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**The Role of International Law in
Determining Land Rights of
Indigenous Peoples: The Case Study
of Abuja Nigeria and a Comparative
Analysis with Kenya**

Sylvanus Gbendazhi Barnabas

A Thesis submitted in partial fulfilment
of the requirements of the University of
Northumbria at Newcastle for the
degree of Doctor of Philosophy

Research undertaken in the Faculty of
Business and Law

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**The Role of International Law in
Determining Land Rights of
Indigenous Peoples: The Case Study
of Abuja Nigeria and a Comparative
Analysis with Kenya**

SG Barnabas

PhD

2017

Volumes 1 and 2

ABSTRACT

In 1976, the Nigerian Government compulsorily acquired the ancestral lands of Abuja peoples of Nigeria without payment of compensation or resettlement. This is legitimised under Nigerian State laws. Indigenous peoples (IPs) suffer from injustices in relation to land globally. The purpose of this thesis is to find answers to the research questions emanating from this case study. One avenue explored herein in addressing dispossession of IPs' lands in Africa, is through considering the relevance of international law on their rights. However, there is no universally agreed definition of IPs. In the determination of whether international law provides solutions to the challenges of protecting land rights of Abuja peoples, the existing description of IPs is challenged.

The second avenue explored herein, is through a comparative approach to understanding how Kenya has resolved these challenges and how Nigeria should respond to similar challenges. The case study is used to illustrate the need for a viable relationship between State law, IPs' customary law and international law. The choice of Nigeria is because the case study is in Nigeria. The choice of Kenya as a comparator is because like Nigeria, Kenya is Anglophone with a plural legal system and has recently embarked on law reforms in relation to customary land rights and the place of international law within its legal system.

Drawing from theories of legal pluralism and post-colonialism, this doctrinal, case study and comparative enquiry, makes the following original contributions to knowledge. Firstly, the case study is used to argue that international law should expand its description of IPs to include collective of peoples with different cultures. Secondly, it draws from international child rights law to advance the argument that international law on IPs should present them more positively. Finally, the comparative analysis between Nigeria and Kenya on the above subjects has not been made by any known literature at the time of writing.

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TABLE OF ABBREVIATIONS

Abbreviation	Meaning
AC	Appeal Cases
AHRLR	African Human Rights Law Reports
ALR	Authorised Law Report
ANPP	All Nigerian Peoples Party
AU	African Union
CA	Court of Appeal
CAP	Chapter
CAPri	Collective Action and Property Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic Social and Cultural Rights

Table of Abbreviations

CESR	Center for Economic and Social Rights
CH	Chancery Division
CLR	Commonwealth Law Reform
CODESRIA	Council for the Development of Social Science Research
EA	East Africa
EC	European Commission
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECOWAS	Economic Community of West African States
eKLR	Electronic Kenya Law Reports
ELR	All England Law Reports
ELT	Environment and Land Court
ER	English Reports
FAO	Food and Agricultural Organization

Table of Abbreviations

FCDA	Federal Capital Development Authority
FCT	Federal Capital Territory
FHC	Federal High Court
FLR	Family Law Reports
FSC	Federal Supreme Court
FWLR	Federation Weekly Law Reports
HC	High Court
HCA	High Court of Australia
HRC	United Nations Human Rights Committee
HSRC	Human Science Research Council
IACHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

Table of Abbreviations

ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
IDEA	Institute for Democracy and Electoral Assistance
IGP	Inspector General of Police
IIED	International Institute for Environment and Development
ILA	International Law Association
ILO	International Labour Organization
IPs	Indigenous Peoples
IWGIA	International Work Group on Indigenous Affairs
JCA	Justice of the Court of Appeal
JSC	Justice of the Supreme Court
KB	King's Bench
KeCA	Kenya Court of Appeal Report
KLR	Kenya Law Report

Table of Abbreviations

LFN	Laws of the Federation of Nigeria
LRC	Law Reform Commission
LGA	Local Government Area
LPELR	Law Pavilion Electronic Law Report
LTR	Law Times Report
LUA	Land Use Act
NIALS	Nigerian Institute of Advanced Legal Studies
NLR	Nigerian Law Reports
NPC	National Population Commission
NRNLR	Northern Region of Nigeria Law Reports
NWLR	Nigeria Weekly Law Reports
OAU	Organisation of African Unity
PT	Part
QB	Queen's Bench

Table of Abbreviations

RIAA	Report of International Arbitral Awards
SALRC	South African Law Reform Commission
SARD	Sustainable Agricultural Rural Development
SASR	South Australian State Reports
SC	Supreme Court
SCN	Supreme Court of Nigeria
SCNLR	Supreme Courts of Nigeria Law Reports
SERAC	Social and Economic Rights Action Center
Sup. Ct. Rep.	Supreme Court Reports
UCP	Uniform Customs and Practice
UKHL	United Kingdom House of Lords Decisions
UKSC	United Kingdom Supreme Court
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child

Table of Abbreviations

UNDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Program
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNSW	University of New South Wales, Australia
UNTS	United Nations Treaty Series
WACA	West African Court of Appeal
WRN	Western Region of Nigeria Law Reports
WTLR	Wills & Trust Law Reports

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DECLARATION

I declare that the work contained in this thesis has not been submitted for any other award and that its all my own work. I confirm that this work fully acknowledges, the opinions, ideas and contributions from the works of others.

All ethical clearance for the research presented in this thesis has been approved. Approval has been sought and granted by the relevant Faculty Ethics Committee on 14 June 2014.

I declare that the word count of this thesis is 84, 995.

Name: Sylvanus Gbendazhi Barnabas

Signature:

Date:

VOLUME 1 OF 2

**Customary Law, English Law, Legal
Pluralism and the Definition of Land
Rights in Pre-Colonial, Colonial and Post-
Colonial Nigeria: A Case Study of Abuja,
Nigeria**

CHAPTER ONE: GENERAL INTRODUCTION

1.1. Background to the Thesis and Case Study

Since the emergence of the United Nations (UN) in 1945, international human rights law has evolved from its initial focus on individual rights as exemplified by the UN General Assembly (UNGA) adoption of the *Universal Declaration of Human Rights* (UDHR) in 1948 to the contemporary era where collective rights of groups such as minorities and indigenous peoples (IPs) are protected as *sue generis* rights. Indeed, for many victims of marginalisation and historical injustices around the world, international law has expanded to protect them against violations of their rights by States or dominant groups and institutions.¹ Despite the above developments in international law, a recent report commissioned by the UN demonstrates that there are still challenges in protecting land rights of IPs worldwide.²

Indeed, the story of European colonial administration of Africa and of British colonial administration of Nigeria in particular and the attainment of political independence, together with the relationship between post-colonial Nigeria with sub-State elements within it, can be likened to the story line in George Orwell's classic novel *Animal Farm*.³ In it, Orwell told the story about animals who fought tirelessly to overthrow tyrannical man from the farm but ended up creating a similarly tyrannical regime. 'All animals are equal' the rebellious animals proclaimed at the beginning of the revolution, 'but some animals are more equal than others' the animals later asserted in a post-revolution era. Indeed, *Animal Farm* was a literary allegory for communist Russia but Orwell

¹ A Cook and J Sarkin, 'Who Is Indigenous: Indigenous Rights Globally, in Africa, and among the San in Botswana' (2009) 18 *Tulane Journal of International & Comparative Law* 93 and TT Ankersen and TK Ruppert, 'Defending the Polygon: The Emerging Human Right to Communal Property' (2006) 59 *Oklahoma Law Review* 681.

² See United Nations Human Rights Committee (HRC), *Rights of Indigenous Peoples: Report of the United Nations High Commissioner for Human Rights*, covering the period May 2015-May 2016 adopted at the HRC thirty-third session. A/HRC/33/27. 20 July 2016.

³ G Orwell, *Animal Farm* (Random House, 2010).

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also intended it to have global implications.⁴ To put it simply, it is the story of a revolution that went wrong by departing from the original intentions of equality, justice and fairness for all in communist Russia. In a way, the story of Orwell's *Animal Farm* and IPs in post-colonial Africa is a literary simile.⁵ Indeed, the idea of political independence associated with the struggle for political independence of colonial African societies was intended to restore freedom from colonialism for all Africans.⁶ These lofty human equality goals were exemplified by the inclusion into the Nigerian *Independence Constitution* 1960 of the fundamental rights and freedoms for all as provided under the UNDHR.⁷

However, as this thesis will demonstrate through the case study of Abuja, just as the animal revolution in Orwell's *Animal Farm* went wrong by replicating the same tyrannical tendencies of man, the lofty objectives of freedom, equality and justice signalled by the attainment of political independence from colonial rule appear to have been equally dissipated in a post-colonial Nigeria. To build this introductory argument, it will be demonstrated later in the following Chapters, that through a combined effect of the *Constitution of the Federal Republic of Nigeria* 1999 (Nigerian Constitution), the Nigerian *Federal Capital Territory Act* 1976 (FCT Act) and the *Nigerian Land Use Act* 1978 (LUA), the *Animal Farm* post-revolution situation of 'all animals are equal but some animals are more equal than others' is literarily replicated in a post-colonial Nigeria. In sub-section 1.1.2-1.1.3 below, the case study in this thesis is introduced briefly.

⁴ B Pardy, 'Animal Farm Revisited: An Environmental Allegory' (1999) 30 *Victoria University of Wellington Law Review* 135.

⁵ E Fadaee, 'Symbols, Metaphors and Similes in Literature: A Case Study of Animal Farm' (2010) 2 *International Journal of English and Literature* 19.

⁶ See M Meredith, *The Fate of Africa: A History of the Continent Since Independence* (Public Affairs, 2011); K Nkrumah, *I Speak of Freedom: A Statement of African Ideology* (Praeger, 1961); and IM Wallerstein, *Africa: The Politics of Independence and Unity* (University of Nebraska Press, 1961).

⁷ See BO Nwabueze, *A Constitutional History of Nigeria* (Addison-Wesley Longman Ltd, 1982); TO Elias, *New Horizons in International Law* (BRILL, 1980); TO Elias, *Groundwork of Nigerian Law* (Routledge & Kegan Paul, 1954); and AO Obilade, *The Nigerian Legal System* (Sweet & Maxwell, 1979).

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1.1.1. Abuja and the Abuja Peoples of Nigeria

Abuja is currently the administrative capital of the Federal Republic of Nigeria.⁸ It is defined geographically under the First Schedule to the Nigerian FCT Act.⁹ Based on the latest census figures by the Nigerian National Population Commission (NPC),¹⁰ despite its status as the capital of Nigeria with people from all over the country settled there and being home to about eight different indigenous ethnic groups,¹¹ Abuja is the least populated territory amongst the thirty-six States of Nigeria. This indicates that the peoples of Abuja are minorities in Nigeria. They are predominantly members of the Gbagyi (Gwari) ethnic group but there are others such as the Koros, Gades, Bassas, Igbiras, Amwamwas, Ajiris, Afos and Gwandaras.¹²

Anthropological studies have demonstrated that the peoples of Abuja lived in this territory prior to British colonial rule in Nigeria.¹³ They are mainly farmers,

⁸ See International Consortium of Planners, *The Abuja Master Plan* (International Planning Associates, 1978). See also, Map of Nigeria showing States including Abuja (Appendix 1) and Table showing States including Abuja by land size (Appendix 3) below.

⁹ *Federal Capital Territory Act 1976* (FCT Act), CAP 128 *Laws of the Federation of Nigeria* 1990. Available at: www.nigeria-law.org/Federal%20Capital%20Territory%20Act.htm, accessed 1 December 2016. See also, the First Schedule Part II of the *Constitution of the Federal Republic of Nigeria* 1999 (as amended). Available at: www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm, accessed 1 December 2016. Where specific geographical information defines the territory as: 'Starting from the village called Izom on 7° E Longitude and 9° 15' Latitude, project a straight line westwards to a point just north of Lehu on the Kemi River; then project a line along 6° 47 1/2' E southwards passing close to the villages called Semasu, Zui and Bassa down to a place a little west of Abaji in Kwara State; thence project a line along parallel 8° 27 1/2' N Latitude to Ahinza village 7° 6' E (on the Kanama River); thence project a straight line to Buga village on 8° 30' N Latitude and 7° 20' E Longitude; thence draw a line northwards joining the villages of Odu, Karshi and Karu. From Karu the line shall proceed along the boundary between the Niger and Plateau States as far as Karu; thence the line should proceed along the boundary between Kaduna and Niger States up to a point just north of Bwari village; thence the line goes straight to Zuba village and thence straight to Izom.'

¹⁰ See www.population.gov.ng/index.php/state-population, accessed 23 October 2016.

¹¹ See S Na'ibi, *The Gwari Tribe in Abuja Emirate* (Federal Government of Nigeria Print Department, 1961) at 7-13. See also, S Na'ibi and A Hassan, *The Gwari, Gade and Koro Tribes* (Ibadan University Press, 1969); R Blench, *Atlas of Nigerian Languages* vol 3 (revised and amended edition of Crozier & Blench, 1992); and Abuja Council of Arts and Culture, *A Socio-Cultural Study of the Peoples of Abuja Vol 1* (Research & Documentation Unit, Abuja Council for Arts and Culture, 1995) at Chapters 1-5.

¹² See further anthropological details about these groups below.

