

The Court's willingness to extend the boundaries of judicial review where fundamental human rights are at stake is a progressive development. This decision has further opened the door to judicial consideration of issues traditionally considered immune from review. The Court has to tread a fine line in order to avoid interfering with legitimate executive discretion in the field of international relations. Indeed, the Court is proceeding cautiously. The expectations of a citizen are limited while the discretion of the Foreign Office is wide. On the facts of this particular case, it was clear that the Foreign Office had considered Abbasi's position and it would therefore be inappropriate to order the Secretary of State to make specific representations to the USA. Nevertheless, this decision is a clear indication that the courts will look closely at the exercise of power, even if it touches upon an apparently non-justiciable prerogative power.

The predicament of the detainees at Guantanamo Bay is to be considered by the appellate courts in the USA and the Inter-American Commission on Human Rights has taken up the case. One can only hope that they are rescued from legal limbo in the near future.

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TREATIES AND TITLES TO TERRITORY

ON 10 October 2002, the International Court of Justice adopted the judgment on *Land and Maritime Boundaries between Cameroon and Nigeria (Cameroon v. Nigeria)*, in which it ruled on sovereignty over certain territories disputed between the litigating parties and also delimited the land and maritime boundaries between them. The differences dealt with in the case followed from the long-standing disagreements between Cameroon and Nigeria which—as is not uncommon—went back to the legal framework established by colonial powers.

The judgment deals with several issues of major significance, including delimitation of land and maritime boundaries. But the most significant aspect of the judgment was the issue of the dynamics of territorial title in the context of interaction of treaties, as normative instruments apparently or arguably conferring title on a given State, and factual realities related to such title, especially if these realities diverge from what is required by a treaty. This problem is dealt with in the judgment with regard to the title to certain Lake Chad areas, as well as to the Bakassi Peninsula.

The Court faced the argument that the 1931 Henderson-Fleuriat Exchange of Notes between France and Britain placed certain disputed areas at Lake Chad under the sovereignty of Cameroon. Nigeria opposed this argument on the basis of its alleged historical consolidation of territorial title; it claimed to have gained title through effective and long-standing occupation of the territory. The Court—without denying the facts presented by Nigeria in any significant respect—emphasised that the claims of historical consolidation of a title to territory based on peaceful occupation of that territory could not prevail over established treaty title (paras. 65–67). The effective exercise of State authority (*effectivités*) claimed by Nigeria did not correspond to the law, and accordingly preference was to be given to the holder of the title. Consequently, sovereignty over these territories remained with Cameroon.

With regard to the Bakassi peninsula, Cameroon invoked the 1913 Agreement between Germany and Great Britain, which transferred sovereignty to Germany (then in colonial possession of Cameroon). Nigeria submitted, first, that Britain could not have validly transferred sovereignty over Bakassi to Germany, since it lacked territorial sovereignty with regard to that territory; according to the 1884 Treaty between Britain and the Kings and Chiefs of Old Calabar, Britain acquired the powers of a protector only, and not of a sovereign; hence it was not entitled to enter into the 1913 Agreement and that agreement was void in relevant parts. However, the Court noted that agreements concluded by colonial powers with local rulers, even if the territory in question was not *terra nullius*, were to be regarded as derivative roots of title. The Court noted in particular that “Even if this mode of acquisition does not reflect current international law, the principle of intertemporal law requires that the legal consequences of the treaties concluded at the time in the Niger delta be given effect today, in the present dispute” (para. 205). In addition, from the outset Britain regarded itself as administering these territories, and not just protecting them (para. 207). Therefore, in 1913 Britain was in a position to determine in relation to Germany its boundaries in Nigeria and consequently to transfer to it the sovereignty over some of its lands.

The Court implied that the legal personality, if any, of the entity represented by the Kings and Chiefs of Old Calabar had lapsed after conclusion of the 1884 Treaty. Even Nigeria could not state with certainty whether the international status of those Kings and Chiefs survived after the Treaty, or whether they protested against that Treaty. Therefore, the Court was left with no option but to give effect to the 1913 Treaty.

