco in the north, Algeria in the east, and Mauritania in the east and South. Western Sahara forms part of the Sahara desert. Consistent with their characteristic 'slicing' of African territories, the European colonialists, in this case, Spain and France, divided the borders of Western Sahara by ratifying various treaties and agreements with the local Chiefs in 1900, 1904, and 1912 respectively.

Western Sahara is rich in high quality phosphate and it is widely believed that the territory is naturally blessed with iron ore, uranium, titanium, and potential oil and gas deposits. It is estimated to have a population of over 554,795 with the two dominant ethnic groups being the Arabs and Berbers.<sup>120</sup>

### **4.2 Pre-Colonial Morocco and the Origin of Instability**

The formal history of the Kingdom of Morocco as a socially, religiously, and politically organized State dates back to as early as 6<sup>th</sup> century BC just before the Arab colonization of North Africa. Although Moroccan statehood might not have conformed to the European

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<sup>120</sup> See <https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html>.

notion or norm of a State, Morocco was largely occupied by the Berbers.<sup>121</sup> The Moroccan State/Empire was ruled by various dynasties; but Morocco was conquered by the Arabs in the early 8<sup>th</sup> century AD and ruled by various sultanates. “The origin of the conflict in Western Sahara dates back to the colonial legacy and to disagreements over the Saharan borders drawn when Morocco and Algeria gained independence in 1956 and 1962. When the French and Spanish governments divvied up the Sahara, they established zones of influence that later became State borders”.<sup>122</sup> Owing to the strategic location of Morocco in North Africa, France showed significant economic interest in it as early as 1830. Pursuant to the Treaty of Fez<sup>123</sup>, Morocco became a French protectorate in 1912. By virtue of the French protectorate over Morocco, France in a bid to consolidate on the European scramble for African territories, took undue advantage of such power to surreptitiously partition the territory of the Sultanate and ceded the far north on the Mediterranean and the south bordering the Spanish Sahara to Spain. Thus, in the usual European predatory character over the Third World territories and by virtue of the Franco-Spanish Treaty of 1900 and 1904, France and Spain created a Spanish protectorate in Morocco on 27 November 1912. Spanish economic interest in the Sahara can be traced to the pre-1700s when it planned to use it as a port for slave trade and commercial fishing.

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<sup>121</sup> The Berbers are a Caucasian heterogeneous ethnic group of people that are indigenous to North Africa who spoke Berber language until the European colonialists invaded North Africa and imposed French and Spanish on their colonies. The Berbers are found in the present day Morocco, Algeria, Tunisia, Mauritania, Libya, among others.

<sup>122</sup> See Khadija Mohsen-Finan “Western Sahara: A Conflict on the Fringes of New Regional Dynamics” in Anouar Boukhars and Jacques Roussellier, eds, *Perspectives on Western Sahara: Myths, Nationalism, and Geopolitics* (Maryland, USA: Rowman & Littlefield, 2014) at 277.

<sup>123</sup> Until 1925, Fez was the capital of Morocco. It is currently the second largest city in Morocco with a population of over one million people.

### **4.3 The United Nations, the Project of Decolonization, and the Politics of Economic Interests**

Since the succession of the defunct League of Nations by the United Nations in 1945, more than 80 former colonies comprising about 750 million people have attained independent status. However, there remains about 16 Non-Self-Governing Territories (“NSGT”), consisting of almost 2 million people across the Third World States that are yearning to be decolonized. Of this number, Western Sahara which was designated by the UN as a NSGT in 1963 is the most populous territory on the list of United Nations’ NGST and the largest in area. NSGTs are “...territories whose peoples have not yet attained a full measure of self-government...”<sup>124</sup> Almost all of this number desires to exercise their right to determine their political, social, and economic status and future but are being frustrated by either the administering powers or other internal or external forces. Consequently, there are lots of essential jobs left undone by the UN by ways of dialogue, diplomatic pressure, and sanctions, if need be. In 1990, the General Assembly proclaimed the first International Decade for the Eradication of Colonialism. In 14 December 2010, it marked the fiftieth anniversary of the Declaration on the Granting of Independence to Colonial countries and peoples. Various UN Special Committees on Decolonization exist with the mandate to continue to negotiate for the freedom of the Dependent Territories and peoples. But these, in and of themselves, are not enough if we are to see the speedy realization of the right of the concerned peoples to self-determination. Numerous resolutions have been passed by the UN General Assembly concerning the decolonization of the Western Sahara but these will prove to be mere rhetoric and paper works unless they are backed by stronger practical commitment to this significant process. “The international community’s indecisiveness and unwillingness to exert pressure

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<sup>124</sup> See Article 73 of the Charter of the United Nations.

on Morocco and the SADR otherwise perpetuates the present *status quo*".<sup>125</sup> The Security Council has failed to wield the big stick against Morocco under Article 41 of the UN Charter apparently owing to the fact that USA and France – two influential members of the body appears to beneficiaries of the conflict in the area of trade relations with Morocco.<sup>126</sup> The West – USA, France, Spain, and Russia, through the supply of arms continues to profit from the armed conflict between Morocco and the Polisario movement over Western Sahara. Morocco's illegal occupation of the Western Sahara appears though regrettably to be enjoying the full support of USA owing to the latter's economic interest in the Mediterranean at the expense of the right to self-determination of the large population in the Sahara. Morocco is a long-time Third World ally of the USA. Morocco is a leading trade partner of France. France is also the second biggest creditor of Morocco after the World Bank. The right to self-determination as a *jus cogens* rule presupposes that a people based on respect for the principle of equal rights and fair equality of opportunity have the right to freely choose their sovereignty and political status with no external compulsion or interference. The imposition of Moroccan illegal sovereignty on the people of Western Sahara not only negates the Charter, ideals, and resolutions of the UN and the freely expressed will of the human population in the territory but it also undermines Woodrow Wilson's famous speech on self-determination that:

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<sup>125</sup> See Osama Abi-Mershed and Adam Farrar "A History of the Conflict in Western Sahara" in Anouar Boukhars and Jacques Roussellier, eds, *Perspectives on Western Sahara: Myths, Nationalism, and Geopolitics* (Maryland, USA: Rowman & Littlefield, 2014) at 23.

<sup>126</sup> Three members of the Security Council – USA, France, and Russia are beneficiaries of the armed conflict in the Western Sahara. Whereas USA and France supply Morocco with arms and ammunitions with which the latter uses to prosecute its war in the Sahara territory, Russia supplies same to SADR.

*“National aspirations must be respected; people may now be dominated and governed only by their own consent. Self-determination is not a mere phrase; it is an imperative principle of action....”*<sup>127</sup>

In the interest of global peace, it is high time that the United States and France desisted from fanning the embers of violence and conflict in the Third World region for their commercial and economic gains. Again, the sitting over of and allocation of the natural resources that are located in the soil of Western Sahara by Morocco which are not in the interest of the people of Western Sahara violates an essential component of self-determination – economic self-determination.

#### **4.4 Grounds for Morocco’s Annexation of Western Sahara**

Morocco’s annexation of Western Sahara is predicated on historic title that predates Spanish colonialism of the Sahara. Thus, Morocco considers the division of its territory into French and Spanish protectorates in 1912 and subsequent occupation and colonization of Western Sahara by Spain in 1884 as a colonial amputation and robbery against it in view of the fact that it impaired its territorial sovereignty as a prominent Kingdom. In the light of this, Morocco considers its present annexation of Western Sahara as a “successful” recovery mission. “The Moroccan occupation of Western Sahara was not spurred, as many observers have assumed, by a simple lust for its phosphates. Rather, an ideology of territorial expansion, founded on the ideal of recreating a supposed “Greater Morocco” of pre-colonial times, was deeply rooted in the Moroccan psyche”.<sup>128</sup> Morocco’s continued sovereignty over

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<sup>127</sup> Woodrow Wilson, the 28<sup>th</sup> President of the United States (1913-1921) on his famous speech on self-determination delivered to the joint session of the US Congress on 11 February 1918 after announcing his Fourteen Points on 8 January 1918. Available at [http://avalon.law.yale.edu/20th\\_century/wilson14.asp](http://avalon.law.yale.edu/20th_century/wilson14.asp).