¹³ For anthropological notes on the history, culture and geographical locations of these tribes in Nigeria, see generally, CL Temple, *Native Races and their Rulers: Sketches and Studies*

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hunters and fishermen who grow cash-crops like yams, cotton, benni-seed and they also produce calabashes and palm-kernels.¹⁴ They depend on the occupation and use of their ancestral lands which they have held under customary law to practice their occupations.¹⁵ Rural and subsistence farming is an activity that cuts across all the various ethnic groups.¹⁶ However, the different ethnic groups have their respective specialties in different crafts.¹⁷

These peoples were settled in the area many centuries before the Islamic jihad of the nineteenth century that engulfed them.¹⁸ This area later became part of and under the political hegemony of the ancient Habe (Hausa) kingdom of Zazzau (Zaria) in the early part of the nineteenth century.¹⁹ Like IPs in other parts of the world, the above development highlights the early vulnerability of these peoples to external forces prior to British colonial rule.²⁰ British colonial administration which was carried out through indirect rule began there in 1904.²¹ Abuja was then carved out of and became an independent Emirate known as the Abuja Emirate under the Niger Province of the defunct Northern

of Official Life and Administrative Problems in Nigeria (Argus printing & Publishing Co Ltd and Way & Co Ltd, 1918) at 29-79; OSMM Temple and CL Temple, *Notes on the Tribes, Provinces, Emirates and States of the Northern Provinces of Nigeria* (2nd Edn CMS Bookshop, 1922); OSMM Temple and CL Temple, *Notes on the Tribes, Provinces, Emirates and States of the Northern Provinces of Nigeria* (Barnes & Noble, 1965); HD Gunn and F Conant, *Peoples of the Middle Niger Region: Northern Nigeria*, vol 1 (International African Institute, 1960); CK Meek, *The Northern Tribes of Nigeria: An Ethnographical Account of the Northern Provinces of Nigeria together with a Report on the 1921 Decennial Census*, vol 1 (Cambridge University Press, 1925) and CK Meek, *The Northern Tribes of Nigeria: An Ethnographical Account of the Northern Provinces of Nigeria together with a Report on the 1921 Decennial Census*, vol 2 (Cambridge University Press, 1925).

¹⁴ They have been reported by historians to have inhabited the Abuja areas of Zuba, Kawali, Bwari, Kuje, Abaji, Gwagwalada, Karu, Karshi and Garki among other towns and villages. See S Na'ibi, (n 11) above at 7-13. See also, S Na'ibi and A Hassan, (n 11) above and R Blench, (n 11) above. See also, Linguistic Map of Nigeria at Appendix 4 below.

¹⁵ See Abuja Council of Arts and Culture, (n 11) above at Chapters 1-5.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ S Na'ibi, (n 11) above at 10.

¹⁹ See table of 'Abuja Genealogy' showing the order of succession in years of these emirs in OSMM Temple and CL Temple, (n 13) above at 518.

²⁰ Ibid.

²¹ Ibid.

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Protectorate²² of Nigeria. Subsequently some parts became territories of four States in the Middle-Belt geo-political region of Nigeria until 1976 when the FCT Act was enacted through a military decree.²³

1.1.2. Colonial and Post-Colonial Land Administration

British colonial land administration in this territory began with the enactment of the 1918 *Land and Native Rights Ordinance* which remained the main legislation on native lands in the Northern Region until political independence in 1960.²⁴ However, it was subsequently repealed and the *Land Tenure Law* 1962 was enacted in replacement.²⁵ The colonial legacy of the State controlling land through State law continued after political independence from Britain, a phenomenon that is replicated in most post-colonial States.²⁶ Presently, the Nigerian Constitution provides that all citizens have the right to acquire and own immovable property.²⁷ However, it is the 1978 LUA²⁸ that is the principal land legislation in Nigeria and it nationalises all lands in Nigeria, thereby replacing the hitherto existing customary system of land tenure. The law vests all land within the territory of each of the thirty-six States that make up the Nigerian federation (except for land vested in the Federal Government)

²² Later Northern Region/Province after the 1914 amalgamation.

²³ See Historical Map of Nigeria Showing the three Regions created by British colonial administration (1954) at Appendix 5 below; Map of Northern Nigeria showing the geography in and around the Emirate in R Heussler, *The British in Northern Nigeria* (Oxford University Press, 1968) at xxii; and HS John, and AHM Kirk-Greene, *The Emirates of Northern Nigeria: A Preliminary Survey of their Historical Traditions* (Oxford University Press, 1966).

²⁴ See PE Oshio, 'The Indigenous Land Tenure and Nationalization of Land in Nigeria' (1990) 10 Boston College Third World Law Journal 43.

²⁵ *Ibid.*, at 45.

²⁶ S Farran, 'Navigating between Traditional Land Tenure and Introduced Land Laws in Pacific Island States' (2011) 43 The Journal of Legal Pluralism and Unofficial Law 65 at 65.

²⁷ See section 43.

²⁸ *Land Use Act 1978 (LUA)*, CAP 202, *Laws of the Federation of Nigeria* 1990. Available at: www.nigeria-law.org/Land%20Use%20Act.htm, accessed 1 December 2016.

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exclusively in the Governor of each State, who holds the land in trust for the benefit of all Nigerians indigenous to such States.²⁹

The introduction of English land tenure law and the idea of the State managing land into Nigeria has raised difficulties that have affected the customary land rights of most Nigerians.³⁰ However, the preservation of certain aspects of customary land tenure within the LUA signifies the survival of some aspects of customary land tenure in those States, of which people indigenous to those States are beneficiaries.³¹ In the case of Abuja, the FCT Act vests all of Abuja lands in the Federal Government.³² As Abuja is not a State within the Nigerian federation, there is no Governor, hence the non-applicability of the LUA. The effect is that the powers to administer and manage land in Abuja are vested in the President of Nigeria.³³ The argument for the compulsory acquisition of the territory of Abuja is that a federal capital in a politically neutral region of the country with adequate space for expansion would serve as a national point of unity.³⁴ However, the factually erroneous view is that the Nigerian Federal

²⁹ See section 1. Section 2 gives the Governor responsibility for land in urban areas while lands in non-urban areas are the responsibility of the Local Governments. See also, Section 49 where lands vested in the Federal Government are excluded from the control of State Governments.

³⁰ See PE Oshio (n 24) above at 49. Also see, I Smith, 'Effects of the Land Use Act on Customary Land Tenure System in Nigeria' (1990) 2 *Journal of Contemporary Legal Problems* 119; FA Salamone, 'The Clash between Indigenous, Islamic, Colonial and Post-Colonial Law in Nigeria' (1983) 15 *The Journal of Legal Pluralism and Unofficial Law* 15; VC Uchendu, 'State, Land, and Society in Nigeria: A Critical Assessment of Land Use Decree (1978)' (1979) 6 *Journal of African Studies* 62; and L Agbosu, 'The Land Use Act and the State of Nigerian Land Law' (1988) 32 *Journal of African Law* 1.

³¹ PE Oshio, (n 24) above at 53-54. For example, Section 24 of LUA preserves the customary law rules governing devolution of property. Section 25 prohibits partitioning of land but it exempts cases which are regulated by customary law. Under Section 29 the holder or occupier entitled to compensation is a community and the governor is empowered to direct payment of the compensation either to the community or to its chief or leader to be disposed of by him for the benefit of the community in accordance with the applicable customary law. Section 50 then defines a 'customary right of occupancy' as 'the right of a person or community lawfully using or occupying land in accordance with customary law ...' while an 'occupier' is defined as 'any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law'

³² See section 1 (3).

³³ The President delegates his powers to do this to the Minister of the FCT.

³⁴ W Adebani, 'Abuja' in S Bekker and G Therborn (eds), *Capital Cities in Africa: Power and Powerlessness* (HSRC Press and CODESRIA, 2012) at 93-94.

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Capital Territory (FCT) did not belong to any ethnic group within Nigeria as at the time of the compulsory acquisition in 1976.³⁵ The recommendations of a Panel constituted for that purpose was accepted by the Nigerian Government which then promulgated the FCT Act,³⁶ establishing Abuja as the capital of Nigeria.³⁷

The Nigerian Government's initial attitude towards the indigenes was to evacuate and resettle them to some 'suitable' locations outside the territory at the expense of the Government.³⁸ However, it later claimed not have sufficient resources to carry out such a plan.³⁹ Instead, it decided that the peoples of Abuja may continue to live there until their lands are needed for developmental purposes.⁴⁰ Without payment of compensation or resettlement, the then President of Nigeria took over the administration of Abuja with effect from 1st January, 1981.⁴¹ Ironically, all the traditional District and Village Heads were retained⁴² - an indication that the government acknowledged the presence of established IPs in the territory.⁴³ As explained in section 1.2 below, the research questions enumerated in sub-section 1.2.2 below link with the central research objective, which is to critically examine whether the Nigerian peoples of Abuja are IPs and whether their customary land rights are protected as such under international law.

1.2. Research Objectives and Key Arguments

In connection to the above central research objective, this thesis aims to critically examine the definition of IPs in the literature and under international

³⁵ Ibid, at 94.

³⁶ Enacted through *Decree No 6 1976*.

³⁷ F Rodd *et al*, *Around and About Abuja* (Spectrum Books, 2005) at 5-6.

³⁸ Ibid.

³⁹ MJ Vatsa, *The Poetry of Abuja: Nigeria's Capital* (Cross Continent Press, 1983) at xii.

⁴⁰ Ibid.

⁴¹ F Rodd *et al*, (n 37) above at 7-8.

⁴² Ibid.

⁴³ Ibid.

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law. The introduction of the case study of Abuja in Chapter Four and the critical analysis of indigeneity that follows in Chapter Six lead to the central argument in this thesis that international human rights law should expand its definition of IPs to cover collective of peoples who belong to different ethnic groups whether such peoples have distinct or similar cultures. Support for this proposition will be established through using the case study of Abuja to critically engage with the existing body of literature on IPs.

Following the introduction of the case study in more detail in Chapter Four and the comparative analysis between the case study and the Ogiek peoples of Kenya in Chapter Five, in Chapter Six of this thesis, it will be demonstrated that the literature on the rights of IPs is characterised by unsettled debates about definition.⁴⁴ For example, James Anaya appears to define IPs in relation to people who inhabited a place prior to invasion by colonisers.⁴⁵ He acknowledges the various conceptions of the term in Africa and Asia.⁴⁶ However, Anaya appears to contradict himself by stating that colonialism is not a factor in determining those who qualify to be regarded as IPs.⁴⁷ One of the themes which comes out of the analysis of the debates on the definition of IPs in Chapter Six, is that this largely West-centric definition of IPs,⁴⁸ if followed strictly has the tendency to exclude certain groups of peoples from benefiting from the protections under international law on the rights of IPs such as land rights.⁴⁹ However, despite the dominance of this West-centric conception of

⁴⁴ See K Lehmann, 'To Define or Not to Define-The Definitional Debate Revisited' (2006) 31 *American Indian Law Review* 509.

⁴⁵ SJ Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004) at 3-4.

⁴⁶ *Ibid*, at 3. See also, SJ Anaya, 'Indigenous Rights Norms in Contemporary International Law' (1991) 8 (1) *Arizona Journal of International & Comparative Law* at 4, where Anaya maintains that cultural distinctiveness and colonialism are key features of IPs.

⁴⁷ *Ibid*, at 4.

⁴⁸ The West-centric definition places too much emphasis on distinctiveness of culture and a link to colonialism.

⁴⁹ For a more comprehensive examination of the definition of IPs, see L Hughes, *The Nonsense Guide to Indigenous Peoples* (New Internationalist Verso, 2003) at 11-16.

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IPs in international law,⁵⁰ in the context of this thesis, IPs are defined to mean any group of non-dominant and minority peoples who have ancestral roots to the territories where they live as against other dominant groups or institutions that threaten the enjoyment of their rights as a group.⁵¹

Alfred and Corntassel recognise that the literature on IPs has been dominated by 'identity constructions that reflect the colonized political and legal contexts.'⁵² Saugestad also identifies this problem when he recognises an African context to the term,⁵³ and examines the process leading up to the production of the Cobo Report⁵⁴ wherein the African conception was brought to focus but rejected. However, Saugestad does not provide a case study to demonstrate how this impacts on the protection or otherwise of the rights of IPs in Africa.⁵⁵ Indeed, like the definition of IPs their collective rights under

⁵⁰ For example, para 6 preamble of UNDRIP suggests that indigenous peoples are those who have suffered from colonialism. See also, Art 1 (1) (a), (b) and (c) as well as Article 1 (2) of ILO 169 where it is provided that the Convention applies to: tribal peoples in independent countries whose socio-cultural and economic conditions distinguish them from others; descendants of people who inhabited a place prior to conquest, colonisation, emergence of state boundaries and self-identification as indigenous.

⁵¹ This model of definition is apparent from a reading of the following literature: W Adebani, 'Terror, Territoriality and the Struggle for Indigeneity and Citizenship in Northern Nigeria' (2009) 13 *Citizenship Studies* 349; A Sayne, *Rethinking Nigeria's Indigene-Settler Conflicts* (US Institute of Peace, 2012); AO Adesoji and A Alao, 'Indigeneship and Citizenship in Nigeria: Myth and Reality' (2009) 2 *Journal of Pan African Studies* 151; African Commission on Human and Peoples Rights (ACHPR) and International Work Group on Indigenous Affairs (IWGIA), *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (IWGIA and ACHPR, 2005); and V Xaxa, 'Tribes as Indigenous People of India' (1999) *Economic and Political Weekly* 3589.

⁵² T Alfred and J Corntassel, 'Being Indigenous: Resurgences against Contemporary Colonialism' (2005) 40 *Government and Opposition* 597 at 605.

⁵³ See S Saugestad, 'Beyond the "Columbus Context": New Challenges as the Indigenous Discourse is Applied to Africa' in H Minde (ed), *Indigenous Peoples Self-determination, Knowledge, Indigeneity* (Eburon Delft, 2008) at 158. Also, note how Saugestad expresses his understanding of the meaning of IPs in the African context at 165-166.

⁵⁴ MJ Cobo, *Study of the Problem of Discrimination against Indigenous Populations* (United Nations (UN), 1987).

⁵⁵ For further discourse on this, see M Pelican, 'Complexities of Indigeneity and Autochthony: An African Example' (2009) 36 *American Ethnologist* 52. See also, JN Brown and PM Sant, *Indigeneity: Construction and Re/presentation* (Nova Science Publishers, 1999). For Asian perspectives, see RH Barnes, A Gray and B Kingsbury, *Indigenous peoples of Asia*, vol 48 (Association for Asian Studies Inc, 1995).

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international law appears to differ from the traditional notions of individual rights under general international human rights law.