The operation of the 1913 Treaty was also opposed by another argument of Nigeria, namely that its terms were never put into effect (para. 201); that Bakassi was administered as part of Nigeria from 1913 to 1960, and was never administered as part of Cameroon (para. 211). However, the Court referred to administration of Bakassi by the United Kingdom not as part of Nigeria, but “as if it formed part of” Nigeria in the period before Cameroon and Nigeria acceded to independence in 1960, and held this insufficient for supporting Nigerian title (para. 212).

Nigeria also referred to its widespread sovereign activities within Bakassi and submitted that this evidenced historical consolidation of Nigeria’s title. The Court therefore turned to the question whether an established treaty title could be outweighed by factors like effective administration (paras. 219 ff.). The Court noted that the case was not one of conflict between opposing claims of effective exercise of governmental functions by the two States, but one in which the territorial claims of one State were also supported by a treaty instrument, and emphasised that “The legal question of whether *effectivités* suggest that the title lies with one country rather than another is not the same legal question as whether such *effectivités* can serve to displace an established treaty title” (para. 223). This supports the view that the title conferred on Germany through the 1913 Treaty to which Cameroon succeeded on independence still prevailed over any practice which had taken place before or after 1960, including the practice allegedly exercised in pursuance of sovereign powers. Despite any such practice or activities of Nigeria, the Court held that the title was already established by the 1913 Treaty. The essence of the argument before the Court was whether a treaty title to territory could emerge and operate in spite of factual realities conflicting with the wording or spirit of that treaty. The Court held that it could.

This difference in the line of reasoning was characteristic of the arguments of the parties. With regard to the Lake Chad area, Cameroon referred to its conventional territorial title as the primary ground, and asserted *effectivités* “as a subsidiary ground of claim, an auxiliary means of support of its conventional titles” (para. 63). Nigeria, however, referred to the manifestations of sovereignty through effective administration accompanied, to a certain extent, by acquiescence of Cameroon (para. 66). Similarly, in Cameroon’s submissions, the arguments inspired by normative categories were predominant with regard to the acquisition of a title over Bakassi, while in Nigeria’s submissions the factual argumentation was central (paras. 211–212, 218).

The Court's support for normative against factual reasoning is clear. By a large majority the Court relied on general legal reasoning about the nature of international obligations to reject Nigeria's arguments. Only Judges Koroma and Rezek and Judge Ajibola, the *ad hoc* judge for Nigeria, dissented on the issues of *effectivités*, historical consolidation and validity of the 1913 Treaty. The Court affirmed the principle that treaties can operate independently and may be invoked by parties in spite of conflicting realities, unless it is proved that a party invoking a treaty has *consented* to the replacement of a legal regime embodied in a treaty by a different regime dictated by factual circumstances. Nigeria's argument on the invalidity of the 1913 Treaty did not succeed; hence the Court was unable to hold that when the tribal entities which were parties to the 1884 Treaty disappeared, Nigeria acquired territorial title. This approach, in conjunction with the Court's attitude with regard to the continued operation of the Henderson-Fleuriau Exchange of Notes, evidences the Court's consolidated view that the content of normative instruments prevails over factual realities conflicting with it, and these realities can give rise to rights and duties only in so far they do not conflict with the relevant normative instruments.

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CONSTRUCTING MANSLAUGHTER IN DRUG ABUSE CASES

WHERE a victim dies from the injection of a drug, is it possible to convict the person who supplied the drug of a homicide offence? The most obvious offence is constructive manslaughter, for which it is necessary to establish that the defendant committed an unlawful and dangerous act which caused death. This offence may have been committed where the supplier has injected the victim, as was recognised in *Cato* [1976] 1 W.L.R. 110. The unlawful act was there held to be the administration of a noxious thing, contrary to section 23 of the Offences Against the Person Act 1861, regardless of the victim's consent to the administration; and it was this administration which caused the death. But what of the case where the victim injected himself? This was the scenario which was considered by the Court of Appeal in *Dias* [2001] EWCA Crim 2986, [2002] 2 Cr.App.R. 5.

The defendant prepared a syringe of heroin with which the victim injected himself. The victim died from injecting the drug and the defendant was charged with constructive manslaughter. The