<sup>128</sup> See Tony Hodges, *Western Sahara: The Roots of a Desert War* (Connecticut, USA: Lawrence Hill & Co. Publishers, 1983) at vii.

Western Sahara is in keeping with the declaration of King Mohammed V in 1958 that Morocco would do everything possible to recover the Sahara.

The Kingdom of Morocco has consistently maintained that Western Sahara has been part of the interior of Morocco by common ethnological, cultural, and religious ties, and that Sakiet El Hamra was artificially separated from it by Spanish colonization. The claim of sovereignty by Morocco over the Saharan territory is grounded on a number of factors and these are: permanent and peaceful presence of Morocco in the Sahara, public display of sovereignty that was uninterrupted and uncontested for centuries and which was evidenced by the general acquiescence of the international community, religious ties binding Western Sahara to Morocco (which the latter claims implies political allegiance), the appointment and its renewal thereof of Sheikhs upon the accession of each Sultan, the imposition of Koranic taxes and levies, and the dispatch of armed forces to repel invaders trying to penetrate the Saharan coasts. Morocco also relied on two visits by Sultan Hassan 1 to the southern area of the Souss in 1882 and 1886 which were aimed at maintaining and strengthening his authority in the southern part of his jurisdiction. Spain countered Morocco's position by stating that there is no documentary evidence to support the thesis that Morocco had political authority over Western Sahara.<sup>129</sup> But this argument appears to be logically flawed on the strength of the fact that documentary transactions were almost a thing of obscurity in the traditional Muslim world and the forms of political authority exercised by Third World "sovereigns" differed in almost all respects from that of classical international law.

#### **4.5 The Nature and Legal Weight of Advisory Opinions of the ICJ**

Generally, only States in international law have the *locus standi* to approach the ICJ for a determination of any legal question of a contentious nature. Nevertheless, the UN devised a

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<sup>129</sup> See Western Sahara Case, *supra* note 13 at paras. 79-81.

procedure by which public international organizations can have standing before the Court.<sup>130</sup> The advisory jurisdiction, opinion and procedure of the ICJ are peculiar and could be said to be in a class of its own. The ICJ issues advisory opinions on legal questions and this must be at the request of any of the organs of the UN or specialized agencies authorized to make such a request. The advisory jurisdiction of the ICJ is triggered by the filing of a written request for an advisory opinion addressed to the Registrar of the ICJ by the Secretary-General of the UN or the Director or Secretary-General of the organization requesting the opinion. Beyond the facts that the advisory opinions of the Court have significant legal and moral weight, contributes to the elucidation and development of international law, strengthens diplomacy and peace in international relations, the advisory opinions of the Court are not binding (except in rare instances). Consequently, it is the requesting organization that decides whether or not to give effect to such opinion and how to proceed in that regard.

#### **4.6 The People of Western Sahara and their Right to Self-Determination**

In the Advisory Opinion, the ICJ, in stressing the significance of ensuring that the outcome of the dispute over the control of Western Sahara reflects the true wish of the concerned people outlined the two essential features of self-determination in the context of decolonization as follows:

- (i) Free and voluntary choice by the peoples of the territory; and
- (ii) Informed and democratic processes impartially conducted based on universal adult suffrage

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<sup>130</sup> See Art. 96 paras. (1) & (2) of the Charter of the United Nations; Article 65 of the Statute of the ICJ. For a detailed nature, procedure and status of the Advisory Opinion of the ICJ, see also the International Court of Justice Handbook, 2013, pp. 81-94 available at <http://www.icj-cij.org/publications/index.php?p1=8>.



In this way, the Court established the free and genuine expression of peoples of the territory as the dominant narrative of self-determination and legal ties as a source of counter-narratives.<sup>131</sup> These features presupposes that the decision whether the territory of Western Sahara is to be fully independent or integrated with the Kingdom of Morocco should be devoid of any form of coercion or manipulation as currently being experienced. Simply put, due regard must be had to the freely expressed wish of the concerned people. It is believed that the exercise of freedom of expression will engender lasting peace in the territory.

#### **4.6.1 Background to the Dispute**

The Western Sahara dispute is peculiar in that it did not arise independently in bilateral relations between States but it is a legal controversy that arose from the proceedings of the UN General Assembly on the decolonization of Non-Self Governing Territories. In an effort to liberate the people of Western Sahara from the grip of colonialism and give effect to their right to self-determination, the UN, relying on Article 96 of the UN Charter and Article 65 of the Statute of the ICJ, sought the advisory opinion of the ICJ on the legal status of the territory of Western Sahara. The two specific questions referred to the Court for its opinion by the General Assembly Resolution 3292 (XXIX) were:

1. *“Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?; and if this question is answered in the negative,*
2. *What were the legal ties (if any) between Western Sahara and the Kingdom of Morocco and the Mauritanian entity?”<sup>132</sup>*

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<sup>131</sup> Karen Knop, *Diversity and Self-Determination in International Law* (UK: Cambridge University Press, 2002) at 112.

<sup>132</sup> See Western Sahara Case, *supra* note 13 at para. 75.

#### 4.6.2 Colonization of the Third World and the Concept of Terra Nullius

The concept of *terra nullius* which has its origin in Roman property law is associated with eighteenth and nineteenth centuries' European colonization of the Third World. "International law is universal... And yet, the universality of international law is a relatively recent development. It was not until the end of nineteenth century that a set of doctrines was established as applicable to all States, whether these were in Asia, Africa, or Europe.<sup>133</sup> In international law, it was a legitimate way of acquiring original title to territory in the Third World if such acquisition was done through effective occupation. For there to be an effective occupation, the concerned territory must be *terra nullius* – a territory/land belonging to no one. "If the natives belonged to what positivists regarded as an uncivilized and yet organized polity, however, European powers would have to assert title through some other means such as conquest or cession".<sup>134</sup> Terra nullius was a concept that governed European territorial claims and technically adopted by the Europeans to justify their conquest and dispossession of indigenous lands in Africa and thus advance their political and economic interests. This is partly why TWAIL sees international law as an illegitimate and predatory legal system that guarantees sovereign equality and self-determination and yet advances the legacies of imperialism and colonial conquest.<sup>135</sup> Terra nullius is traceable to the prejudice and hierarchical posture of international law against the Third World. It was basically aimed at denying international legal personality to Third World peoples and thus makes them easily prone to the predatory and exploitative tendencies of colonization. From the *TWAILian* perspective, international is being used by Europeans as a political and economic manoeuvre

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<sup>133</sup> Anghie, supra note 4 at 32.

<sup>134</sup> See Anghie, supra note 4 at 84.