Under international law there is a distinction between individual rights applicable to all and group or collective rights applicable to IPs by being *sui generis* rights under certain special international human rights instruments.⁵⁶ Generally, in international law the rights of IPs fall under the broad category of group rights,⁵⁷ and such rights includes land rights as well as cultural rights. Despite this distinction, this thesis will demonstrate in Chapter Seven that the jurisprudence of the UN Human Rights Committee (HRC), the UN human rights treaty Monitoring Bodies and the African Commission on Human and Peoples Rights (African Commission) illustrates that the general body of international human rights law is significant to the protection of land rights of IPs under international law.⁵⁸

⁵⁶ See MD Freeman, 'Are there Collective Human Rights?' (1995) 43 Political Studies 25.

⁵⁷ See P Alston, *People's Rights* (Oxford University Press, 2001); P Jones, 'Human Rights, Group Rights, and Peoples' Rights' (1999) 21 Human Rights Quarterly 80; D Sanders, 'Collective rights' (1991) 13 Human Rights Quarterly 368; T Van Boven, 'Human Rights and Rights of Peoples' (1995) 6 European Journal of International Law 461.

⁵⁸ See generally, Committee on the Elimination of Racial Discrimination (CERD), *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, fifty second session, Annex V, UN Doc A/52/18 (SUPP) (26 September 1997) (*General Recommendation No 23: Indigenous Peoples*); United Nations Human Rights Committee (HRC), *General Comment on Article 27*. CCPR/C/21/Rev.1/Add.5, 26 April, 1994; HRC, *Aerela and Nakkalajarvi v Finland*, HRC, Communication No 779/1997, UN Doc CCPR/73/D/779/1997, 24 October 2001; HRC, *Lubicon Lake Band v Canada*, Case 167/1984. UN Doc. A/45/40, Vol II; HRC, *Apirana Mahuika et al v New Zealand*, Case 547/1993, view of October 2000; HRC, *Sandra Lovelace v Canada*, Communication No 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977; HRC, *General comment No 18: Non-discrimination*, thirty seventh session (1989); Committee on Economic Social and Cultural Rights (CESCR), *General comment No 21: Right of everyone to take part in cultural life (art. 15, para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009. E/C.12/GC/21; CESCR, *General Comment No 13: Right of everyone to take part in cultural life (article 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) (2009)*. E/C.12/GC/21. 21 December 2009, at paras 46 and 47; CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health (2000)*, E/C.12/2000/4. 11 August 2000, at para 33; CESCR, *General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant*, E/C.12/GC/17. 12 January 2006, at para 28; and CESCR, *General Comment No 18: Article 6 of the International Covenant on Economic, Social and Cultural Rights (2005)* E/C.12/GC/18. 6 February 2006, at para 22; *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, para 6; ACHPR, *Advisory Opinion*, adopted at its forty first ordinary session held 16-30 May 2007

1.2.1. Land Rights of IPs under International Law

Out of the various rights of IPs under international law, land rights⁵⁹ have dominated debates in the literature because of IPs' historical connections with such lands and the connection of land rights to other rights under international human rights law, as land is beyond its usual economic value and tends to have spiritual and cultural implications.⁶⁰ This is the exact situation in Nigeria where people's identities are linked to land.⁶¹ However, the need to protect land rights of IPs may quite often come into conflict with the interests of the State. State interests may negate land rights of IPs, especially where the powers of the State to manage and control land are legitimised by national law as is the case in Nigeria.⁶² In this context, IPs are particularly vulnerable because of their lack of political and economic power. It will be argued in Chapters Four and Five that these kinds of situations demonstrate the importance of international law. This then leads and connects to the second central research objective in this thesis.

in Accra, Ghana; and ACHPR and IWGIA, *Report of the African Commission's Working Group on Indigenous Populations Communities*, (ACHPR and IWGIA, 2005).

⁵⁹ See Arts 13 and 14 of ILO 169 and Art 25 of UNDRIP which seeks to protect the land rights of IPs.

⁶⁰ G Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 *European Journal of International Law* 165, at 166. See also, S Farran, 'Land as a Fundamental Right: A Cautionary Tale' (2009) 40 *Victoria University of Wellington Law Review* 387 at 388-389. See also, S Farran, 'Navigating between Traditional Land Tenure and Introduced Land Laws in Pacific Island States' (2011) 43 *The Journal of Legal Pluralism and Unofficial Law* 65; and S Farran, 'Fragmenting Land and the Laws that Govern It' (2008) 40 *The Journal of Legal Pluralism and Unofficial Law* 93.

⁶¹ See W Adebani, 'Terror, Territoriality and the Struggle for Indigeneity and Citizenship in Northern Nigeria' (2009) 13 *Citizenship Studies* 349; A Sayne, *Rethinking Nigeria's Indigene-Settler Conflicts*, (United States (US) Institute of Peace, 2012); AO Adesoji and A Alao, 'Indigeneship and Citizenship in Nigeria: Myth and Reality' (2009) 2 *Journal of Pan African Studies* 151; African Commission on Human and Peoples Rights (ACHPR) and International Work Group on Indigenous Issues (IWGIA), *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (IWGIA and ACHPR, 2005); and I Nwachukwu, 'The Challenges of Local Citizenship for Human Rights in Nigeria,' (2005) 13 *African Journal of International & Comparative Law* 235.

⁶² For a similar situation in Kenya in relation to Ogieks, see J Kimaiyo and K Nakuru, *Ogiek Land Cases and Historical Injustices* (Egerton and Ogiek Welfare Council, 2004) at Chapters 5 and 7. See also, D Vinding and IWGIA, *The Indigenous World 2001-2002* (IWGIA, 2002) at 376-377; and D Vinding and IWGIA, *The Indigenous World 2002-2003* (IWGIA, 2003) at 367-368.

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After identifying those characterised as IPs under international law in Chapter Six and after a critical examination of whether IPs' land rights are protected under international law in Chapter Seven, the second central research objective is then to critically examine the relationship between international and national law in post-colonial Nigeria. A comparative analysis between Nigeria and Kenya in this respect will be made. The justification for such comparative analysis will be explained later in sub-section 1.3.3 below.

Accordingly, this thesis will use the case study of Abuja to develop the argument in Chapter Nine, that where a State has designed its national laws in ways that enable it to deny individuals or groups of their rights, there should be ways in which domestic courts of law in such States may have recourse to international law for the protection of such rights. To achieve this second central research objective, this thesis will in Chapter Eight examine the relationship between the Nigerian legal system and international law. Following on from the analysis in Chapter Eight, in Chapter Nine there will be a comparative analysis of the relationship between international and national law in the two Anglophone African States of Nigeria and Kenya.

The afore-mentioned comparative analysis will demonstrate the common historical and constitutional challenges that Anglophone African States are presented with, in terms of the application of international law domestically. This thesis will illustrate how Kenya has responded to these challenges and it will indicate how Nigeria may possibly improve the relationship between its legal system and international law.⁶³ It will be argued that while Nigeria and Kenya have historically followed the British tradition of dualism, recent constitutional developments in Kenya makes it easier for Kenyan courts and litigants to look to international law to resolve domestic legal issues. By contrast, it will be demonstrated that in Nigeria, international law is rarely

⁶³ See T Kabau and C Njoroge, 'The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonisation of the Legal System,' (2011) 44 *Comparative & International Law Journal of South Africa* 293.

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utilised by litigants with the courts applying international law only occasionally. In fact, the way Section 12 (1) of the Nigerian Constitution is worded makes it difficult to invoke the provisions of international law by domestic courts in Nigeria.⁶⁴

It will be argued that the implications of constitutional changes effected in Kenya through the adoption of the *Constitution of the Republic of Kenya 2010* (Kenyan Constitution) has enhanced better enforcement of international law by the domestic law courts in Kenya. Accordingly, it will be argued that for Nigerians to benefit effectively from the provisions of international law and for it to be generally enforceable in Nigeria, it will be necessary to amend the Nigerian Constitution by adopting the approach of the 2010 Kenyan Constitution.

Additionally, it will also be argued that if an amendment to the Nigerian Constitution is not possible, the courts of law in Nigeria have legitimate grounds to use their inherent powers as well as take guidance from other jurisdictions like the United Kingdom (UK) in terms of recent judicial developments in which the Supreme Court (UKSC) has demonstrated a willingness to use the provisions of international treaties to interpret national laws and policies, even when such treaties have not been domesticated into UK law.⁶⁵

1.2.2. Research Questions

To address the first central research objective, the following central and sub-research questions have been posed. The first central research question is: 1. Are Abuja peoples of Nigeria IPs under international law and are their customary land rights protected under international law as IPs? To answer this

⁶⁴ C Nwapi, 'International Treaties in Nigerian and Canadian Courts' (2011) 19 African Journal of International & Comparative Law 38.

⁶⁵ See *Cameron Mathieson v Secretary of State for Work and Pensions* [2015] (United Kingdom Supreme Court) UKSC 47 and *R (on the application of SG) and Ors v Secretary of State for Work and Pensions* [2015] UKSC 16.

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central research questions the following sub-research questions have been posed:

- 1) Who are IPs under international law?
- 2) Is the concept of IPs relevant in the African context?
- 3) Do Abuja peoples meet the criteria to qualify as IPs under international law?
- 4) How are children defined under international child rights law and are there any insights to be gleaned from this so that IPs may be defined in a more positive context?
- 5) How relevant is the general body of international human rights law to the protection of land rights of IPs and how does international law protect such rights?

However, as the African region in general has adopted its own regional human rights framework as a document written by Africans for Africans, it will be significant to enquire about its relevance to the protection of land rights of IPs in Africa. Accordingly, the following sub-research question is posed:

- 6) Are the land rights of IPs protected under the African Charter?

These research questions are answered in Chapters Six and Seven as explained further in section 1.6 below.

To achieve the second central research objective, the second central research question posed is: 2. What is the nature of the relationship between international and national law in post-colonial Africa? To answer this second central research question, the following sub-research questions have been posed:

- 1) What are the differences in approach and how do these impact on the domestic application of international law?
- 2) What is the nature of the relationship between international and national law in post-colonial Nigeria?
- 3) What is the nature of the relationship between international and national law in post-colonial Kenya?
- 4) What are the differences and similarities in the approaches of Nigeria and Kenya towards international law?

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- 5) Do the post-colonial African States of Nigeria and Kenya have anything to learn from each other in terms of the relationship between international and national law?

These second central and sub-research questions are answered in Chapters Eight and Nine. In answering the above central and sub-research questions, this research has been informed by two main theoretical frameworks and they include legal pluralism and post-colonialism as explained further in sub-section 1.2.3 below.

1.2.3. Theoretical Frameworks: Legal Pluralism and Post-Colonialism

In Chapter Two, it will be argued that the academic debates among scholars of legal pluralism which have been shaped by Jacques Vandalinden,⁶⁶ Barry Hooker,⁶⁷ Marc Galanter,⁶⁸ John Griffiths,⁶⁹ Boaventura de Sosa Santos,⁷⁰ Brian Tamanaha,⁷¹ Sally Engle Merry,⁷² Anne Griffiths,⁷³ Paul Schiff Berman,⁷⁴

⁶⁶ J Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later' (1989) 21 *The Journal of Legal Pluralism and Unofficial Law* 149.

⁶⁷ MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Clarendon Press Oxford, 1975).

⁶⁸ M Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 13 *The Journal of Legal Pluralism and Unofficial Law* 1.

⁶⁹ J Griffiths, 'The Idea of Sociology of Law and its Relation to Law and to Sociology' (2005) 8 *Current Legal Issues* 49 and J Griffiths, 'What is Legal Pluralism?' (1986) 18 *The Journal of Legal Pluralism and Unofficial Law* 1.

⁷⁰ BdS Santos, *The Post-Modern Transition: Law and Politics* (Oficina Do CES, 1989); BdS Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press, 2002); and BdS Santos, 'Law: A Map of Misreading-Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law & Society* 279.

⁷¹ BZ Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001); BZ Tamanaha, 'The Folly of the 'Social Scientific' Concept of Legal Pluralism' (1993) *Journal of Law and Society* 192; BZ Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375; BZ Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27 *Journal of Law and Society* 296; and BZ Tamanaha, C Sage and M Woolcock, *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, 2012).

⁷² SE Merry, 'Legal Pluralism' (1988) *Law and Society Review* 869.

⁷³ A Griffiths, 'Pursuing Legal Pluralism: The Power of Paradigms in a Global World' (2011) 43 *The Journal of Legal Pluralism and Unofficial Law* 173.

⁷⁴ PS Berman, 'Federalism and International Law through the Lens of Legal Pluralism' (2008) 73 *Missouri Law Review* 1149; PS Berman, 'A Pluralist Approach to International

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Gordon Woodman,⁷⁵ William Twining,⁷⁶ Franz von Benda-Beckmann,⁷⁷ Gunther Teubner⁷⁸ and Sally Falk Moore,⁷⁹ are useful in the context of this thesis. It will be argued in Chapters Two, Three and Four that legal pluralism theories explain the monopolisation of law by States which began with the emergence of statehood in Western Europe and which was imported into Africa through colonialism and that there are significant human rights implications of these in the context of protecting land rights of IPs which are often based on customary law.⁸⁰ It will be demonstrated in Chapter Four that the case study of Abuja supports this argument.

It will be further argued in Chapter Two that legal pluralism not only demonstrates the existence of different forms of law, it also throws up insights

Law' (2007) 32 *Yale Journal of International Law* 301; and PS Berman, 'The New Legal Pluralism' (2009) 5 *Annual Review of Law and Social Science* 225.

