

BAKASSI: CRITICAL LOOK AT THE GREEN TREE AGREEMENT

1. Introduction

I have taken a keen interest in the ongoing debate on the issue of the Bakassi Peninsula and the contention by the National Assembly that the former President, President Olusegun Obasanjo, contrary to section 12 of the 1999 Constitution, failed to involve it in the ratification process of the Green Tree Agreement, a treaty between Nigeria and Cameroon. This Agreement is intended to implement the judgement of the International Court of Justice (ICJ) delivered on 10 October 2002 that, amongst other things, awarded the ownership of Bakassi Peninsula to Cameroon [See **Land and Maritime Boundary between Cameroon and Nigeria**, ICJ Reports (2002), 303]. Article 1 of the Agreement states:

“Nigeria recognises the sovereignty of Cameroon over the Bakassi Peninsula in accordance with the judgement of the International Court of Justice of 10 October 2002 in the matter of land and maritime boundary between Cameroon and Nigeria. Cameroon and Nigeria recognise the land and maritime boundary between the two countries as delineated by the Court and commit themselves to continuing the process of implementation already begun.”

The National Assembly appears to rely heavily on section 12 of the 1999 Constitution in arguing that the Green Tree Agreement should have been referred to it for ratification, and the failure to do so would make the Agreement unconstitutional, null and void. I am afraid this position would appear to be a misconception of the legal effect of section 12, especially as regards the distinction between treaty-making and implementation, and the dual nature of Nigeria's obligation – its obligation under international law and national law. This write up seeks to contribute to the clarification of this misconception.

2. Section 12 of the Constitution

Section 12 does not give the National Assembly any legal role in the ratification of treaties (or treaty-making), but rather involves it in the implementation (or domestication) of treaties. There is a distinction between ratification of a treaty, on the one hand, and its implementation (or domestication) on the other. Ratification is the process by which a State (in this case Nigeria) establishes in the international plane its consent to be bound by a treaty (See article 1 of the Vienna Convention on the Law of Treaties 1969). While the implementation (or domestication) is the process by which a treaty validly entered into by a State is enacted (or domesticated) as legislation so it can have effect within the domestic plane. Section 12 applies to the implementation (or domestication) of treaties and states that: *“No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly”*. The side explanatory note of section 12, along with item 31 of the Exclusive Legislative List, makes it clear that the National Assembly's legislative role is limited to the implementation of treaties.

In Nigeria, a treaty may be ratified by the President without the National Assembly because it still operates the inherited system from the UK whereby the executive is able to ratify a treaty without the Parliament. Stating the UK position, the House of Lords in **J.H. Rayner Ltd v. Department of Trade & Industry** [1990] 2 AC 418 AT 476 said, *“The Government [i.e. the executive] may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom”* The Privy Council also, in the earlier case of **Attorney General for Canada v. Attorney General for Ontario** [1937] AC 326 AT 347-348 commenting on the UK practice, as carried out in the then British Empire, had the following to say:

“It will be essential to keep in mind the distinction between (1) formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an Executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. .. Parliament, no doubt, has a constitutional control over the

Executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the Executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default."

Professor B.O. Nwabueze pointed out that section 12(1) of the 1979 Constitution [identical to section 12(1) of the 1999 Constitution] reflects the inherited common law position that treaty-making is a purely executive act that requires subsequent implementation within the country by way of legislation enacted by the legislature. He explains that treaty-making and its implementation are two separate functions, the former for the executive and the latter for the legislature. See *Federalism in Nigeria under the Presidential Constitution* (1983, Sweet & Maxwell, London), pp.255-256. This is unlike the system operating in certain other jurisdictions, such as the USA and Ghana where the Constitutions specifically requires that no treaty be ratified, unless it is approved by a specified majority in the Federal Legislative arm[See Article II, section 2 of the United States Constitution and Section 75 of the Constitution of Ghana]. This author has on several occasions advocated for the Nigerian Constitution to be amended to incorporate a role for the National Assembly(preferably the Senate) in the ratification process of treaty in a manner similar to what obtains in the USA and Ghana.[See "The New Territorial Waters(Amendment) Act 1998 – Comments on the Impact of International Law on Nigerian Law"(2000) 12 *African Journal of International and Comparative Law*, pp.84-104 and more recently in "Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria"(2007) 51(2) *Journal of African Law*,pp.249-284]. However, until such amendment is made to the Constitution, the fact remains that the executive, through the President, has the competence to make and ratify treaties without the input of the National Assembly.