<sup>135</sup> See James Thuo Gathii "TWAIL: A Brief History of its Origins, Its Decentralized Network, and A Tentative Bibliography" (2011) 3(1) Trade L. & Dev. 26, pp.29-30.

to perpetrate, assert, and justify their colonial tendencies. The concept of terra nullius brings to mind the asymmetrical relationship that existed (or still exists) between the Europeans and Third World peoples. Terra nullius as constructed by Europeans has no bearing with African realities and peculiarities. As has been demonstrated in chapter two, even before the invasion of Africa by the colonial powers, the territory was occupied, patterned, and governed along monarchical forms. But except for the colonial theory and construction of the concept of terra nullius, the first question for determination before the ICJ is logically invalid in view of the sophisticated social and political structure of African Kingdoms. The idea of terra nullius is a “mechanism of exclusion”.<sup>136</sup> In the predatory character of international law, “a territory is ownerless in international law as long as it belongs to no subject of international law...In so far as it was not under European dominion; Africa was considered a terra nullius. Subjects of international law are only those States who exercise all rights of sovereignty and perform State functions in the same way as modern European States”.<sup>137</sup>

The Court in its wisdom addressed the two questions separately. The Court considered “the time of colonization by Spain” as the period dating back to 1884 when Spain proclaimed protectorate over the territory known as Rio de Oro. The ICJ in dealing a death blow on the fallacious concept of terra nullius in the Advisory Opinion stated that Spain having found local Chiefs in Western Sahara in 1884 that were competently governing their local populations, and in recognition of such governance had negotiated and entered into agreements with those Chiefs, it could not effectively anchor its sovereignty over Western Sahara on a claim that the land was owned by no one. The Court noted that the mode of acquisition of Western Sahara by Spain which was by “cession” and not occupation affirms

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<sup>136</sup> Antony Anghie “The Evolution of International Law: Colonial and Post-Colonial Realities” in Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens, eds. *International Law and the Third World: Reshaping Justice* (New York: Routledge-Cavendish, 2008) at 37.

<sup>137</sup> Jorg Fisch, *supra*, note 11 at 356.

the argument that Spain derived its root of title over the territory from the agreements with the local Chiefs. Again, in colonizing Western Sahara, Spain did not hold itself out as establishing sovereignty over terra nullius but relied on the agreements of protection entered into with the tribal chiefs. Therefore, based on State practice of the relevant period as well as the evidence before it, the ICJ found that Western Sahara was not a terra nullius at the time of colonization by Spain.

At the time of colonization by Spain, Western Sahara was inhabited by nomadic people who were nevertheless socially and politically organized along tribal lines under the administration of competent Chiefs. The Court reasoned that territories inhabited by tribes or peoples having a social and political organization were not regarded as terra nullius. Therefore, the lawful acquisition of territories of such nature was only through agreements concluded with local rulers and not through unilateral occupation.<sup>138</sup>

In answering the second question, the Court gave regard to the nomadic way of life of the people of Western Sahara, the peculiarity of the territory vis-à-vis their pasture, crops, intermittent rainfall as well as the political and social organization of the population.

Morocco contended that its legal ties with Western Sahara at the time of colonization by Spain were one of historical and immemorial possession. It relied on the period of the Arab conquest of North Africa in the 7<sup>th</sup> century A.D., and the geographical contiguity of Western Sahara to Morocco and argued that for a long period, Morocco was the only independent State which existed in the north-west of Africa. In an effort to convince the Court about its display of sovereignty over Western Sahara, Morocco drew the attention of the Court to its alleged acts of internal display of authority and some international acts that could constitute recognition by other States of its sovereignty over the whole or part of

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<sup>138</sup> See Western Sahara Case, *supra* note 13 at para. 80.

Western Sahara. But in the Court's view, the decisive factor in resolving the second question is the direct evidence in respect of effective display of authority over Western Sahara at the time of its colonization by Spain and in the period immediately preceding that time and not indirect inferences drawn from past historical events.

In Spain's view, there is no documentary evidence or other traces of a display of political authority by Morocco with respect to Western Sahara. Spain questioned the unity of the Saharan region with the regions of southern Morocco.

The Court reasoned that beyond the indications that a legal tie of allegiance existed at the relevant period between the Sultan and some nomadic peoples of Western Sahara, going by the evidence before it, there is no tie of territorial sovereignty between Western Sahara and the Kingdom of Morocco nor is there any indication of effective and exclusive State activity in Western Sahara.

On the legal ties which existed between Western Sahara, at the time of its colonization by Spain, and the Mauritanian entity, the Court and Mauritania were in alignment in respect of the peculiarity of Mauritania in relation to Western Sahara on the ground that Mauritania did not then constitute a State and hence the Statehood of Mauritania is not retroactive.<sup>139</sup> Therefore, the Court was not concerned with the legal ties of State sovereignty of Mauritanian entity but other legal ties which by their nature, knew no frontiers between the territories and were vital to the maintenance of life in the region. Mauritania noted that the term "Mauritanian entity" was used by the General Assembly to denote the cultural, geographical, and social entity which existed at the time in the region of Western Sahara and within which the Islamic Republic of Mauritania was later to be created.

Mauritania pointed out to the Court the special character of the Saharan region

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<sup>139</sup> The Republic of Mauritania attained independence in 28 November 1960.

namely - the tribal territories, migration routes, and the nomadic lifestyle of the people therein – factors which the colonial Powers gave no regard to in carving out the artificial boundaries of the territory.

As to the legal ties between Western Sahara and the Mauritanian entity, Mauritania argued that at the time of colonization by Spain, the Mauritanian entity extended from the Senegal River to the Wad Sakiet El Hamra.<sup>140</sup> It further submitted that the part of the territories now under Spanish administration was an integral part of the Mauritanian entity. In concluding that the legal relation between the part under Spanish administration and the Mauritanian entity was one of inclusion, Mauritania urged the Court to find that “at the time of colonization by Spain, the part of the Sahara now under Spanish administration did have legal ties with the Mauritanian entity”.<sup>141</sup>

Spain submitted that at its time of colonization of the territory, there were no legal ties between the territory of Western Sahara and the Mauritanian entity. Spain based its argument here on the fact that the concept of Mauritanian entity is not accompanied by proof of any tie of allegiance between the tribes inhabiting the territory of Western Sahara and the Mauritanian tribes. According to Spain, beyond the mere sociological facts about nomadic life, the tribes of Western Sahara led their own life independently of the other Saharan tribes.

The Court held that whereas the nomadic way of life of the people of Western Sahara at the time of its colonization gave rise to certain ties of a legal character between the tribes of the territory and those of neighboring regions, there did not exist at the time of

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<sup>140</sup> Located in the northern part of Western Sahara, it is one of the two territories that formed the Spanish province of Spanish Sahara after 1969.

<sup>141</sup> Western Sahara Case, *supra* note 13 at para. 140.

colonization by Spain, any tie of sovereignty or allegiance of tribes between the territory of Western Sahara and the Mauritanian entity.

The Court therefore came to the conclusion that on the strength of the evidence before it, there were legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara but there was no legal tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. The Court found that there is no legal tie of such a nature that could affect the decolonization of Western Sahara or the principle of self-determination through the free and genuine will of the peoples of the territory. “The claims of Morocco and Mauritania were based on the proposition that ethnic, historical, and other ties pre-dating colonization could operate to override the wishes of the people within the colonially established territorial framework...”<sup>142</sup>

Firstly, the ICJ Advisory Opinion concerning Western Sahara to the effect that “there was no legal tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco ...” should be seen in the light of the resolve of the UN to liberate the people from colonialism. As the Court noted, “the right of that population [Western Sahara] to self-determination constitutes therefore a basic assumption of the questions put to the Court”.<sup>143</sup> By pointing out this fact, the Court which is an organ of the UN was rightly placing emphasis and significance to the need to liberate the human population in Western Sahara from the grip of colonialism. The Court was more or less making a policy Opinion to accentuate the resolution of the UN to decolonize territories. This is because the ICJ acknowledged that whereas there were indeed ties of allegiance between Morocco and the

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<sup>142</sup> See Shaw, note 7 at 124.

<sup>143</sup> See Western Sahara Case, supra note 13 at para. 70.

indigenous population of Western Sahara, but they were not strong and enough justification not to give effect to the UN resolution to decolonize Western Sahara. The Court also noted that whatever questions it had been invited to determine, the applicable principles of decolonization call for examination since they are an essential part of the framework of the questions contained in the request.