⁷⁵ GR Woodman, 'Constitutions in a World of Powerful Semi-Autonomous Social Fields' (1989) *Third World Legal Studies* 1; GR Woodman, 'Customary Law in Common Law Systems' (2001) 32 *Institute of Development Studies Bulletin* 28; GR Woodman, 'Ideological Combat and Social Observation: Recent Debate about Legal Pluralism' (1998) 30 *The Journal of Legal Pluralism and Unofficial Law* 21; GR Woodman, 'Legal Pluralism and the Search for Justice' (1996) 40 *Journal of African Law* 152; GR Woodman, 'Some Realism About Customary Law-The West African Experience' (1969) *Wisconsin Law Review* 128; and GR Woodman, U Wanitzek and H Sippel, *Local Land Law and Globalization: A Comparative Study of Peri-Urban Areas in Benin, Ghana and Tanzania* (Beiträge zur Afrikaforschung, 2004).

⁷⁶ W Twining, *Globalisation and Legal Theory* (Cambridge University Press, 2000) and W Twining, 'Legal Pluralism 101' in BZ Tamanaha, C Sage and M Woolcock (eds), *Legal Pluralism and Development—Scholars and Practitioners in Dialogue* (Cambridge University Press, 2010).

⁷⁷ See F von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 34 *The Journal of Legal Pluralism and Unofficial Law* 37 and K von Benda-Beckmann, *Globalisation and Legal Pluralism* (Springer, 2002)

⁷⁸ G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism, ' (1991) 13 *Cardozo Law Review* 1443.

⁷⁹ SF Moore, *Law as Process: An Anthropological Approach* (Routledge and Kegan Paul, 1978); SF Moore, *Social Facts and Fabrications" Customary" Law on Kilimanjaro, 1880-1980* (Cambridge University Press, 1986); SF Moore, 'From Giving and Lending to Selling: Property Transactions Reflecting Historical Changes on Kilimanjaro' in R Roberts and K Mann (eds), *Law in Colonial Africa* (Heinemann, 1991); SF Moore, 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology 1949-1999' (2001) 7 *Journal of the Royal Anthropological Institute* 95; and SF Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (Summer 1973) *Law and Society Review* 719.

⁸⁰ See BZ Tamanaha, (n 71) above and J Griffiths, (n 69) above.

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into the inherent conflict that legal pluralism generates.⁸¹ Therefore, locating Nigeria as a 'semi-autonomous social field',⁸² in Chapter Four it will be shown that there are human rights implications of legal pluralism in the context of how State law tends to exercise dominance over other forms of law.

Likewise, the ideas of the leading post-colonialists will be used to critically examine the case study. In doing this, the theoretical arguments of scholars on colonialism and de-colonisation by the four leading post-colonial writers prominent in the discipline - Frantz Fanon,⁸³ Edward Said,⁸⁴ Gayatri Spivak⁸⁵ and Homi Bhabha⁸⁶ - will be critically analysed and applied to the thesis in Chapter Four. The argument will be made that together the combined impact of their scholarly works provides critical perspectives to the case study. They do so through their demonstration of the hegemonic tendencies of colonialism through the control of knowledge and representation and the implications of these in a post-colonial Nigeria.

The argument then is that the circumstances in which Abuja peoples find themselves in terms of their land rights do not only have their origins in the colonial encounter with Britain, but they also illustrate the continuing impacts of colonialism in a purportedly post-colonial era. Indeed, as the Nigerian novelist Chinua Achebe observed in his world renowned literary piece - *Things Fall Apart*⁸⁷ - African societies fell apart with the consolidation of colonial rule.⁸⁸ It will be demonstrated in Chapters Two and Three that with the advent of

⁸¹ BZ Tamanaha, (n 71) above.

⁸² SF Moore, (n 79) above.

⁸³ F Fanon, *The Wretched of the Earth* (Grove, 1963).

⁸⁴ E Said, *Orientalism* (Pantheon, 1978).

⁸⁵ GC Spivak, 'Can the Subaltern Speak?' in C Nelson and L Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press, 1988) at 271-314.

⁸⁶ HK Bhabha, *The Location of Culture* (Psychology Press, 1994).

⁸⁷ C Achebe, *Things Fall Apart* (Everyone's Library, 1958).

⁸⁸ Ibid, at 152.

British colonial administration of Nigeria, customary law fell apart but not entirely. In Chapter Four it will be argued that the falling apart of customary law in colonial and post-colonial Nigeria has negative implications for the land rights of Abuja peoples. In developing this argument, it will be illustrated that some post-colonial scholarly works have demonstrated the colonial effects of destroying the organic evolution of indigenous African States.⁸⁹ This thesis will therefore contribute to the existing body of post-colonial literature by examining the relationship between the post-colonial African State of Nigeria and the IPs of Abuja.

1.3. Methodology and Methods

This research is predominantly doctrinal.⁹⁰ In conducting this research the following additional research techniques are utilised: case study and comparative research. The research is also law reform-focussed. This primarily doctrinal enquiry will review relevant primary sources such as State laws in Nigeria and Kenya, government policy documents, and reports of national and international human rights bodies. The international laws to be analysed include: the 1989 *International Labour Organisation Convention 169*

⁸⁹ For example, F Fanon, (n 83) above and E Said, (n 84) above. See generally, NL Bruce-Wallace, 'Africa and International Law—the Emergence to Statehood' (1985) 23 *The Journal of Modern African Studies* 575; OC Okafor, 'After Martyrdom: International Law, Sub-state Groups, and the Construction of Legitimate Statehood in Africa' (2000) 41 *Harvard International Law Journal* 503; and LD King, 'State and Ethnicity in Precolonial Northern Nigeria' (2001) 36 *Journal of Asian and African Studies* 339. See also, A Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1; A Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (1999) 32 *New York University Journal of International Law & Policy* 243; A Anghie, *Imperialism, Sovereignty the Making of International Law* (Cambridge University Press, 2005); A Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 *Third World Quarterly* 739; A Anghie *et al*, *The Third World and International Order: Law, Politics, and Globalization* (Martinus Nijhoff, 2003); and A Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibilities in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77.

⁹⁰ See M McConville and WHE Chui, *Research Methods for Law* (Edinburgh University Press, 2007) and CM Bast and RC Pyle, 'Legal Research in the Computer Age: A Paradigm Shift' (2001) 93 *Law Library Journal* 285.

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on the *Rights of Indigenous and Tribal Peoples* (ILO 169),⁹¹ the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP)⁹² and other general international human rights instruments.⁹³ The specific way in which this research has been undertaken using the afore-mentioned research methods is explained more elaborately in sub-sections 1.3.1–1.3.3 below.

1.3.1. Doctrinal Analyses

Doctrinal analyses about the debates on land rights of IPs in journals, commentaries, textbooks, encyclopaedias and legal periodicals have been made. This kind of enquiry has enabled the construction of alternative approaches to the definition of IPs and application of international law in Nigeria through its analytical methods.⁹⁴ Therefore, the main source of materials for this research has been the library. As the subject of this research requires some heuristic interdisciplinary research into anthropology in relation to the debates on the definition of IPs as well as anthropological information about the Abuja peoples, a research visit was made at the beginning stages

⁹¹ *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No 169) reprinted in ILM 1382 (1989), adopted in Geneva, at the 76th International Labour Congress (ILC) session on 27 June 1989, entered into force 5 September 1991.

⁹² *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP), adopted by the UNGA Resolution 61/295 on 13 September 2007.

⁹³ These instruments range from those emanating from the UN treaties and Treaty Monitoring Bodies such as the HRC, the CERD and the ILO. Others are: the *Universal Declaration of Human Rights* 1948 (UDHR), adopted by the UNGA Resolution 217A in Paris, France on 10 December 1948; *International Covenant on Civil and Political Rights* (1966) (ICCPR), adopted and opened for signature, ratification and accession by UNGA resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with its Art 49 *International Covenant on Economic, Social and Cultural Rights*, 1966 ((ICESCR) adopted and opened for signature, ratification and accession by UNGA Resolution 2200A (XXI) of 16 December 1966, entered into Force 3 January 1976, in accordance with its Art 27; *International Convention on the Elimination of All Forms of Racial Discrimination* (1965) (ICERD), adopted and opened for signature and ratification by UNGA Resolution 2106 (XX) of 21 December 1965, entered into force on 4 January 1969, in accordance with its Art 19; *UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*, 1992 (the Minority Rights Declaration), adopted by UNGA Resolution 47/135 at the 92nd Plenary meeting on 18 December 1992; and *The African Charter on Human and Peoples Rights*, 1987 (African Charter). Adopted in Nairobi, Kenya on 27 June 1981, entered into force 21 October 1986.

⁹⁴ R Banakar and M Travers, 'Law, Sociology and Method', in R Banakar and M Travers (eds), *Theory and Method in Socio-Legal Research* (Hart, 2005) at 7.

of this research to the anthropological section of the library at the University of Durham, for collection of anthropological literature on IPs and Abuja peoples.

In addition to the above, relevant materials have also been obtained from specialised libraries such as the British Library, and many other university libraries from across America and the UK with the support of the Northumbria University inter-library loan service. Books have been obtained, studied and analysed from the Northumbria University library as well as the Newcastle University library. Mainly journal articles from electronic law journals available through Westlaw, Hein Online, Lexis Library and JICS Journal Archive have been collected and reviewed through the electronic search engines NORA and Library Search of the Northumbria University library as well through the EndNote online electronic search engine. Documentations available on the website of the UN on IPs and relevant documentations from the website of the African Commission on Human and People's Rights (African Commission) as well as the African Court on Human and Peoples Rights (African Court) have been obtained and reviewed.

1.3.2. Case Study

Case study methodology⁹⁵ has also been utilised. The level of analysis is at the Nigerian State level. This single case study of Abuja was selected because the case study is in Nigeria and because of the researcher's in-depth knowledge of the case study and experience of practicing as a legal practitioner in the Nigerian legal system. The unit of analysis is Nigerian State laws, policies and the judicial decisions of Nigerian courts of law. Although the case-study method of research has been criticised for being 'the weak cousin' of research strategies,⁹⁶ this limitation has been resolved by the comparative

⁹⁵ See J Hamel, D Fortin and SP Dufour, *Case Study Methods* (Sage Publications, 1993); B Gillham, *Case Study Research Methods* (Continuum, 2000) and M Hammersley, R Gomm and P Foster, *Case Study Method: Key Issues, Key Texts* (Sage Publications, 2000).

⁹⁶ See generally, R Yin, *Case Study Research: Design and Methods* (Sage Publications, 1994) and J Hamel, D Fortin and SP Dufour, *Case Study Methods* (Sage Publications, 1993).

research method employed in this thesis as demonstrated sub-section 1.3.3 below.

Another reason why this single case-study approach has been chosen is because it presents the opportunity for detailed and insight-generating analysis.⁹⁷ This in turn gives room for an in-depth and detailed analysis of relevant laws in Nigeria *vis-à-vis* the international human rights regime on the rights of IPs. It also provides the opportunity to discover and analyse multiple and possibly conjectural factors that may either inhibit or enhance the effectiveness of international law in protecting land rights of Abuja peoples in a post-colonial Nigeria. This single case-study illuminates the problem with the West-centric description of IPs in a practical way and provides findings that can be used to make broad generalisations about the need to adopt a more expansive definition of IPs to cover more categories of peoples in the African context. In this way, although the research findings in this thesis are generally idiographic,⁹⁸ there are potentials for such findings to be nomothetic.⁹⁹

1.3.3. Comparative Research

The comparative technique utilised in this research examines the legal culture of the jurisdictions analysed and raises new insights as to how the law in Nigeria may be reformed in the future, while pointing out the possible difficulties that may be encountered as well as providing a critical appraisal of

⁹⁷ B Flvbjerg, 'Five Misunderstandings about Case-Study Research' (2006) 12 *Qualitative Inquiry* 219.

⁹⁸ By Idiographic it is meant that the findings in this research are applicable only to Nigeria and the case study in this thesis, generalisability to other similar research scenarios may be limited. For the meaning and import of Idiographic research, see H Tsoukas, 'The Validity of Idiographic Research Explanations' (1989) 14 *Academy of Management Review* 551 and DH Barlow and MK Nock, 'Why Can't we be More Idiographic in our Research?' (2009) 4 *Perspectives on Psychological Science* 19.

⁹⁹ Nomothetic research implies the capacity of research findings to be easily generalisable. See J Jaccard and P Dittus, 'Idiographic and Nomothetic Perspectives on Research Methods and Data Analysis' (1990) 11 *Research Methods in Personality and Social Psychology* 312 and HJ Hermans, 'On the Integration of Nomothetic and Idiographic Research Methods in the Study of Personal Meaning' (1988) 56 *Journal of Personality* 785. See also, R Donmoyer, 'Generalizability and the Single-Case Study' in R Gomm, M Hammersley and P Foster (eds), *Case Study Method: Key Issues, Key Texts* (Sage Publications, 2000).

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the Nigerian legal system.¹⁰⁰ This is done in Chapters Five and Nine by comparing the Nigerian legal system with its Kenyan counterpart in relation to the nature of the relationship between State law and other forms of law like IPs' customary law and international law respectively in both States. Indeed, this technique is also justified because as Kenya is an Anglophone African State with a plural legal system just like Nigeria, the experience of recent post-colonial law reforms in Kenya enables the advancement of possible reform-oriented solutions in a post-colonial Nigeria based upon approaches that have been tested in the Kenyan jurisdiction. This renders both jurisdictions apt for such comparative analysis.

In line with the above argument, Konrad Zweigert and Hein Kötz have argued '[t]hat method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation ...'¹⁰¹ because such comparison may lead to discovery of alternative solutions to a particular legal problem from one jurisdiction to another.¹⁰² Indeed, as Kenya has recently embarked on a series of law reforms and has also attempted to address domestic legal challenges in relations to land rights of IPs, this jurisdiction therefore constitutes a useful unit for comparative analysis with Nigeria. Although in Chapter Eight some general comparison will be briefly made in relation to the relationship between international and national law in Francophone post-colonial African States and Anglophone post-colonial African States, such comparison will be heuristic as a detailed analysis of

¹⁰⁰ See G Wilson, 'Comparative Legal Scholarship' in M McConville and WHE Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2010) at 89 and K Zweigert and H Kötz, *Introduction to Comparative Law* (Oxford University Press, 1998). On the use of legal culture as a technique of comparative legal research, see D Nelken, *Comparing Legal Cultures* (Ashgate Dartmouth, 1997); D Nelken, 'Using the Concept of Legal Culture' (2004) 29 *Australian Journal of Legal Philosophy* 1; D Nelken, 'Rethinking Legal Culture' in Freeman M (ed), *Law and Sociology* (Oxford University Press, 2006) 200-224; D Nelken, 'Thinking about Legal Culture' (2014) 1 *Asian Journal of Law and Society* 255; JP MacKenzie, 'The Legal Culture' (1995) 40 *New York Law School Law Review* 903; and LM Friedman, 'The Place of Legal Culture in the Sociology of Law' in M Freeman (ed), *Law and Sociology* (Oxford University Press, 2006) 185-199.