It must be pointed out that a possible exception under the UK practice, which arguably may be applied to Nigeria, is when the treaty involves a cession of British territory. In this case, it has been posited that such a treaty requires the approval of the Parliament given by statute. Professor Arnold McNair states that, "as a matter of strict law" such treaties do not require legislation, though " as a matter of constitutional convention a series of modern precedents makes it extremely unlikely that in future any cession will take place without statutory authority". See McNair, "When Do British Treaties Involve Legislation?" (1928) vol.9 *British Yearbook of International Law*, p.59 at 63. Although, on the surface it would appear that the Green Tree Agreement can be categorised as a treaty of cession, in reality it is actually a treaty of cession? A treaty of cession is when a State by way of treaty cedes a territory that belongs to it to another State. This would not appear to be the case in the Green Tree Agreement, since the relevant territory, Bakassi Peninsula did not at the time of the making of the treaty belong to Nigeria, as per the ICJ judgement of 10 October 2002. Therefore, in reality Nigeria had nothing under the Agreement to cede. The Agreement was actually one to confirm the boundary delineation in respect of Bakassi Peninsula as between Nigeria and Cameroon as per the judgement of the ICJ. An apposite case on this is the Indian case of ***Maganbhai Ishwarbhai Patel v. Union of India*** (1970) 3 SCC 400. In this case a border dispute between India and Pakistan was referred to international arbitration. The award of the arbitration held that that certain villages which were thought to fall under Indian territory actually belonged to Pakistan. When the central government of India sought to give effect to the award a suit was filed contesting the power of the central government to cede the territory of India to a foreign power. The majority decision of the Supreme Court of India held that this did not amount to a cession of the territory of India. The learned Chief Justice of India at that time, M. Hidayatullah, who read the majority decision of the Court, said:

"The precedents of this Court are clear only on one point, namely, that no cession of Indian territory can take place without a constitutional amendment... Must a boundary dispute and its settlement by an arbitral tribunal be put on the same footing? ... A settlement of a boundary dispute cannot, therefore, be held to be a cession of territory. It contemplates a line of demarcation on the surface of the earth. It only seeks to reproduce a line, a statutable boundary and it is so fixed. The case is one in which each contending State ex facie is uncertain of its own rights and therefore consents to the appointment of an arbitral machinery. Such a case is plainly distinguishable from a case of cession of territory known to be home territory".

This case would appear to support the point that the Green Tree Agreement is not a treaty of cession, since in Article 1 (quoted above) it merely states that Nigeria recognises both the sovereignty of Cameroon over Bakassi and the land and maritime boundary delineation as between Nigeria and Cameroon by the ICJ decision.

As a matter of courtesy, just like in the UK, the President may notify the National Assembly of his intention to ratify a treaty, but there is no legal obligation to do so, neither can such notification be regarded as a request for the National Assembly to ratify the treaty. Under the Nigerian Constitution, as it presently stands, and the inherited UK practice the National Assembly has no constitutional competence to ratify any treaty between Nigerian and another country. Its role under section 12, as has been mentioned above, is limited to implementing domestically a treaty already validly entered by the President. According to Professor Nwabueze:

"...the President, as the chief executive of the federal government, is designated head of state...As head of state, he represents the country in 'the totality of its international relations, acts for his State in its international intercourse, with the consequence that all his legally relevant international acts are considered to be acts of his State...It comprises in substance chiefly: reception and mission of diplomatic agents and consuls, conclusion of international treaties, declaration of war, and conclusion of peace.' These powers are not conferred upon the President by the Constitution in explicit terms, apparently upon the theory that the power is inherent in every independent, sovereign State, and is held on its behalf by its head..."

See *Federalism in Nigeria under the Presidential Constitution* (1983) at p.254.