What forms of authorities were exercised by the various rulers, Empires, and Kings in pre-colonial Africa? As has been demonstrated in chapter two, pre-colonial Africa had sophisticated structure of governance and conducted many international affairs in the areas of commerce and diplomacy. However, all across Africa, the exercise of authority by various Empires and Kingdoms were more of a fusion of executive, legislative, and judicial powers. The overlaps of these functions were crystal clear in the manner that the Empires and Kings discharged their authorities. There was rarely a clear-cut distinction. Even where there appeared to be one, the final determination and sanction of the decision resided with the King. Historical facts concerning the mode and level of authority exercised by the Sultan of Morocco which was an admixture of executive, legislative and religious powers lends credence to the fact that the King of Morocco was regarded as a State institution. The Sultan exercised those powers by means of a decree known as Dahir. The ICJ manifested cynicism, prejudice, and disregard concerning this form of political structure owing to the fact that it was strange to the European model of Statehood.



#### **4.7 Modern and Internal Colonialism in the Third World**

The African States that are interested parties before the ICJ in the dispute over Western Sahara have two things in common – they are former European colonies<sup>144</sup> and Islamic States. It is deeply saddening that at the twilight of Spanish colonization of Western Sahara, these former colonies that should be at the forefront of decolonization campaign in the Third World territories turned around to become colonial Powers against one of its own apparently for the purpose of boosting economic, political, and national prestige. The current Moroccan occupation of the Sahara is an unfashionable and condemnable expansion of territory and a bad omen for the peoples of Third World. The forced integration of Western Sahara into the Kingdom of Morocco does violence to the spirit of right to self-determination. Whereas this modern and internal colonialism by Morocco practically curtails the right to self-determination of the people of Western Sahara, it is also tantamount to making resolution 1514 (XV) which the former rode on to gain independence of no effect. It is even unpleasantly astonishing and ridiculous that Morocco still sits in the UN with other States to deliberate on global peace. Morocco should incur the wrath of the UN by being expelled from the world body as its acts concerning the Western Sahara shows that it has no regard for true democratic principles; lest this will continue to set a bad precedence in the international domain. The act of Morocco in holding tenaciously to the territory of Western Sahara not only frustrates the capability and possibility of the people to develop to their fullest potential which is very needful in the Third World but it also perpetrates avoidable ethnic conflicts and rivalries that takes its toll on all spheres of lives of the civilian population in the territory. The international legal norm of self-determination is an anti-colonial and liberating principle but paradoxically, Morocco has so far been ‘permitted’ to carry on in the Western Sahara

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<sup>144</sup> Morocco, Mauritania, and Algeria were all colonized by France though part of Morocco was occupied by Spain.

territory in a manner that renders the principle almost meaningless. The Court's Opinion that upheld the application of decolonization of the people of Western Sahara is clear enough:

*"...the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine will of the territory".*<sup>145</sup>

Morocco's act of marching into and taking over the Western Sahara territory shortly after the signing of the Madrid Accord on the claim that the territory was merely detached from it during colonization by Spain is not only a violation of the principle of *pacta sunt servanda* but portrays the Kingdom as a State that has no regard for diplomacy, freedom of expression, and popular will of a people. This posture of Morocco has practically grounded the quest for the realization of the right to self-determination of the people of Western Sahara and negates the right of the concerned people to freedom from outside interference.

Morocco is a signatory to the UN Charter, the International Covenant on Economic, Social and Cultural Rights ("ICESCR")<sup>146</sup> as well as the International Covenant on Civil and Political Rights ("ICCPR").<sup>147</sup> Morocco is working against the purposes of the UN as expressed in Article 1(2) of the Charter by frustrating the possibility of realizing self-

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<sup>145</sup> Western Sahara Case, *supra* note 13 at para. 162.

<sup>146</sup> The ICESCR was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, and entered into force on 3 January 1976.

<sup>147</sup> The ICCPR was adopted and opened for signature, ratification and accession by the General Assembly resolution 2200A (XXI) of 16 December 1966, and entered into force on 23 March 1976.

determination by the Saharan population and promoting armed conflict in the territory.

Article 1(2) provides that:

*“The purposes of the United Nations are: to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”*

Again, Morocco covenanted in Article 1 of ICESCR that:

*“...Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms;*

*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.*

Article 1(3) of the ICCPR provides that:

*“The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self Governing Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations”.*

The state of affairs currently existing in Western Sahara shows the degree of contempt and levity with which Morocco treats the letters and spirit of these covenants to which it is a party. It depicts the Kingdom of Morocco in the world map as a Third World State that is contributing significantly in destabilizing the continent of Africa.

Although the Court acknowledged that resolution 1541 (XV) contemplates up to three possibilities for Non-Self-Governing Territories namely: emergence as a sovereign independent State, free association with an independent State, and integration with an independent State;<sup>148</sup> it is submitted that the idea is to have the concerned population freely and genuinely choose from the available options and not to compel it to accept a particular option.

#### **4.8 The Role of Spain in the Conflict**

The UN General Assembly Resolution 1514 (XV) concerning Declaration on the granting of independence to colonial countries and peoples in paragraph 5 provides thus:

*Paragraph 5 – “Immediate steps shall be taken, in Trust and Non-Self Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom”.*

The instability that has engulfed the north-west Africa could be traced to the ‘decolonization’ procedure that Spain chose to follow when it was ‘forced out’ of Western Sahara. Why would Spain hand over Western Sahara to Morocco and Mauritania? The ‘people’ that Resolution 1514 (XV) refers to here are undoubtedly the people of Western Sahara who were under Spanish colonization and not Morocco. It is submitted that Spain’s handing over of the administrative control of Western Sahara to Morocco and Mauritania

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<sup>148</sup> See Western Sahara Case, supra note 13 at para. 57.

smacks of bad faith. It was a mischievous move that had the least interest of the population at heart and it is fraught with illegality. The illegality lies in the fact that Western Sahara is currently listed by the UN as a Non-Self Governing Territory but ridiculously enough; Morocco is never listed or recognized as the administering Power. It was this fundamental wrong course of action taken by Spain that got us all into this socio-political and legal quagmire. Since Spain's position before the ICJ was that there is no tie between Western Sahara and Morocco and Mauritania, why did Spain hand over the territory to Morocco? Does this not amount to blowing hot and cold? Was Spain's act here not a calculated attempt to perpetually keep a people under colonialism and bondage and ultimately perpetrate conflict? It more or less appears that Spain's abrupt exit as one of the colonial Powers in north-west Africa embittered it. The Madrid Accord entered into between Spain, Morocco, and Mauritania was Spain's unique and calculated attempt to perpetuate confusion, armed conflict, and under-development on the Third World peoples of Western Sahara. It represents one colonial legacy of confusion left by Europeans to perpetually haunt the people of North Africa. It is saddening that all the stakeholders in this debacle have allowed this plot to succeed for about four decades. Again, that the UN did not oppose timeously Spain's handing over of Western Sahara to Morocco and Mauritania in view of the duo's vested interest in the territory speaks volume of international law's conspiracy and unfairness against Third World peoples. The procedure that Spain took in handing over the territory to Morocco undermines the efforts of the UN and portrays the latter as practically ineffective.

The case and status of Western Sahara is one of inchoate and pseudo-decolonization. By handing over the administrative machinery to Morocco, Spain appeared to have exercised the right of self-determination on behalf of the people of Western Sahara and certainly set the people of north-west Africa on a warpath with one another. Owing to the political instability in the territory, the people of Western Sahara cannot enjoy the natural resources in their soil

indicating that the colonial project generally served to accelerate development in Europe and retard same in the Third World.

Morocco appreciates the degree of illegality of its forced annexation of Western Sahara and so has never transmitted information concerning the territory to the UN Secretary-General as provided for in Article 73(e) of the UN Charter. Thus, Morocco is continually in violation of 73(b) of the UN Charter which provides that:

Article 73      *“Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:*

*73(b) “to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement”.*

This chapter has attempted to trace the historical factors that led to the conflict in Western Sahara and the mischievous role played by Spain in the whole saga. In the next chapter, the study will look at the struggles that led to the realization of the right

to self-determination in the island of East Timor after suffering many years of brutality and losses in the hands of neighbouring Indonesia.