¹⁰¹ K Zweigert and H Kötz, (n 100) above at 15.

¹⁰² *Ibid.*

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judicial interpretation of the law in both legal systems is beyond the scope of this thesis. Indeed, it has been rightly argued that any such comparison will require the use of different methodologies and research techniques which are not utilised in this thesis.¹⁰³

Although comparative research in law has the limitation that other factors outside of law like cultural, social and political developments do have different impacts in different jurisdictions on the development of law,¹⁰⁴ careful attention has been given to the reasoning of the courts in both Nigeria and Kenya as to how and on what basis they interpret their domestic laws in the context of the applicability of international law in the domestic legal systems of the two States.

A similar attitude has also been taken in relation to how domestic courts of law in the two States accommodate or subject IPs' customary law to State law. The comparative analysis is aimed at law reforms in Nigeria. The comparative examination of the new approaches towards IPs' customary land rights and international law in Kenya, makes it possible to advance the hypothesis about the possible effectiveness of transplanting such new law reforms in Kenya into Nigeria to respond to similar challenges that exist in Nigeria in relation to the case study of Abuja. This kind of research technique contributes to the understanding of law in society and identifies possible avenues for law reforms in Nigeria.¹⁰⁵

¹⁰³ J Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1966) *The American Journal of Comparative Law* 419.

¹⁰⁴ G Wilson, (n 100) above at 93 and Z Konrad and K Hein, (n 100) above.

¹⁰⁵ G Wilson, (n 100) above at 92. For more on comparative research techniques in law, see G Dannemann, 'Comparative Law: Study of Similarities or Differences?' in M Reimann and R Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) at 384-418; TW Bennett, 'Comparative Law and African Customary Law' in M Reimann and A Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) at 642-671; M Graziadei, 'Comparative Law as the Study of Transplants' in M Reimann and A Zimmerman (eds), *Oxford Handbook of Comparative Law* (Oxford University Press, 2006) at 442-474; M Tushnet, 'Comparative Constitutional Law' in M Reimann and A Zimmerman (eds), *Oxford Handbook of Comparative Law* (Oxford University Press, 2006) at 1226-1256; and HM Watt, 'Globalization and Comparative Law' in M Reimann and A Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) at 583-606.

1.4. Limitations and Challenges of the Research

Although this doctrinal enquiry has provided quick answers to the research questions posed in this thesis and the construction of alternative approaches to law in Nigeria through its analytical methods;¹⁰⁶ a major limitation is that of subjectivity.¹⁰⁷ There is the possibility that the interpretations and analysis may have been influenced by personal views, perceptions, unconscious as well as conscious idiosyncrasies and understandings. This shortcoming has been mitigated with the use of a variety of sources. In addition, the analyses are not mere abstractions, as such analyses are of social utility in terms of the practical effects of law in society which is illustrated by using case study research method. Indeed, most of the laws, policy documents, cases, international laws and literature examined are available for public scrutiny and verification. Where possible references and links to internet sources have been provided in footnotes and bibliography.

Nevertheless, doctrinal enquiry can be time-consuming, and as Armstrong and Knott argue there is 'the difficulty of knowing when to stop searching'.¹⁰⁸ This challenge has been largely resolved by setting clear boundaries in terms of the type and relevance of documents reviewed at each point. However, conducting a doctrinal research from a desktop in Europe about a case study and a comparator jurisdiction in Africa is challenging to the extreme! For example, the publicly accessible databases of cases in both Nigeria and Kenya have no facilities for finding cases by using key words or even by using the names of the parties or case numbers.¹⁰⁹ These challenges have resulted

¹⁰⁶ AK Singhal and I Malik, 'Doctrinal and Socio-Legal Methods of Research: Merits and Demerits' (2012) 2 Educational Research Journal 252.

¹⁰⁷ Ibid.

¹⁰⁸ JDS Armstrong, and CA Knott, *Where the Law Is: An Introduction to Advanced Legal Research* (Thomson West, 2004) at 3.

¹⁰⁹ For Nigeria, see <www.nigeria-law.org/LawReporting.htm>, and <http://lawnigeria.com/>, accessed 29 November 2016. For Kenya see, <http://kenyalaw.org/caselaw/>, accessed 29 November 2016.

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in expending a lot of time and energy on reading many irrelevant materials and cases.

In line with the above challenges, there is hardly any way of knowing whether a case decided by a High Court or Court of Appeal has gone on appeal to the Supreme Court in either Kenya or Nigeria, as the publicly accessible databases have no facilities to automatically or manually monitor the progress of cases on appeal or as they are being decided by courts of law. The implication is that a case cited in this thesis may as at the time the reader is reading have been overruled or the Supreme Court in either country may have made a new decision in a new case that changes the entire position of the law in either Nigeria or Kenya. Likewise, the Parliaments in both countries may have enacted new legislation, amended a law. The implications are that by the time the reader is examining this thesis, such laws may have been revised or repealed. To that extent, the information, arguments and analyses made in this thesis represent the position of the law as at the time of writing.¹¹⁰

The last point on limitations and challenges is that the claims in Chapter Four in relation to the *de facto* existence and practice of customary land tenure in Abuja, despite the *de jure* exclusive ownership of the Federal Government of Nigeria, could have benefited from empirical evidence such as interviews and focus groups with some indigenous individuals and communities in Abuja. However, due to limited resources and time to conduct such an empirical enquiry, such empirical research methods have not been utilised. This limitation has been mitigated by references to available literature like the 2010 report by the United States Agency for International Development (USAID) on land tenure law in Nigeria; the report of the Centre on Housing Rights and Evictions (COHRE) and Social and Economic Rights Action Centre (SERAC); and the academic views of some authors.¹¹¹ Likewise, empirical evidence of

¹¹⁰ This thesis is up-to-date as at 31 March 2017.

¹¹¹ See USAID (2010), www.land-links.org/country-profile/nigeria/ accessed 07/04/ 17 and Centre on Housing Rights and Evictions (COHRE) and Social and Economic Rights Action Centre (SERAC), *The Myth of the Abuja Master Plan: Forced Evictions as Urban Planning in*

the complicity of indigenous elites from Abuja in creating and sustaining the problem with the land rights of Abuja peoples could have enriched the thesis by providing a holistic picture of the challenge of legally accommodating and protecting customary land rights of Abuja peoples.

1.5. Contribution and Originality

Studies in the 1980s and 1990s illustrated how law had been used to manipulate and determine power relations between people and groups in various societies.¹¹² Research also reveals that although African customary law was not static, through a combined effect of official colonial interference with the evolution of customary law and the role of indigenous African elites in the manipulation of power relations, official customary law has emerged which is different from the customary law practiced by ordinary African peoples.¹¹³ Scholars have argued for a symbiotic relationship between State law, customary law and other forms of law.¹¹⁴ Legal scholars have also revealed

Abuja, Nigeria (COHRE & SERAC, 2008) at 32. See Chapter Four, sub-section 4.1.2 at last two paragraphs.

¹¹² See SE Merry, 'Anthropology, Law and Transnational Processes' (1992) *Annual Review of Anthropology* 357 at 360 and JF Collier, *Marriage and Inequality in Classless Societies* (Stanford University Press, 1993).

¹¹³ See RL Roberts and K Mann (eds), *Law in Colonial Africa* (Heinemann Educational Books, 1991); SE Merry, (n 111) above at 364; and SF Moore, *Social Facts and Fabrications" Customary" Law on Kilimanjaro, 1880-1980* (Cambridge University Press, 1986).

¹¹⁴ See A Allott and GR Woodman, *People's Law and State Law: The Bellagio Papers* (Walter de Gruyter, 1985); BdS Santos, 'Law: A Map of Misreading-Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law & Society* 279; J Griffiths, (n 69) above; G Woodman, 'How State Courts Create Customary Law in Ghana and Nigeria' in Morse BW and G Woodman (eds), *Indigenous Laws and The State* (Foris Publications, 1988); and J Vanderlinden, 'Return to Legal Pluralism: Twenty Years Later' (1989) 21 *The Journal of Legal Pluralism and Unofficial Law* 149.

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the gap between the 'living'¹¹⁵ customary law and 'official'¹¹⁶ or 'sociologists' customary law.¹¹⁷

The literature has also identified several factors that have introduced changes into customary land laws like the State, interactions with other groups, official recognition by State institutions and globalisation.¹¹⁸ Indeed, a study has also revealed how State law tends to exclude peoples from utilising their indigenous accountability systems thereby negating their citizenship rights.¹¹⁹ Studies have shown how official State institutions tend to accommodate customary law and the influence of other factors on customary land law.¹²⁰ This thesis aims to contribute to the existing debates by illuminating how such official treatment of customary land laws negates customary land rights of IPs guaranteed under contemporary international law in post-colonial Nigeria. In this modest attempt, this thesis introduces the case study of Abuja, Nigeria to the existing debates

¹¹⁵ E Ehrlich, *Fundamental Principles of the Sociology of Law* (Russell & Russell Inc, 1962).

¹¹⁶ SF Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (Summer 1973) *Law and Society Review* 719.

¹¹⁷ GR Woodman, 'Judicial Development of Customary Law: The Case of Marriage Law in Ghana and Nigeria' (1977) 14 *University of Ghana Law Journal* 115.

¹¹⁸ See GR Woodman, 'Customary Land Laws within Legal Pluralism over the Generations', 4 *SADC Law Journal* 2014/15, 189-208; GR Woodman, 'Ghana: How Does State Law Accommodate Religious, Cultural, Linguistic and Ethnic Diversity?', in M Foblets, J Gaudreault-Desbiens and A Dundes Renteln (eds), *Cultural Diversity and the Law: State Responses from Around the World*, (Bruylant, Éditions Yvon Blais, 2010) 255-280; and GR Woodman, 'Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated From the Field of Land Law' in H Mostert and T Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta & Co Ltd, 2012) 35-58.

¹¹⁹ A Claassens, 'Contested Power and Apartheid Tribal Boundaries: The Implications of "Living Customary Law" for Indigenous Accountability Mechanisms, in H Mostert and T Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta & Co Ltd, 2012) 174-209.

¹²⁰ See AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20 *The Modern Law Review* 244; AN Allott, 'Towards the Unification of Laws in Africa' (1965) 14 *International & Comparative Law Quarterly* 366; AN Allott, 'What is to be Done with African Customary Law?' (1984) 28 *Journal of African Law* 56; and TO Elias, *The Impact of English Law on Nigerian Customary Law* (Ministry of Information, 1958).

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on legal pluralism by situating the case study within the context of international law.

This thesis makes original contributions to knowledge in three main specific ways. Firstly, the case study of Abuja peoples' land rights has not been academically studied in the context of the rights of IPs under international law. In this context, this case study is used as a vehicle through which to illustrate the need for a more expansive approach to the definition of IPs under international law to cover peoples with different cultures and belonging to different ethnic groups in an African context. There is no known literature as at the time of writing which has advanced this argument. In addition to this, the application of theories of legal pluralism and post-colonialism to this case study has also not been academically examined by any known literature about the rights of IPs under international law. Therefore, this thesis makes the original contributions to the existing body of literature on the rights of IPs by introducing the case study of Abuja to the existing debates on IPs and their rights under international law through the theoretical lenses of legal pluralism and post-colonialism.

Secondly, based on the analysis made in Chapter Six, the original argument is advanced that the existing academic, international and regional attempts at defining and empowering IPs need to adopt the contemporary approach used by international law towards protecting the rights of children. It will be demonstrated in Chapter Six that previously, children were presented as citizens in waiting.¹²¹ Consequently, children were not viewed as individuals fully ready to engage, live and participate in a world dominated by adults.¹²² It will be shown that this removed them from any discussion in relation to work,

¹²¹ See R Lister, 'Why Citizenship: Where, When and How Children?' (2007) 8 *Theoretical Inquiries in Law* 693. For examples of literature that justified this approach, see TH Marshall, *Citizenship and Social Class* (Cambridge University Press, 1950) and R Lister *et al*, 'Young People and Citizenship' in M Barry (ed), *Youth Policy and Social Inclusion*, vol 33 (Routledge, 2005).

¹²² *Ibid*.

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politics and sexuality.¹²³ They were presented as uncompleted human beings.¹²⁴ It will be maintained that this attitude towards children justified a lack of formal recognition of children as citizens and consequently their exclusion from acquiring citizenship rights.¹²⁵

To develop the above analogical argument, references will be made to the 1924 League of Nation's *Declaration on the Rights of the Child*,¹²⁶ and the 1959 *UN Declaration on the Rights of the Child*.¹²⁷ It will be argued that under these two previous international instruments on the rights of children, there was no recognition of the rights of children as autonomous people like their adult counterparts and children's participatory rights in decision matters that affected them were not protected.¹²⁸

After demonstrating the above previous approach to children's rights, it will be argued that by contrast to the above traditional approaches of presenting children as 'future adults' which created a binary situation in terms of citizenship rights between children and adults, the 1989 *UN Convention on the Rights of the Child*, (UNCRC),¹²⁹ adopts a completely different approach by

¹²³ P Aries, *Centuries of Childhood: A Social History of Family Life*. Translated from the French by Robert Baldick (Knopf, 1962) and KLF Calvert, *Children in the House: The Material Culture of Early Childhood 1600-1900* (North-Eastern University Press, 1992).