3. Dual Nature of Nigeria's obligation – International and Domestic

Although the National Assembly may decline to implement the Green Tree Agreement under section 12 of the Constitution thereby depriving it of any force of law domestically, this does not in any way void the international obligation of Nigeria, firstly, under the ICJ judgement of October 2002 and secondly, under the Green Tree Agreement.

The ICJ judgement imposes an international obligation upon Nigeria, which as a member of the United Nations, a party to the United Nations Charter and the Statute of the ICJ (an integral part of the Charter); it is required to comply with. Under Article 94(1) of the UN Charter: *" Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."*(See also Article 59 of the Statute of the ICJ). In cases where a party to the case fails to perform its obligations under the judgement of the ICJ the other party(in this case Cameroon) may have recourse to the Security Council which may , under the powers granted to it by the Charter, impose sanctions on the recalcitrant State. See Article 94(2). Although, in reality no State has so far utilised the recourse to the Security Council to enforce the judgement of the ICJ, it is not advisable for Nigeria to expose itself to the possibility of this happening, especially since three permanent members of the Security Council – the United States of America, United Kingdom and France – were amongst the witness States to the Green Tree Agreement. Nigeria, certainly at this stage cannot afford any international opprobrium!

Further, under the Vienna Convention on the Law of Treaties, a party to a treaty (in this case the Green Tree Agreement), "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (Article 27). In essence, the fact that the National Assembly has failed to domesticate the Green Tree Agreement will not void Nigeria's international obligation under this treaty. In addition, it is pertinent to mention here Article 46 of the Vienna Convention on the Law of Treaties which states that a party to a treaty "may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance". The proviso to this article would not avail for Nigeria because, as mentioned earlier the consent of President Obasanjo to the Green Tree Agreement without the ratification of the National

Assembly is a valid consent under the internal laws of Nigeria, as it presently stands. Nothing in the Constitution detracts from this position.

4. Conclusion

In my view, it is too late in the day for the National Assembly to take its present stance on the Green Tree Agreement. Nigeria needs to comply with its international obligation! The better position should be how to ensure that the surrender of Bakassi is done in the best interest of the indigenes of Bakassi area and to ensure there is no breakdown of peace and security, which in the long run will cause untold hardship, especially for those located in the border towns of Nigeria and Cameroon. There is clearly a need to resettle the Bakassi indigenes to a decent and suitable new location comparable to their former location. This is a responsibility the National Assembly and the Executive, both at the Federal and relevant State and Local government level, would need to give serious attention!

Further, for those indigenes that would prefer to remain in the Bakassi area there is a need to ensure that Cameroon complies with its obligation under the Green Tree Agreement, which states in article 3 as follows:

“(1) Cameroon, after the transfer of authority to it by Nigeria, guarantees to Nigerian nationals living in Bakassi Peninsula the exercise of the fundamental rights and freedoms enshrined in international human rights law and in other relevant provisions of international law

(2) In particular, Cameroon shall:

(a) not force Nigerian nationals living in Bakassi Peninsula to leave the zone or to change their nationality;

(b) to respect their culture, language and beliefs;

(c) respect their right to continue their agricultural and fishing activities;

(d) protect their property and their customary land rights;

(e) not levy in any discriminatory manner any taxes and other dues on Nigerian nationals living in the zone; and

(f) take every necessary measure to protect Nigerian nationals living in the zone from any harassment or harm”.

I suggest a body of some sort be set up by the Federal government, made up of the representatives of Nigerian nationals in Bakassi; representatives of government at the Federal, State and Local government levels; representatives of the security agencies and independent experts, in areas such as human rights, international law and taxation. This body would have the responsibility for constantly monitoring and ensuring Cameroon's compliance with its obligations under the Green Tree Agreement in respect of Nigerian nationals remaining in Bakassi.

As the National Assembly, prepares to review the 1999 Constitution, this is an appropriate time to incorporate into the Constitution clear provisions on what organ of government has competence in treaty-making, instead of having this governed by unwritten inherited common law rules of the UK. In addition, there is a need, in the opinion of this author, for a clear role in the constitution for the national legislature in treaty-making, similar to what obtains in the USA, from where we borrowed the Presidential system of government, and Ghana.

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