## CHAPTER FIVE

### EAST TIMOR: SELF-DETERMINATION, ANNEXATION BY INDONESIA AND THE “CIVILIZING MISSION” OF PORTUGAL

#### 5.0 Introduction

The realization of a full-fledged right to self-determination by the people of East Timor in 2002 was in phases. The first phase was in 1975 from their primary colonial Power – Portugal, but that freedom was a fleeting one as the liberation was truncated through a military invasion by neighboring Indonesia.

The European colonization of the Island of Timor dates back to the 16<sup>th</sup> century when the Portuguese claimed it in 1515. Whereas the Dutch colonialists settled in the western part of Timor in 1640, the Portuguese were compelled to move to East Timor. In a bid to demarcate their boundaries and make certain their “possessions” in the Island of Timor, Portugal and The Netherlands signed two Treaties at Lisbon on 20 April 1859 and 10 June 1893 and another at The Hague on 1 October 1904 wherein the two colonial powers demarcated the boundary between East and West Timor apparently for their own commercial and political gains. But the boundary treaty was finalized on 25 June 1914 when the Permanent Court of Arbitration (“PCA”) drew the definitive boundary which has since then remained the international boundary between contemporary East Timor and Indonesia.<sup>149</sup> “The direct involvement of European States in the scramble for colonies led to a number of complications. Legal niceties were hardly a concern of European States powerfully intent on imperial expansion. Given the conceptual inadequacies of the positivist framework for dealing with the colonial encounter ...and the intense competition among European States for

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<sup>149</sup> The boundary dispute between The Netherlands and Portugal over the Island of Timor was submitted to the PCA in 1913 and the case/award is available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1029](http://www.pca-cpa.org/showpage.asp?pag_id=1029).



colonies, it was hardly surprising that international law contributed very little towards the effective management of colonial scramble. The tensions arising from the scramble were such that the European powers held the Berlin Conference of 1884-5 to try and resolve matters”.<sup>150</sup>

## 5.1 Background of East Timor

East Timor officially known as Democratic Republic of Timor-Leste is a State in South-eastern Asia with a population of about 1,114,000 peoples.<sup>151</sup> It is one of the Third World States whose history is largely shaped by European and Asian colonialism. East Timor was originally and primarily colonized by Portugal and secondarily<sup>152</sup> colonized by Indonesia. “It is hardly controversial that one of the primary driving forces of nineteenth-century colonial expansion was trade. The right to enter other territories to trade, the freedom of commerce asserted so powerfully and inevitably even in Vitoria’s time, was a principal rule of nineteenth-century legal and diplomatic relations”.<sup>153</sup> Thus, attracted by the abundance of sandalwood, honey, wax, and slaves in East Timor; Portuguese trade explorers established trade links with the Island of Timor. East Timor was declared a Portuguese colony in 1769 after the European traders had established a trading outpost in Dili.<sup>154</sup>

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<sup>150</sup> See Anghie, supra note 4 at 69 & 90.

<sup>151</sup> Source: <http://data.un.org/CountryProfile.aspx?crName=Timor-Leste>.

<sup>152</sup> For a good understanding of the concept of ‘secondary colonialism’, see Awet Tewelde Weldemichael, *Third World Colonialism and Strategies of Liberation: Eritrea and East Timor Compared* (New York: Cambridge University Press, 2013) at 1-9.

<sup>153</sup> See Anghie, supra note 4 at 67.

<sup>154</sup> Dili is the current capital of Timor-Leste and its largest city with the main sea port. It has a commercial and metropolitan outlook.

## **5.2 Momentary and Permanent Self-Determination in East Timor**

On 28 November 1975, East Timor gained independence from Portugal but the joys, excitement, and celebration of that freedom was short-lived as it was invaded and occupied by neighboring Indonesia only nine days thereafter. However, the annexation by Indonesia was not recognized by the UN as the latter formally appointed Portugal as the administering Power of East Timor. Civil conflict widely believed to have been perpetrated and funded by the Indonesian government in order to consolidate its forced annexation of and sovereignty over the people of East Timor ensued and thousands lost their lives. “The doctrine of self-determination, that had been developed in the inter-war period principally in relation to the peoples of eastern Europe, was now adopted and adapted by the UN to further and manage the transformation of colonial territories into independent, sovereign States. The modern doctrine of self-determination, then, was formulated in response to the whole phenomenon of colonialism”.<sup>155</sup> Consequently, on 30 August 1999, the people of East Timor via a UN-supervised referendum unmistakably spoke in one accord in favor of their right to determine their political and social future. Thus, the right to self-determination was realized by East Timor when on 20 May 2002, it was formally recognized as an independent State and was admitted into the UN on 27 September 2002.

## **5.3 The Genesis of the Dispute at the ICJ**

On 11 December 1989, Indonesia and Australia entered into a treaty (“The Timor Gap Treaty”) to enable the exploration and exploitation of the petroleum resources of the continental shelf of the area between the Indonesian Province of East Timor and northern Australia. This area is believed to be extremely rich in oil and natural gas reserves and so

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<sup>155</sup> See Anghie, *supra* note 4 at 196.

should ordinarily be the main economic base of the people of East Timor upon their realization of self-determination. A joint Australian/Indonesian regime was set up for exploiting the oil resources on the continental shelf between Australia and East Timor. The treaty would remain in force for an initial period of 40 years from the date of its entry into force and shall continue in force after the initial 40-year term for successive terms of 20 years, unless by the end of each term, including the initial term of 40 years, the two States have concluded an agreement on the permanent continental shelf delimitation in the area covered by the Zone of Cooperation.

The nucleus of the dispute between Portugal and Australia before the ICJ was not in respect of the decolonization of East Timor but in respect of the Timor Gap Treaty between Australia and Indonesia and the cognate rights that could flow therefrom vis-à-vis the people of East Timor. By virtue of *Article 34 paragraph 1* of the Statute of the ICJ, “only States may be parties in cases before the Court”. Thus, Portugal as the administering Power over the territory of East Timor instituted a proceeding against Australia before the ICJ on 22 February 1991 concerning certain activities of Australia with respect to East Timor. Portugal claimed that Australia had by its conduct failed to observe the obligation to respect the duties and powers of Portugal as the administering power of East Timor and the right of the people of East Timor to self-determination and the related rights. Consequently, Australia, according to Portugal, had incurred international responsibility in relation to the people of East Timor and Portugal.

## **5.4 Indonesia's Annexation of East Timor and the Politics of Re-colonization in the Third World**

Indonesia through its military forcefully annexed East Timor on 7 December 1975 thereby abruptly ending the fledgling, popular, and Portugal-backed government of East Timor led by the Revolutionary Front for an Independent East Timor ("*FRETILIN*"). This military assault by Indonesia, itself a beneficiary of the principle of right to self-determination, against the newly-liberated people of East Timor did not go unchallenged by the latter but Indonesia prevailed through the procurement of advanced weaponry from the United States and Australia. The United Nations deplored the invasion of East Timor by Indonesia and called on Indonesia to desist from further violation of the territorial integrity and withdraw without delay its military forces from the territory of East Timor in order to enable the people to freely exercise their right to self-determination and independence.<sup>156</sup> Indonesia advanced anti-colonial unity and realization of the peoples' right to self-determination as its reasons for annexation of East Timor. It stated that the colonial division of the island of Timor into east and west was a result of colonial assault and oppression perpetrated by the Portuguese and Dutch imperial powers. Therefore, its annexation of East Timor was aimed at the restoration of the original unity that had existed in the entire Island before the arrival of the colonial Powers. This reasoning of Indonesia is partly fraught with contradictions in view of the fact that the idea behind the principle of self-determination is the liberation of a people from socio-political oppression and bondage. In the case of the people of East Timor, it was about freedom from foreign domination, whether by Portugal or Indonesia. "The right of self-determination has primarily to do with a collective right of a people to govern themselves, creating a voluntary civil society, usually by creating a State. It is about the right of a people