¹²⁴ C Jenks, 'Sociological Perspectives and Media Representations of Childhood' in J Fionda (ed), *Legal Concepts of Childhood* (Hart Publishing, 2001) at 23-33.

¹²⁵ See O O'Neill, 'Children's Rights and Children's Lives' (1992) 6 *International Journal of Law & Family* 24.

¹²⁶ 1924 League of Nation's *Declaration on the Rights of the Child*, adopted 26 September 1924 in Geneva, Switzerland. Available at: www.un-documents.net/gdrc1924.htm, accessed 26 November 2016.

¹²⁷ *UN Declaration on the Rights of the Child*, 1959 proclaimed by UNGA Resolution 1386 (XIV) of 20 November 1959. This formed the adoption of the latter *Convention on the Rights of the Child*, 1959 adopted by the UNGA 30 years later on 20 November 1989. The *UN Convention on the Rights of the Child*, 1989, entered into force on 2 September 1990.

¹²⁸ MD Freeman, *The Moral Status of Children: Essays on the Rights of the Children* (Martinus Nijhoff Publishers, 1997) at 50.

¹²⁹ *Supra*.

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empowering them with the capacity of being legal subjects in their own right.¹³⁰ It will be argued that there are analogical lessons to be gleaned from the transformation of children's rights under international child rights law that could be transplanted towards international law on the rights of IPs. The argument will be made that IPs are easily presented as victims. Like the previous approach towards children's citizenship rights *vis-à-vis* adults' citizenship rights, which created a binary situation, the way IPs are presented in international law appears to repeat this binary situation between 'victimised' IPs' citizenship rights on the one hand, and the citizenship rights of other 'non-victimised' citizens on the other hand.

The third and final point about originality and contribution to knowledge is in relation to the comparative analyses of the relationship between State law and IPs' customary law as well as international law in Nigeria and Kenya. As at the time of writing, no such comparative study between Nigeria and Kenya on the afore-mentioned subjects has been made.¹³¹ In this modest way, this thesis makes original contributions to the existing body of knowledge about the relationship between State law on the one hand, and IPs' customary law as well as international law on other hand. Such original contributions to the existing body of knowledge also succeed in pointing out ways in which the success of law reforms in Kenya could be transplanted to resolve similar legal challenges such as those which the case study of Abuja demonstrates in Nigeria. If this thesis succeeds in instigating such law reforms in Nigeria, it would have achieved its main objective.

¹³⁰ D Stasiulis, 'The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement' (2002) 6 *Citizenship Studies* 507.

¹³¹ Some comparative analyses found are in relation to international law but such analyses are in the context of Canada and Ghana. See C Nwapi, 'International Treaties in Nigerian and Canadian Courts' (2011) 19 *African Journal of International & Comparative Law* 38 and CN Okeke, 'The Use of International Law in the Domestic Courts of Ghana and Nigeria,' (2015) 32 *Arizona Journal of International & Comparative Law* 371.

1.6. Thesis Structure

In order to provide the reader with a clear presentation of the issues in this thesis and for a logical flow of the arguments advanced, the thesis has been divided into two main volumes. Following this introduction, Volume 1 will continue by presenting the historical and contextual background to the thesis in Chapters Two and Three. The main purpose of Chapter Two is to provide the reader with a general contextual and historical background to the colonial legal developments in Nigeria until political independence. In Chapter Three, the retention of the colonial legal heritage after political independence will be demonstrated. Against the background of the historical context set out in Chapters Two and Three, the case study of Abuja will be introduced in more detail in Chapter Four. In Chapter Five, there will be comparative analyses between Abuja peoples of Nigeria and Ogiek peoples of Kenya. The purpose of the comparative analyses in Chapter Five is to demonstrate how Kenya has responded to the challenges of protecting IPs' customary land rights and how Nigeria may respond to similar challenges.

Volume 2 is aimed at answering the research questions arising from the case study of Abuja which have already been enumerated in sub-section 1.2.2 above. Consequently, Chapter Six will critically examine the emergence of IPs and their land rights under international law by answering the first (1) central and sub-research questions 1), 2) 3) and 4). Sub-research questions 5 and 6 to the first central research question will be answered in Chapter Seven. In Chapter Eight, the relationship between the Nigerian legal system and international law will be critically analysed. In Chapter Nine, there will be comparative analyses of the relationship between national and international law in Nigeria and Kenya. This will be done by answering the second (2) central research question and its associated sub-research questions 1) and 2) in Chapter Eight. Sub-research questions 3), 4) and 5) are answered in Chapter Nine. Thereafter, the concluding arguments in this thesis will be presented in Chapter Ten.

CHAPTER TWO: ENGLISH LAW, CUSTOMARY LAW AND LEGAL PLURALISM IN COLONIAL NIGERIA - A HISTORICAL PERSPECTIVE

Introduction

The objective in this Chapter is to provide the reader with a historical background to this thesis and the case study which will be introduced in Chapter Four. To achieve this purpose, the Chapter has been sub-divided into three main sections. Section 2.1 examines the existence of indigenous States and customary law in pre-colonial Africa. The purpose is to illustrate the nature of pre-colonial statehood and the role of indigenous customary laws and legal institutions in the administration of justice in Africa prior to European colonial rule. The section concludes by examining the nature of the interactions between Africans and Europeans prior to colonialism and in the process, it demonstrates the nature, influence and balance of power between African customary law and European law before the advent of European colonial administration.

Section 2.2 examines the beginning of European colonialism which was formalised by the 1884-1885 Berlin Conference and the resultant partitioning of Africa amongst the colonial Powers. Whilst focussing on the colonial developments in West Africa and Nigeria it demonstrates the gradual introduction of English law into Nigeria and the simultaneous relegation of indigenous customary laws to an inferior status by the colonial legal institutions from 1861 until political independence of Nigeria in 1960. In section 2.3 it will be argued that the debates by scholars such as John Griffiths, Boaventura de Sousa Santos, Gordon Woodman, Brian Tamanaha, Gunter Tubner, Sally Engle Merry, Sally Falk Moore and others help in contextualising the coexistence of English law and customary law in colonial Nigeria. This legal pluralism discourse will be a springboard upon which later analyses will be made in subsequent Chapters.

2.1. Pre-Colonial Africa, Indigenous States and Customary Law

Africa's place in the world and the influence of external factors on the development of indigenous customary laws and legal systems from the Middle Ages to early nineteenth century can be understood within the context of political, commercial and historical interactions between Europeans and the more significant African States that existed from early times to the eve of colonialism. According to recorded history, ancient Ghana existed as a powerful Kingdom between 300-1240 A.D and was known in the ninth century to be carrying on trade with other indigenous African States such as Morocco.¹ Nii Lante Wallace-Bruce argues that 'Ghana had all the attributes of an effective Empire. In the words of Basil Davidson, it presented "the familiar picture of a centralized government which had discovered the art and exercise of taxation, another witness of stability and statehood."²

However, this ancient State of Ghana fell in the year 1240 A.D as it was conquered by the Kingdom of Susu and subsequently by the Empire of Mali.³ Like Ghana, Mali had all the characteristics of a very powerful empire, 'with effective systems of administration and justice.'⁴ Elias and Akinjide argued that it rose to

¹ See TO Elias and R Akinjide, *Africa and the Development of International Law* (Martinus Nijhoff Publishers, 1988) at 7; P Englebert, 'Pre-Colonial Institutions, Post-Colonial States, and Economic Development in Tropical Africa' (2000) 53 *Political Research Quarterly* 7; S Michalopoulos and E Papaioannou, 'Pre-Colonial Ethnic Institutions and Contemporary African Development' (2013) 81 *Econometrica* 113; and D Northrup, *Trade Without Rulers: Pre-Colonial Economic Development in South-Eastern Nigeria* (Oxford University Press, 1978).

² NL Bruce-Wallace, 'Africa and International Law—the Emergence to Statehood' (1985) 23 *The Journal of Modern African Studies* 575 at 578. See also, M Berbers, 'Archaeology and the Prehistoric Origins of the Ghana Empire' (1980) 21 *Journal of African History* 457; A Holl, 'Background to the Ghana Empire: Archaeological Investigations on the Transition to Statehood in the Dhar Tichitt Region (Mauritania)' (1985) 4 *Journal of Anthropological Archaeology* 73; and JD Fage, 'Ancient Ghana: A Review of the Evidence' (1957) 3 *Transactions of the Historical Society of Ghana* 3.

³ NL Bruce-Wallace, (n 2) above at 578.

⁴ *Ibid.*

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become one of the most powerful indigenous African States.⁵ Indeed, it has also been argued that the ancient Empire of Mali was a great example of the capacity of Africans to build States and has been described as one of the purely indigenous African States, which was remarkable and exemplified the capacity of Africans for political organisation.⁶ In Nigeria there were also numerous indigenous States in existence until the nineteenth century. In Northern Nigeria for example, notable indigenous States were the Hausa States of Kano, Gobir, Zaria, Katsina and the Sokoto Caliphate that extended eastwards from the River Niger to Lake Chad.⁷ The Sokoto Caliphate forcefully engulfed the other indigenous Hausa States in a nineteenth century expansionism – through a Jihad waged by one Usman Dan Fodio to form a theocratic empire that engulfed most of the non-Muslim States in Northern Nigeria.⁸

Likewise, in Southern Nigeria, pre-existing indigenous States until the nineteenth century included the Oyo Empire, the Benin Kingdom and the Kingdom of Ile-Ife among others.⁹ The Benin Kingdom was already a powerful State and independent by the time the Portuguese first visited in 1472.¹⁰ Therefore, prior to European colonialism a number of indigenous States were in existence in Africa,

⁵ TO Elias and R Akinjide, (n 1) above at 9.

⁶ Ibid. See also, M Quigley, *Ancient West African Kingdoms: Ghana, Mali, & Songhai* (Capstone Classroom, 2002); A Ghana, *Mali* (Methuen, 1973); D Lange, *Ancient Kingdoms of West Africa* (Röll, 2004); and P Koslow, *Mali: Crossroads of Africa* (Chelsea House Publication, 1995).

⁷ TO Elias and R Akinjide, (n 1) above at 10.

⁸ OC Okafor, 'After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa' (2000) 41 *Harvard International Law Journal* 503 and LD King, 'State and Ethnicity in Precolonial Northern Nigeria' (2001) 36 *Journal of Asian and African Studies* 339. See also, A Burns and AC Burns, *History of Nigeria* (Barnes & Noble, 1972) at 56-58; and JE Flint and RA Oliver, *The Cambridge History of Africa*, vol 5 (Cambridge University Press, 1976) at 121-160.

⁹ OC Okafor, (n 8) above at 508.

¹⁰ TO Elias and R Akinjide, (n 1) above at 10.

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contrary to the claims of some writers.¹¹ One of these claims is to the effect that '[a]t the time of the first sea voyages to Asia, Africa did not consist of well-organized states, though it had known some important states in the past.'¹² Indeed, some writers even argue that 'it was the inability of the rulers of traditional Africa to demonstrate and defend their statehood that resulted in the almost complete colonisation of the continent by Europe in the final decades of the nineteenth century.'¹³ To the contrary, it is herein submitted in the words of Wallace-Bruce that:

The Euro-centric view that Africa was devoid of state-organisation and in a legal vacuum during the pre-colonial period is not supported by evidence, and must be rejected. Likewise, the argument that the various organised entities were just 'tribal units', and not sovereign states, must be dismissed.¹⁴

However, developments in Europe in relation to the Berlin Conference of 1884-1885 would change the course of history in terms of the independence, sovereignty and the nature of indigenous customary laws and legal institutions of the various indigenous African States. From the latter half of the nineteenth century to the latter half of the twentieth century there was a transition from a period of mere interactions in trade and diplomatic relations to a period of formal colonisation, when the sovereignty of African States was removed from the global

¹¹JJG Syatauw, *Some Newly Established Asian States and the Development of International Law* (Springer Science & Business Media, 2013).

¹² *Ibid*, at 18.

¹³ See RH Jackson and CG Rosberg, 'Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis' (1986) 24 *The Journal of Modern African Studies* 1 at 2.

¹⁴ NL Bruce-Wallace, (n 8) above at 583. A comprehensive discussion about the status of indigenous African States prior to colonialism is beyond the scope of this thesis. For more detailed information and studies on these, see B Davidson and J Hughes, *The Story of Africa* (Mitchell Beazley, 1984); B Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (Times/Random House, 1993); G Casely-Hayford, *The Lost Kingdoms of Africa* (Bantam Press, 2012); RJ Reid, *A History of Modern Africa: 1800 to the Present*, vol 7 (John Wiley & Sons, 2011); E Coulson 'African Society at the Time of the Scramble' in LH Gann and P Duignan (eds), *Colonialism in Africa, 1870-1960: The History and Politics of Colonialism 1870-1960*, vol 1 (Cambridge University Press, 1969) 27-60.

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map of this period. Before examining the legal and political developments in colonial Nigeria it is important to examine the nature of pre-colonial African customary laws and the indigenous legal systems in general.

2.1.1. Pre-Colonial Africa and Indigenous Customary Laws

In the context of this thesis, indigenous African customary law refers to the unwritten customary rules which are considered as binding upon members of various African communities in pre-colonial, colonial and post-colonial times¹⁵ which Elias argued 'forms part and parcel of law in general'.¹⁶ Likewise, Robert Smith demonstrated that although there is some diversity in African customary law across the continent, such differences do not outweigh the similarities.¹⁷ Anthony Allott,¹⁸ identifies and examines the common features of African customary laws to include: the unwritten and customary nature of the law;¹⁹ some similarities in judicial processes,²⁰ which could be indigenous courts presided over by chiefs or in the arbitral tribunal in the villages,²¹ households, families and even clans;²² the significance of the supernatural;²³ forms of government founded upon consent of the community as well as the function and role of the community

¹⁵ See R Smith, 'Peace and Palaver: International Relations in Pre-colonial West Africa' (1973) 14 *The Journal of African History* 599 at 600. See also, M Chanock, 'Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform' (1989) 3 *International Journal of Law, Policy and the Family*; 72 and GR Woodman, 'African Legal Systems', in JD Wright (ed), *International Encyclopaedia of the Social & Behavioral Sciences* (2nd edn, Elsevier, 2015) 272-275.

¹⁶ TO Elias, *The Nature of African Customary Law* (Manchester University Press, 1972) at v.

¹⁷ R Smith, (n 15) above at 600. See also, AN Allott, 'Towards the Unification of Laws in Africa' (1965) 14 *International & Comparative Law Quarterly* 366 at 368.

¹⁸ AN Allott, *Essays in African Law* (Butterworth, 1960) at 66-70.

¹⁹ *Ibid*, at 62 and 66.

²⁰ *Ibid*, at 68.

²¹ *Ibid*.

²² *Ibid*, at 68 and 70.

²³ *Ibid*, at 69.

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in the application, interpretation and enforcement of the law.²⁴ Elias, appears to agree with this characterisation of African law as he also argued that across Africa there had emerged rules of customary law that were similar.²⁵ Similarly, Smith reported that such customary laws were widespread in Africa and they were noticed by European visitors to Africa prior to colonialism.²⁶ Customary law evolved with the various pre-colonial African societies. This implies that indigenous African customary laws were by no means static or uniform across pre-colonial African societies, as Sally Falk Moore observed amongst the pre-colonial Chagga peoples of Kilimanjaro, Tanzania.²⁷

Indeed, pre-colonial customary laws and societies in Africa existed harmoniously with each other, such that a study of the history of African customary law in any African society is akin to a study of the history of such societies.²⁸ Similarly, Omoniyi Adewoye observed, in relation to Southern Nigeria, that customary law in this area was '...latent in the breasts of the community's ruling elite or of the court of remembrance, and was given expression only when...called for...'²⁹ However, it remained as much 'a functional element' or 'a means of practical

²⁴ Ibid, at 68-70.

²⁵ TO Elias, 'African Law' in A Larson and CW Jenks, *Sovereignty within the Law* (Oceania, 1965) at 210-222. See also, M Gluckman, *Ideas and Procedures in African Customary Law* (Oxford University Press, 1969); AN Allott, *Essays in African Law: With Special Reference to the Law of Ghana* (Butterworth, 1960); AL Epstein, *Juridical Techniques and the Judicial Process: A Study in African Customary Law*, vol 1 (Manchester University Press, 1954); S Roberts, 'Introduction: Some Notes on "African Customary law"' (1984) 28 *Journal of African Law* 1; C White, 'African Customary Law: the Problem of Concept and Definition' (1965) 9 *Journal of African Law* 86; and LA Obiora, 'Reconsidering African Customary Law' (1993) 17 *Legal Studies Forum* 217.

²⁶ R Smith, (n 15) above at 600.

²⁷ SF Moore, *Social Facts and Fabrications "Customary" Law on Kilimanjaro, 1880-1980* (Cambridge University Press, 1986) at 38.

²⁸ Al Asiwaju, 'Law in African Borderland: The Lived Experience of the Yoruba Astride the Nigerian-Dahomey Border' in RL Roberts and K Mann (eds), *Law in Colonial Africa* (Heinemann Educational Books, 1991) 224-238 at 226.

²⁹ O Adewoye, *The Judicial System in Southern Nigeria 1854-1954: Law and Justice in a Dependency* (Longman, 1977) at 3.

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action as law in literate society.³⁰ In line with the above argument, it has been argued that indigenous African customary law ‘... provided a bond between the different States and peoples of West Africa, and a form of international law by which their relations with each other could be regulated.’³¹ One of the main objectives of customary law, as in the case of Southern Nigeria, was for ‘peace-keeping and the maintenance of the social equilibrium.’³² The reconciliation of parties to a particular dispute was also one of the overall objectives of indigenous African legal processes.³³ In contrast to the nature of the French inquisitorial and the British adversarial judicial systems, the overarching goal of law in pre-colonial African societies was ‘...to assuage injured feelings, to restore peace, to reach a compromise acceptable to both disputants.’³⁴

The various interactions amongst African societies *inter se* and the interactions between Africans and Europeans in terms of trade and inter-State relations in the pre-colonial era had some influences on the development of indigenous African customary laws.³⁵ Richard Roberts and Kristin Mann confirm that some legal relationships and interactions between Europe and Africa existed prior to colonialism.³⁶ The pro-longed interactions between Africans and Europeans pre-colonially had the effect of gradually influencing the already evolving indigenous customary legal rules and institutions as the patterns of resource utilisation, trade

³⁰ Ibid.

³¹ R Smith, (n 15) above at 600-601.

³² Ibid.

³³ Ibid.

³⁴ O Adewoye, (n 29) above at 4.

³⁵ Ibid.

³⁶ RL Roberts and K Mann, ‘Law in Colonial Africa’ in RL Roberts and K Mann (eds), *Law in Colonial Africa* (Heinemann Educational Books, 1991) at 9.

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and social life were changing.³⁷ This development in terms of the pre-colonial interactions between Africans and Europeans including the already polyethnic nature of the various indigenous political units gave rise to a pre-colonial situation of legal pluralism with the effects of gradually changing some indigenous African customary laws.³⁸ Thereby adding another layer to the already existing pre-colonial pluralism in the indigenous African States.³⁹

From the above historical analyses, three points are obvious in terms of the nature of customary law on the eve of formal colonialism. First, indigenous African customary law was largely unwritten and founded upon oral traditions which emerged simultaneously with the evolution of various African societies.⁴⁰ Secondly, although there were certain similarities in the indigenous African laws practiced amongst various pre-colonial African societies as demonstrated by Allott and Elias,⁴¹ there were some differences as a result of language, ideology, legal rules and social institutions.⁴² Thirdly, due to the polyethnic and heterogeneous nature of some pre-colonial African States as well as the introduction of new forms of law by dominant groups or as a result of the prolonged interactions between Africans and Europeans - there was already a situation of legal pluralism⁴³ evolving within pre-colonial African States.

³⁷ Ibid, at 10. See also, E Coulson, 'African Society at the Time of the Scramble' in LH Gann and P Duignan (eds), *Colonialism in Africa 1870-1960: The History and Politics of Colonialism 1870-1960*, vol1 (Cambridge University Press, 1969) at 27-60.

³⁸ E Coulson, (n 37) above at 27-60

³⁹ AN Allott, (n 17) above at 369. For the general situation in West Africa see E Coulson, (n 37) above at 35-46.

⁴⁰ Al Asiwaju, (n 28) above at 226.

⁴¹ AN Allott, (n 17) above at 369 and TO Elias, (n 25) above at 210-222.

⁴² E Coulson, (n 37) above at 35-60.

⁴³ See, J Griffiths, 'What is Legal Pluralism?' (1986) 18 *The Journal of Legal Pluralism and Unofficial Law* 1 and BZ Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375.

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It must be noted however, 'that prior to the nineteenth century, the balance of power in African and European legal interactions favoured the Africans.'⁴⁴ Therefore, although the 'semi-autonomous social fields'⁴⁵ of pre-colonial African societies may have been invaded, African customary law appears to have held its own turf, on its own terms whilst sometimes changing in accordance with prevailing social, economic and political circumstances of the times. African customary laws did not depend on the recognition of any external sovereign entity, institution, law or person for recognition and validity.⁴⁶

The validity of customary laws were dependent on their acceptance by members of a community as binding upon them.⁴⁷ In this context and in the overall context of this thesis, a community in the words of Bromley and Cernea means any group which may '... vary in nature, size and internal structure across a broad spectrum, but they are social units with definite membership and boundaries, with certain common interests, with at least some interaction among members, with some common cultural norms, and often their own endogenous authority systems.'⁴⁸ However, as this Chapter will demonstrate in sub-section 2.1.2 and section 2.2 below, the balance of power in the legal interactions between Africans and

⁴⁴ RL Roberts and K Mann, (n 36) above at 9.

⁴⁵ See SF Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) *Law and Society Review* 719.

⁴⁶ See TO Elias, (n 25) above at 210-222.

⁴⁷ *Ibid.*

⁴⁸ DW Bromley and MM Cernea, *The Management of Common Property Natural Resources: Some Conceptual and Operational Fallacies*, vol 57 (World Bank Publications, 1989) at 15. See also, A Ainslie, 'When "Community" Is Not Enough: Managing Common Property Natural Resources in Rural South Africa' (1999) 16 *Development Southern Africa* 375 at 375; P Blaikie, 'Is Small Really Beautiful? Community-Based Natural Resource Management in Malawi and Botswana' (2006) 34 *World Development* 1942; T Kepe, 'The Problem of Defining 'Community': Challenges for the Land Reform Programme in Rural South Africa' (1999) 16 *Development Southern Africa* 415; J Dyer *et al*, 'Assessing Participatory Practices in Community-Based Natural Resource Management: Experiences in Community Engagement from Southern Africa' (2014) 137 *Journal of Environmental Management* 137; and A Agrawal and CC Gibson, 'Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation' (1999) 27 *World Development* 629 at 630-631.

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Europeans shifted from one that favoured African customary law to one that favoured European law with the formalisation of colonialism in the mid-nineteenth century to the present day.

2.1.2. The Emergence of English Law and Legal Institutions in Nigeria

Elias reported that prior to 1832 British traders were involved in commercial transactions with people in the coast and along the river creeks of Southern Nigeria for several years.⁴⁹ Alan Burns also reported that most of the British traders were unable to legally enforce their debts against the local merchants and customers, so that the only available authority to regulate these transactions was the powers exercised at the time by captains of the Queen of England's ships operating at nearby stations.⁵⁰ However, in 1849 the first British Consul was appointed in Lagos 'for the purpose of regulating the legal trade between British merchants and the ports of Benin, Brass, New and Old Calabar, Bonny, Bimbia, the Cameroons, and the ports in the territories of the King of Dahomey'.⁵¹ Therefore, this marked the beginning of direct influence of British legal rules and institutions in Southern parts of what was to become Nigeria.⁵²

Treaties signed between Britain and local chiefs 'authorised Britain to take military action to put an end to slave trade in the Nigerian territories'⁵³ such as the treaties entered into by King Akitoye of Lagos with Consul Beecroft and Commodore Bruce, while a Vice-Consul was appointed for the purpose of enforcing the

⁴⁹ TO Elias, *Groundwork of Nigerian Law* (Routledge & Kegan Paul, 1954) at 38. See also, JA Yakubu, 'Colonialism, Customary Law and the Post-Colonial State in Africa: The Case of Nigeria' (2005) 30 (4) *Africa Development* 201 at 202.

⁵⁰ A Burns and AC Burns, *History of Nigeria* (Barnes & Noble, 1972).

⁵¹ As quoted in TO Elias, (n 49) above at 39. See also, BO Nwabueze, *A Constitutional History of Nigeria* (Addison-Wesley Longman Ltd, 1982) at 5.

⁵² BO Nwabueze, (n 51) above at 5-6.

⁵³ *Ibid*, at 6.

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provisions of the treaty.⁵⁴ Such were the administrative and legal scenarios in Lagos between 1852 and 1860.⁵⁵ However, despite the establishment of Consular Courts in Lagos, most indigenous Lagosians (Nigeria did not exist at this time) still utilised the indigenous customary means of administering justice in the various local chief indigenous tribunals.⁵⁶ Therefore, it was only those Lagosians who were involved in business activities with foreign traders and a few others who submitted themselves to the Consular Courts for the resolution of their trade disputes that came under the jurisdiction of the Consular Courts.⁵⁷ Elias argued that it was because the majority of the disputes continued to be adjudicated by the native chiefs using the indigenous customary laws that accounted for 'so few disturbances' in Lagos.⁵⁸

For reasons of historical accuracy, it is important to note that although the Berlin Conference of 1884-1885 represents the moment when colonialism in Africa was legally effected and hence marked the beginning of formal colonialism in Africa by the European Powers as will be demonstrated in section 2.2 below, the gradual emergence of the colonial legal developments in Lagos described in section 2.1, was a gradual crystallisation of the already existing smaller-scale colonial influence by Europeans in Africa.⁵⁹ For example, the Gold Coast was already a Colony by 1850 and Lagos by 1861.⁶⁰ Tunis and other territories were also already international Protectorates before the Berlin Conference.⁶¹ However, the

⁵⁴ Ibid.

⁵⁵ AE Afigbo, 'Background to Nigerian Federalism: Federal Features in the Colonial State' (1991) 21 *Publius: The Journal of Federalism* 13 at 16.

⁵⁶ TO Elias, (n 49) above at 39 and BO Nwabueze, (n 51) above at 5-6.

⁵⁷ JA Yakubu, (n 49) above at 202.

⁵⁸ TO Elias, (n 49) above at 39.

⁵⁹ Ibid.

⁶⁰ TO Elias and R Akinjide, (n 1) above at 18.

⁶¹ Ibid.

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above evolving colonial legal developments and colonial annexation of territories was given global imprimatur by the 1884–1885 Berlin Conference. Therefore, the Berlin Conference became a catalyst for European acquisition of territories in Africa with enormous implications for the legal status of indigenous African customary laws as demonstrated further in section 2.2 below.

2.2. Colonial Africa, English Law and Customary Law in Colonial Nigeria (1861-1960)

British colonial administration of Nigeria was legally effected by the signing of the *Treaty of Cession* with King Docemo of Lagos and four other of his chiefs at the Consulate on 6 August, 1861.⁶² Consequently, Lagos formally became a British Settlement under the administration of a British Governor in 1862.⁶³ The Governor presided over disputes between merchants.⁶⁴ Military officials performed law enforcement duties within the Settlement of Lagos.⁶⁵ Other courts were also established in January 1862 for increased efficacy in the administration of justice by the British colonial administration.⁶⁶ After the cession of Lagos in 1861, the first Legislative Council was established there in 1862.⁶⁷ English law was made applicable in Lagos on 4th March, 1863.⁶⁸

In addition, under the English *Colonial Laws Validity Act* 1865, any legislative enactment from a Colony which was contrary to the provisions of any Act of the

⁶² O Ikimi, 'Nigerian Reaction to The Imposition of British Colonial, 1885-1918 in S Förster, WJ Mommsen and RE Robinson, *Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition* (Oxford University Press, 1988) 454-467 at 458.