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<sup>156</sup> See Question of East Timor, GA Res 3485 (XXX), UNGAOR, 30<sup>th</sup> Sess, UN Doc A/10426 (1975) 116.

to constitute a State”.<sup>157</sup> Self-determination was proclaimed as an anti-colonialist principle; its obvious aim was to disrupt colonial empires and redistribute power in the international community on the basis of the idea of equality among nations, thereby assisting in the emergence of new international subjects consisting of those peoples which had previously been subjected to colonialist rule.<sup>158</sup> It is hardly about being forcibly annexed by or integrated with an existing or neighboring State against the wishes and desires of a people. Much as *Principle VI of the UN Resolution 1541 (XV)*<sup>159</sup> envisages three different options for the attainment of full measure of self-government by a non-self-governing territory namely: emergence as a sovereign independent State; free association with an independent State; or integration with an independent State; notwithstanding, *Principle VII* provides that “free association [with an independent State] should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic process”.<sup>160</sup>

“*Article 1(1)* of the International covenant on Economic, Social and Cultural Rights prohibits States from meddling in the affairs of another contracting State, in a manner that seriously infringes upon the right of that State ‘freely to determine [its] political status and economic, social and cultural development’. It prohibits contracting States from invading and occupying the territory of other contracting States in such a manner as to deprive the people

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<sup>157</sup> See Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995) at 92.

<sup>158</sup> See Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (UK: Cambridge University Press, 1995) at 317.

<sup>159</sup> See General Assembly Resolution 1541 (XV) passed on 15 December 1960 - Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Art. 73(e) of the Charter of the United Nations.

<sup>160</sup> See Principle VII para. (a) of GA Res 1541 (XV) UNGAOR, 15<sup>th</sup> Sess, Supp No 38, UN Doc A/4651 (1960) 29.

living there of their right to self-determination. Military occupation and, *a fortiori*, annexation of a foreign territory amounts to a grave breach of *Article 1(1)*.<sup>161</sup> The right as contained in *Article 1(1)* is available to the people even when they are yet to realize independence.

Indonesia's annexation of East Timor lasted for over two decades largely because it enjoyed the support of the United States, Australia, United Kingdom; and Australia was the only western State to recognize Indonesia's annexation of East Timor apparently for economic and political interests. "Self-determination is significant jurisprudentially. For one thing, its study enables us to inquire into the underlying tensions and contradictions of international relations as well as the interplay of law and politics on the world scene. For another, self-determination belongs to an area where States' interests and views are so conflicting that States are unable to agree upon definite and specific standards of behavior..."<sup>162</sup>

Indonesia's re-colonization of East Timor and the attendant decimation of the civilian population therein speak volumes of how low the ethics in governance of some Third World leaders have fallen especially when they are nudged by some Western leaders. It shows how power-drunk and brutal the leaders in Third World States could be in order to plunder the resources in a contiguous territory. "If East Timor can be considered a microcosm of Third World expropriation by developed countries, then the territory's occupation by Indonesia in

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<sup>161</sup> See Cassese, *supra* note 90 at 55.

<sup>162</sup> See Antonio Cassese "The International Court of Justice and the Right of Peoples to Self-Determination" in Vaughan Lowe and Malgosia Fitzmaurice, eds, *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*(Great Britain: Cambridge University Press, 1996) at 351.

1975 was also an example of how corrupt administrations in developing countries can assume the aggressive colonial practices normally associated with Western imperialism”<sup>163</sup>

### 5.5 Australia’s Arguments

In its Counter-Memorial, Australia relied on the case of *Monetary Gold Removed from Rome in 1943*<sup>164</sup> to argue that the ICJ lacked jurisdiction to hear Portugal’s claim. Australia argued that in view of the principle established in the Monetary case which is to the effect that the Court could not adjudicate on the claims of parties (Italy and UK) to a certain quantity of Albanian gold in the absence of a third State (Albania) which was not before it; and the fact that Indonesia is not before the Court, the ICJ cannot assume jurisdiction in the present case. It was Australia’s contention that for there to be an effective determination of the case against it, it was a condition precedent that the Court must determine the legality or illegality of the occupation of East Timor by Indonesia. Australia maintained that there is in reality no dispute between itself and Portugal and that the true respondent is Indonesia and that it is erroneously being sued in place of Indonesia.<sup>165</sup>

In response to the jurisdictional question, the Court held that for the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the real dispute is between Portugal and Indonesia rather than Portugal and Australia. The Court concluded that Portugal had, rightly or wrongly, formulated complaints of fact and law

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<sup>163</sup> See Stephen McCloskey “East Timor – From European to Third World Colonialism” in *Paul Hainsworth & Stephen McCloskey, eds, The East Timor Question: The Struggle for Independence from Indonesia* (New York: I.B. Tauris, 2000) at 1.

<sup>164</sup> Case Concerning Monetary Gold Removed from Rome, Judgment (Preliminary Question), [1954] ICJ Rep at 19.

<sup>165</sup> See *Case Concerning East Timor (Portugal v Australia)*, supra note 12 at para. 21.

against Australia which the latter has denied. Thus, by virtue of this denial, there is a legal/justiciable dispute between Portugal and Australia.<sup>166</sup>

The Court considered Australia's principal argument to the effect that Portugal's application would require the Court to determine the rights and obligations of Indonesia. Australia argued that by virtue of the declarations made by the parties under *Article 36 paragraph 2 of the Statute of ICJ* which conferred jurisdiction on the Court over the case, the Court would not be able to act if in order to do so, it would rule on the lawfulness of annexation of East Timor by Indonesia and on the validity of the 1989 Treaty and on the rights and obligations of Indonesia under that Treaty. Portugal agreed that if its application required the Court to decide any of these questions, the Court could not entertain it.<sup>167</sup>

## 5.6 Portugal's Claims

Portugal contended that its application is concerned exclusively with the objective conduct of Australia which consisted in having negotiated, concluded and initiated performance of the 1989 Treaty with Indonesia, and that this question is perfectly separable from any question relating to the lawfulness of the conduct of Indonesia. According to Portugal, the conduct of Australia with regards to the 1989 Treaty constitutes a breach of its obligation to treat East Timor as a Non-Self-Governing Territory and Portugal as its Administering Power; and that breach could be passed upon by the Court by itself and without passing upon the rights of Indonesia.<sup>168</sup> Portugal contended that its claim before the Court is against Australia and not against Indonesia and that even if Indonesia may be affected by the judgment, the conduct that forms the subject matter of the case is that of Australia.

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<sup>166</sup> See *Case Concerning East Timor (Portugal v Australia)*, supra note 12 at para. 22.

<sup>167</sup> See para 23 *Case Concerning East Timor (Portugal v Australia)*, supra note 12 at para. 23.

<sup>168</sup> See *Case Concerning East Timor (Portugal v Australia)*, supra note 12 at para. 25.



In response to Portugal's contention, the Court noted that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. Thus, the Court concluded that Australia's behavior could not be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so hence, that the Court could not make such a determination in the absence of the consent of Indonesia.<sup>169</sup>

Portugal further argued that the rights which Australia breached were rights *erga omnes* and that accordingly, Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner. The Court noted that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Therefore, the Court could not rule on the lawfulness of the conduct of another State which is not a party to the case. Nevertheless, the Court stated that Portugal's assertion that the right of peoples to self-determination as it evolved from the Charter and from the UN practice, has an *erga omnes* character, is irreproachable; and that the right to self-determination of peoples has been recognized by the UN Charter and in the jurisprudence of the Court; it is one of the essential principles of international law.<sup>170</sup>

The Court concluded that given the nature and facts of this case, Indonesia's rights and obligations would definitely constitute the very subject matter of the judgment made in the absence of Indonesia's consent. Such a judgment would run directly counter to the well-established principle of international law embodied in the Court's Statute, namely, that the

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<sup>169</sup> See *Case Concerning East Timor (Portugal v Australia)*, supra note 12 at para. 27.

<sup>170</sup> See *Case Concerning East Timor (Portugal v Australia)*, supra note 12 at para. 29.

Court can only exercise jurisdiction over a State with its consent.<sup>171</sup> The Court noted that for Portugal and Australia, the territory of East Timor remains a Non-Self-Governing Territory and its people have a right to self-determination.<sup>172</sup> Relying on the case of the Monetary Gold and jurisdictional ground, the Court declined to entertain the case.

The ICJ is ordinarily supposed to be a Court of law and equity that should contribute in advancing the ideals of the United Nations and as Judge Weeramantry stated correctly in his dissenting opinion: “East Timor is a non-self-governing territory recognized as such by the General Assembly and the Security Council, and acknowledged by the Respondent [Australia] to be still of that status...the applicant [Portugal] is under a duty under international law to take necessary steps to conserve the rights of the people of East Timor”.<sup>173</sup> By declining jurisdiction on the East Timor case and having restated that “the principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court...”<sup>174</sup> the ICJ appeared to have contributed to the ambiguity and vagueness that have over time characterized the principle of self-determination. The pronouncement was a tacit judicial backing of the plunder of the peoples’ natural resources and continual dehumanization of the East Timorese. The judgment is surprisingly saddening and unhelpful to the aspirations of the people of East Timor especially when it is believed in some quarters that “self-determination has set in motion a restructuring

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<sup>171</sup> See *Case Concerning East Timor (Portugal v Australia)*, supra note 12 at para. 34.

<sup>172</sup> See paras. 31 & 37 *Case Concerning East Timor (Portugal v. Australia)*, supra note 12 at paras. 31 & 37.

<sup>173</sup> See *Case Concerning East Timor (Portugal v. Australia)*, (*Dissenting Opinion of Judge Weeramantry*), at 221.

<sup>174</sup> See *Case Concerning East Timor (Portugal v Australia)*, supra note 12 at para. 29.

and redefinition of the world community's basic 'rules of the game'".<sup>175</sup> As an anti-colonial principle, for self-determination to be effectively given its practical meaning for the benefit of a people under foreign domination and subjugation as the East Timorese, it should "promote democratic self-government and free access of peoples to the role of international actors". The ICJ pronouncement on the *East Timor case* is not in sync with one of the purposes of the United Nations as contained in *Article 1 paragraph 2* which is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".

The report card of Portugal's colonization of East Timor was particularly notorious for its neglect of the development of the territory; brutality and exploitation of the colonial subjects. From time immemorial, Portugal was not favorably disposed to (or at best has been indifferent to) the concept of decolonization as introduced by the United Nations. It colonized East Timor for about four centuries and was one of the two States that voted against one of the two important resolutions adopted by the UN for Non-Self-Governing Territories to have the opportunity to freely choose the manner in which their right to self-determination would be realized.<sup>176</sup> Portugal's case against Australia at the ICJ might not have been borne out of a genuine desire to protect the interest of the people of East Timor. Perhaps, Portugal moved against Australia at the ICJ because it felt that as the former colonial Power and the then Administering Power of East Timor, it had the 'exclusive right' to sit over and enjoy the natural resources of the administered territory. Therefore it considered it an assault on the sensibilities of Portugal for 'third parties' to control and disburse the wealth located in its administered territory.

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<sup>175</sup> See Antonio Cassese "The International Court of Justice and the Right of Peoples to Self-Determination" in Vaughan Lowe and Malgosia Fitzmaurice, eds, *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*(Great Britain: Cambridge University Press, 1996) at 351.

<sup>176</sup> See Cassese, *supra* note 90 at 71; and Res 1541 (XV).

## CHAPTER SIX

### 6.0 SUMMARY OF ARGUMENTS AND CONCLUSIONS

This thesis has analyzed the ICJ decisions in the Cameroon and Nigeria; Western Sahara; and East Timor conflicts from the lens of Third World Approaches to International Law (TWAIL). The colonial encounter between Europe and the Third World and its negative impacts in various former colonies is an unpleasant product of the ‘civilizing mission’ of the Imperialists in these territories. In this work, historical factors have been used to establish a nexus between colonialism and the army of conflicts that have continued to assail the Third World which calls for decisive action from the concerned peoples. As a result of the colonial enterprise, the post-colonial Third World has been a victim of series of civil unrests and instability. Millions of people have lost their lives while many others that are fortunate to be alive are forced to live under the most inhuman conditions.

Attempt has been made to depict the disruptive effects of European colonization in Africa spurred by economic and political interests. The present condition of Bakassi peoples shows the attendant chaos that would inevitably befall Third World peoples when “in 1884-85, the European imperial powers met in Berlin and without the consent or the participation of African people, demarcated the continent of Africa into colonies or spheres of influence. In many cases, kingdoms or tribes were split with such reckless abandon that they came under two or three European imperial powers”.<sup>177</sup> The fate of Bakassi people demonstrates the failure and inadequacy of the discipline of international law to contend with the fallouts of European States that gave birth to the scramble for territory in the Third World.

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<sup>177</sup> See T.O. Elias, *Africa and the Development of International Law* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1988) at viii.

It has also been demonstrated that Africa had cognizable political structure and authority as well as diplomatic ties with foreign States as opposed to the notion in some quarters to the contrary. The thesis has buttressed these by demonstrating how these indigenous Kingdoms were patterned along monarchical forms with their strong systems of taxation and shrewdness in various commercial activities thereby generating revenues for the Kingdoms. There were clearly established administrative justice systems founded on customary and Islamic laws with notable jurists and scholars. Some of the Empires had established electoral processes through which an aspirant to an office could emerge. Arab colonialism, its consequent trading in slaves and introduction of Islam as a religion in North Africa were bad omen for the continent.

The application of the right to self-determination has been enmeshed in the miasma and caldron of controversies over the doctrine of *uti possidetis* – itself a colonial heritage. Therefore, in the view of the thesis, the nebulous application of self-determination is partly traceable to the selfish political interests of the African leaders who brood no opposition in their territories as well as the colonial institutions and structures inherited by the existing States.

On the Bakassi dispute, the thesis has posited that the words of the Treaties and agreements relied upon by the Court were not given their literal and ordinary grammatical meanings and so were interpreted out of context in violation of the Vienna Convention on the Law of Treaties. The ICJ's interpretation of the various Treaties between the local Kings and the colonial Powers were fundamentally erroneous and were presumably a judicial attempt to join the league of proponents of the theory that non-European peoples had no sovereign rights over their territories. Again, as has been argued in chapter two, the sovereignty and governmental structures of non-Europeans date back to the 6<sup>th</sup> and 7<sup>th</sup> centuries.

On a critical reflection of the decision in the Cameroon and Nigeria boundary dispute and considering the agitation and tensed atmosphere in Bakassi, the ICJ appears to have sounded a death knell to the possibility of a peaceful co-existence of the Third World peoples in the Peninsula. By not giving regard to the interest of the human population in Bakassi, the ICJ decision detracts significantly from the object of the Court and that of the UN at large which is to “...bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace”.<sup>178</sup>

It is argued that the socio-economic and political interests of the inhabitants of Bakassi should have superseded or at least ranked *pari pasu* with the issue of title. In view of the debate and vagueness of the meaning of “a people” in international law, other judicial pronouncements and given the features of the people of Bakassi, they meet the requirements for the exercise of self-determination.

The ICJ judgment in this case and its failure to foster palpable peace in Bakassi is one of the strong indications that the Third World is yet to recover fully from the nightmare of colonialism after more than half a century. By relying on unconscionable treaties and agreements to cede the territory of a large group of people without their consent, the ICJ has demonstrated that ‘non-European peoples are the peripheral concerns of international law’.<sup>179</sup>

The conflict in Western Sahara is notorious for lingering for up to four decades. However, the people of Western Sahara have consistently been speaking with one voice

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<sup>178</sup> See Article 1 of the Charter of the United Nations and Statute of the ICJ, 1945.

<sup>179</sup> See generally, Anghie, *supra* note 4.

concerning their right to choose the country that they wish to belong to. They appear, and rightly so, relentless in their quest for freedom from domination and exploitation.

This thesis has demonstrated how Spain deliberately engineered and triggered the current state of socio-political instability in Western Sahara that has ultimately set the people of North Africa on a warpath with one another. Spain's act of handing over of Western Sahara to Morocco and Mauritania detracts significantly from the UN resolution concerning Declaration on the granting of independence to colonial countries and peoples and so smacks of mischief against the territory. Spain tactically exercised the right to self-determination on behalf of the people of Western Sahara. In the view of the thesis, it is Spain that sowed the foundational seed of discord that germinated and snowballed into tribal war and displacement that have persisted to date.

The study has posited that the decolonization process in Western Sahara cannot be realized simply by churning out resolutions by the UN to this effect. It submitted that for the decolonization project to see the light of the day, it is imperative that it be backed by stronger and practical political commitments on the part of the world body.

The conflict in Western Sahara appears to be enjoying the blessing of the UN. The thesis has argued that the Security Council appears to be hesitant to use relevant provisions of the UN Charter to mete out penal measures on the Kingdom of Morocco apparently because some of its members are feeding fat from the conflict in North Africa. It has been submitted that Morocco should be barred from the world body as a member as its continuous sitting at the UN to deliberate on global peace and democratic principles makes caricature of the UN as an institution and sets a bad precedence in the world.

In the light of the features of the right to self-determination, the process and outcome of decolonization of Western Sahara should be devoid of internal and external manipulations

and coercion. The outcome should be a true reflection of the wishes and desires of the people of Western Sahara.

The concept of terra nullius which the Europeans had devised to rob the people of Third World of international legal personality has no bearing with the realities in the Third World. On this score, the thesis submitted that the ICJ did not reckon with the ties between the Kingdom of Morocco and people of Western Sahara partly because of the Court's determination to see the latter attain independence and European age-old prejudice against the socio-political structure of the Third World which it did not regard as being in sync with that of Europe.

It has been argued that Indonesia's claim that its annexation of East Timor was borne out of the quest to reclaim and redeem the lost unity that the island of Timor enjoyed prior to European colonization is contradictory to the spirit of the principle of self-determination. The thesis has submitted that the ICJ's pronouncement to the effect that "the principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court" and yet declining jurisdiction was akin to approbating and reprobating. It did not in any way help the aspirations of the people of East Timor to self-determination but rather added to the ambiguity and uncertainty of self-determination.

## **6.1 Conclusions**

This study has attempted to use the theoretical framework of *TWAIL* to analyze the conditions of instability in some Third World territories foisted upon them by the imperialists and accepted, hallowed, and practised by many African leaders. It has employed the *TWAILian* perspective to demonstrate how the regime of international law has continued to plunder, dehumanize, subordinate, and annihilate the non-European peoples. These are evident in the manner the ICJ ceded the Bakassi Peninsula to Cameroon without considering



the social, political, and legal fate of the inhabitants who are now refugees in their own State. With regard to citizenship, it is unclear whether they are Nigerians or Cameroonians. The decision of the ICJ in this case has again sustained the *TWAILian* argument that “neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of governance for the Third World”.<sup>180</sup> In view of the fate that has befallen the inhabitants of Bakassi Peninsula, ICJ decision in the Cameroon v. Nigeria border dispute is devoid of equity and fairness as it has fallen short of achieving justice and peace which ought to be the objective of the Court and the UN.

But it is high time Third World peoples through their leaders, policy makers, and civil society organizations rose up to the challenge facing them in respect of boundary disputes. A fundamental and patriotic action is indeed required of it. The National Committee on Boundary Adjustments of Cameroon and Nigeria needs to be empowered to move in and begin to work together with an objective of definitely marking the boundaries so as to avoid future occurrence. The Third World cannot continue to bemoan the situation thrust upon it by the colonialists or pretend that it does not worth its attention when its kiths and kin are losing their lives, have lost their main source of livelihood, and are displaced. The situation on ground no longer makes it fashionable for African leaders to sit on the fence - for this will amount to a great disservice to the millions of affected population across the continent that are either directly or indirectly affected. More importantly, there is a need for a change of attitude in the pattern of governance by the Third World leaders. Governments exist for the welfare of the masses and not that of the few as currently being experienced in many States in the territory. There is the need for a synergy and integration between the leaders and the led.

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<sup>180</sup> See Antony Anghie “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law” 40 HARV. INT’L L.J. 1 (1999) cited in Makau Mutua “What is TWAIL?” supra note 1 at 31.

When it is very needful, the people should be allowed to exercise their political and economic rights to self-determination. These could significantly reduce the spate of conflicts that are ravaging the Third World and enhance development in the region.

This inquiry has added another value to the *TWAILian* objectives to the extent that it has attempted to use the issues in the three cases to “understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans”.<sup>181</sup> On the creation and perpetuation of racialized hierarchy of international norms, it has been re-established in chapter two that the sovereignty of Third World States which dates back to 6<sup>th</sup> and 7<sup>th</sup> centuries could rank *pari pasu* with that of Europe. Again, using TWAIL as an analytical tool, the thesis has shown in chapters two and four how the concept of terra nullius is a tool of robbery in the hands of Europeans to deny legal personality to the people of Third World in order to take possession of lands therein.

TWAIL being a movement that “seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World”,<sup>182</sup> this study has attempted to use its findings to recommend some courses of action to all stakeholders. It is hoped that if some of these recommendations are accepted and implemented, some of the issues and factors that have threatened development in the territory could be eradicated.

Whereas it is advised here that Cameroon and Nigeria comply fully with the ICJ decision in the interest of peace, unity, and development of the Third World; and in view of the fact that the world Court cannot reverse itself, genuine efforts need to be made by the Nigerian and Cameroonian governments to liaise with the UN to organize a

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<sup>181</sup> See Mutua “What is TWAIL?” supra note 1 at 31.

<sup>182</sup> Mutua “What is TWAIL?” supra note 1 at 31.

plebiscite/referendum for the Bakassi people as has been done in other jurisdictions. This is necessary because even if the international community believes that there is peace in the Peninsula at the moment, it could well be the peace of a graveyard. Africa has for many decades been destabilized by ethnic and political violence and therefore deserves to experience peace, unity, and tangible development. Allegations of invasion, harassment, and human rights violations of the civilian population in Bakassi by the Cameroonian gendarmes or authorities ought to be checked and investigated with a view of meting out appropriate punishment to the masterminds.

It more or less appears that the UN is reluctant to take a definite position or make a definite statement on the application of the right to self-determination so as not to stir up more controversy amongst the comity of nations. Therefore, it might not be out of place if the ICJ uses its judicial clout in the globe to bring some degree of certainty into the application of self-determination whenever the occasion demands. This is likely to contribute to the growth of international law.

Much as there could be considerable merit in Morocco's claim of sovereignty over Western Sahara from the historic and pre-colonial perspectives, times have changed. Colonialism has become archaic and so no longer fashionable. The current status quo in the region poses serious threat to the peaceful co-existence and development of Africa. Morocco should relinquish sovereignty over Western Sahara now that the ovation is loudest by creating a conducive atmosphere for a UN-monitored referendum to be conducted so as to determine the genuine wishes of the concerned people. The huge amount of dollars currently channeled to the purchase of arms from USA and France, for the prosecution of war in the Sahara could be utilized to better the lots of the people of Morocco in various ways. Needless to say, that these huge sums put food on the tables of the suppliers and 'starve' the

purchasers. Africa should consistently rise against this internal colonialism by one of its own over another.

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