⁶³ AO Obilade, *The Nigerian Legal System* (Sweet & Maxwell, 1979) at 18.

⁶⁴ O Ikimi, (n 62) above at 458.

⁶⁵ Ibid.

⁶⁶ AO Obilade, (n 63) above at 19-21.

⁶⁷ TO Elias, (n 49) above at 40.

⁶⁸ AO Obilade, (n 63) above at 18.

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British Parliament extending to the Colony was deemed repugnant and void.⁶⁹ The Act also empowered the authorities of a Colony to establish legislative and judicial institutions for the making of laws and the administration of justice in the Colonies.⁷⁰

The organisation of justice in this early colonial period was done on an unofficial basis, as the Courts of Equity were created to resolve disputes.⁷¹ The Courts of Equity were informal courts created for the resolution of trade disputes between European traders and their indigenous African counterparts.⁷² However, by an *Order in Council* 1872 the afore-mentioned Courts of Equity were given legislative imprimatur.⁷³ The afore-mentioned *Order in Council*⁷⁴ made provisions for the official organisation of both Consular and Equity Courts. With respect to the Courts of Equity, Article 5 of the Order empowered the Consul to 're-organise the local Courts known as the Courts of Equity' in the following jurisdictions: Old Calabar, Bonny, Cameroons, New Calabar (Degema), Brass, Opobo, Nun and Benin Rivers (these jurisdictions later became known as the Oil Rivers Protectorate)⁷⁵ for resolving trade disputes between 'British subjects or between British subjects and natives'.⁷⁶

⁶⁹ TO Elias, (n 49) above at 56-57.

⁷⁰ Ibid, at 57.

⁷¹ See O Adewoye, *The Judicial System in Southern Nigeria, 1854-1954: Law and Justice in a Dependency* (Longman, 1977) at 31-69.

⁷² Ibid, at 31-32.

⁷³ Ibid, at 31.

⁷⁴ The *Order in Council* of 21 February 1872 as cited in O Adewoye, (n 71) above at 31.

⁷⁵ The Oil Rivers Protectorate haven been created later in 1885.

⁷⁶ TO Elias, (n 49) above at 57. See also, AO Obilade, (n 63) above at 18.

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The composition of the Courts of Equity comprised of 'British agents and traders carrying on business at the place where the courts were established'⁷⁷ and Assessors were required to assist the Consul in the adjudication of more serious and important cases.⁷⁸ The courts were to exercise jurisdiction over natives to the extent that such native persons or person 'surrendered himself to the jurisdiction and gave security to abide by the decisions of the Consul or of the Courts of Equity.'⁷⁹ In addition to the Courts of Equity, the 1872 *Order in Council* also legally regularised Consular Courts empowering the Consul to apply and ensure the enforcement of any treaty, convention or agreements made or to be made between Britain and the local chiefs in the afore-mentioned territories.⁸⁰ Elias argued that it was based on the residual powers conferred by the 1872 *Order in Council*⁸¹ 'that the Consul got the authority to appoint local chiefs to preside over the adjudication of disputes'.⁸²

The above developments signalled the willingness of the early colonial authorities (1861-1874) to accommodate and use indigenous legal mechanisms simultaneously with the introduced English legal system in what would later become Nigeria.⁸³ It is important to note that the afore-mentioned legal history relates only to the Settlement of Lagos and some territories in present day southern parts of Nigeria.⁸⁴ However, as Adiele Afigbo argues '[f]rom here, this

⁷⁷ TO Elias, (n 49) above at 57.

⁷⁸ Ibid.

⁷⁹ Ibid, at 57.

⁸⁰ Ibid.

⁸¹ As quoted in TO Elias (n 49) above at 57.

⁸² TO Elias (n 49) above at 57.

⁸³ Ibid.

⁸⁴ That is other territories within the Oil Rivers Protectorate.

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political, constitutional, legal and commercial tradition was to assault the rest of the Nigerian interior and to seek to overwhelm it ...'⁸⁵

In line with the above claim, by virtue of a Royal Commission of 19 February, 1866, the Settlement of Lagos was united with the Settlements of the Gold Coast, Sierra Leone, and the Gambia under one Government known as the Government of the West African Settlements with the Capital in Sierra Leone.⁸⁶ In 1874, the Settlements of Gold Coast and Lagos were separated from the Government in Sierra Leone to form a separate Colony known as the Gold Coast Colony with its own legislature which promulgated the *Supreme Court Ordinance* No 4 1876.⁸⁷ Therefore, Lagos was at this period (1874-1886) part of the Colony of the Gold Coast. However, upon separation of Lagos and Gold Coast in 1886⁸⁸ the *Supreme Court Ordinance* No 8 1886 amended the *Supreme Court Ordinance* 1876 above.⁸⁹

The *Supreme Court Ordinance* No 8 1886 established the Supreme Court of the Colony of Lagos as the Supreme Court of Judicature for 'the Colony of and for the territories thereto near or adjacent wherein Her Majesty may at any time before or after the commencement of this Ordinance have acquired power and jurisdictions.'⁹⁰ Section 14 of the *Supreme Court Ordinance* provided that: 'the Common Law, the doctrines of Equity and statutes of general application in force in England on 24 July 1874 should be in force within the court's jurisdiction.'⁹¹

⁸⁵ AE Afigbo, (n 55) above at 18. See also, AE Afigbo, 'The Establishment of Colonial Rule' in F Ajayi and M Crowder (eds), *History of West Africa*, vol., 2 (Longman, 1974) at 440.

⁸⁶ JA Yakubu, (n 49) above at 204.

⁸⁷ Ibid.

⁸⁸ By letters Patent of 13 January, 1886, proclaimed on 13 February, 1886.

⁸⁹ JA Yakubu, (n 49) above at 204.

⁹⁰ Section 3 as quoted in TO Elias, (n 49) above at 67.

⁹¹ TO Elias, (n 49) above at 67.

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Section 17 also provided that all relevant imperial laws were to be applied only within local limits. By virtue of section 19 all indigenous laws and customs which were not 'repugnant to justice, equity and good conscience', were to be applied by the Court in so far as practicable.⁹²

Therefore, although the colonial authorities recognised the indigenous customary laws, such customary laws were subjected to an inferior status in comparison to English and colonial laws as well as the English principles of equity, justice and good conscience.⁹³ In addition to subjecting customary laws to the 'repugnancy clause', the Privy Council in England became the apex Court as appeals from the decisions of Supreme Court of Lagos could be referred to the Privy Council. In this way, the British colonial authorities succeeded in introducing the common law, principles of equity and general principles of English law into the Colony of Lagos and other 'Protected Territories', while subjecting customary law and indigenous legal institutions to an inferior status.⁹⁴

It is argued that this was the beginning of formal legal pluralism in the weak sense in Nigeria as explained later in section 2.3 below. The meaning of legal pluralism in the weak sense will also be demonstrated and examined in section 2.3 through a critical examination of the literature and debates on legal pluralism. However, to provide the reader with sufficient information about the broader picture of the changing legal tradition in Nigeria during British colonial rule as well as the evolution of the Nigerian State through colonial unification of hitherto separate and independent indigenous political units, it is significant for the reader to be presented with the legal development in other parts of the territories that would

⁹² TO Elias, (n 49) above at 67.

⁹³ As amended by the *Supreme Court Ordinance* No 8 1886 cited in TO Elias, (n 49) above at 67.

⁹⁴ By an *Order in Council* of 29 December, 1887, the Legislative Council of the Colony of Lagos was also empowered to pass legislation covering other 'protected territories' as reported in TO Elias, (n 49) above at 67-68.

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later constitute parts of Nigeria during colonialism with a focus on Northern Nigeria where the case study was in colonial times. Most of the African colonies became effective only after 1885 and even Gold Coast and Lagos were only firmly established and 'took their final shape afterwards as the result of the boundary agreements involving extension and readjustment of territories.'⁹⁵

While the Berlin Conference was ongoing a British company – the National African Company - was already moving through Northern Nigeria making treaties with local chiefs in the indigenous States of Sokoto and Gwandu.⁹⁶ It appears then that armed with these treaties and others entered into with indigenous chiefs even before the Berlin Conference, the British Government quite easily succeeded in establishing a claim over the Lower Niger.⁹⁷ Thereafter, in other parts of the Niger and Oil Rivers Districts treaties were quickly entered into with local chiefs with the objective of inducing them to accept British protection.⁹⁸ Curiously, some of these treaties contained clauses for the annexation and in some cases cession of territories to the British.⁹⁹

By 1885 earlier commercial as well as anti-slave activities had already transformed the political configurations of four British Colonies in West Africa: Gold Coast, Gambia, Sierra Leone and Southern Nigeria where an Oil Rivers Protectorate was established in 1885 east of the Crown Colony of Lagos.¹⁰⁰

⁹⁵ TO Elias and R Akinjide, (n 1) above at 18-19.

⁹⁶ TO Elias and R Akinjide, (n 1) above at 17. See also, AN Cook, *British Enterprise in Nigeria* (University of Pennsylvania Press, 1943) at 91.

⁹⁷ TO Elias and R Akinjide, (n 1) above at 17.

⁹⁸ Ibid.

⁹⁹ Ibid. For example, see Article I *Treaty with Lagos*, 1861 and Article I *Treaty with Sokoto*, reprinted in A Burns and AC Burns (n 50) above at 319.

¹⁰⁰ O Roland and M Crowder, *The Cambridge Encyclopaedia of Africa* (Cambridge University Press, 1981) at 163 and JC Anene, *Southern Nigeria in Transition: 1885-1906, Theory and Practice in a Colonial Protectorate* (Cambridge University Press, 1966).

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Indeed, the larger part of Africa was effectively occupied by European Powers between 1878 and 1903 when the indigenous State of the Sokoto Caliphate in what became Northern Nigeria came under the colonial administration of the British.¹⁰¹

The colonial encounter between the indigenous African States and the European Powers had enormous implications on the nature of law in colonial African States. Once the colonial powers had 'consolidated their boundaries by international treaties, the existing sovereignties of the old kingdoms and city states became submerged under the new sovereignties of the "metropolitan" Powers.'¹⁰² Therefore, owing to the loss of sovereignty by pre-colonial African States to the colonial powers, the hitherto historic ways of interacting with the international system through commerce, trade and treaties, discussed earlier, were effectively closed to the indigenous States.¹⁰³ Subsequent external relations during colonialism came to be identified with the respective colonial powers.¹⁰⁴

The taking over of the sovereignties of indigenous African States by colonial powers did not go unchallenged.¹⁰⁵ In Nigeria for example, the JaJa of Opobo demanded that the word 'Protectorate' be explained to him in detail and because of his insistence on clarification and eventual opposition to British rule, in 1887 he was deported out of West Africa to the West Indies by the British.¹⁰⁶ Other leaders

¹⁰¹ Ibid, at 158.

¹⁰² TO Elias and R Akinjide, (n 1) above at 19.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ See O Roland and M Crowder, (n 100) above at 158.

¹⁰⁶ See O Ikimi, 'Nigerian Reaction to the Imposition of British Colonial, 1885-1918 in S Förster, WJ Mommsen and RE Robinson, *Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition* (Oxford University Press, 1988) 454-467 and JE Flint, 'Nigeria: The Colonial Experience from 1880 to 1914' in LH Gann and P Duignan (eds), *Colonialism in Africa, 1870-1960: The History and Politics of Colonialism 1870-1960*, vol 1 (Cambridge University Press, 1969) at 234-235.

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of indigenous African States who faced a similar fate as the JaJa of Opobo on account of their opposition to British rule include: the Nana of Ebrohimi, the Oba of Benin, the Oba of Ijebu and the Sultan of Sokoto.¹⁰⁷ In addition to the above developments, though the British declared a Protectorate over Northern Nigeria in the year 1900, 'the non-Caliphate parts of "Northern Nigeria" also refused to give up their sovereignty and many groups in what was to be known as Middle-Belt of Nigeria fought against the British off and on from 1900 to the period of the 1914-18 war.'¹⁰⁸

It has already been demonstrated in section 2.1 above that prior to colonialism, customary law in Nigeria was the main legal regime regulating the affairs of Nigerians and administration of justice even during the early contacts between Africans and Europeans in terms of trade and inter-State interactions. So, although in the period of this early legal interaction between Africans and Europeans the balance of power was in favour of the indigenous African customary law, things changed dramatically with the advent of formal colonialism.¹⁰⁹ Therefore, the hitherto indigenous legal institutions played a more restricted role in the administration of African States during colonialism than they had in pre-colonial settings, as colonialism extended to every part of African States.¹¹⁰ This development limited the opportunity of indigenous rulers and institutions in the administration of justice and governance through law in the Colonies.¹¹¹

¹⁰⁷ O Ikimi, (n 106) above at 460-462. These latter local chiefs were not deported but dethroned.

¹⁰⁸ Ibid. For details of the European encounters between the colonial powers and other African countries see generally O Roland and M Crowder, (n 100) above at 156-465.

¹⁰⁹ RL Robert and K Mann (n 36), above at 10-11.

¹¹⁰ Ibid.

¹¹¹ Ibid, at 11.

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Indeed, as the British arrogated to themselves the moral and legal superiority of their own civilisation over those of the people who later became Nigerians, they consequently 'equated societal standards of morality prevalent in Europe with standards of living in Africa, and thought those were lacking in Africa.'¹¹² In order to give the reader a complete picture of the legal developments in colonial Nigeria and their implications in a post-colonial Nigeria as well as their relevance to this thesis, it is important to examine some more general colonial legal developments in relation to indigenous legal institutions and colonial legal institutions in what later became the Colony of Nigeria.

2.2.1. Native Courts

Although under the Supreme Court system in the Lagos Colony and its Protectorate no specific provisions were made for statutory Native Courts, it appears that 'traditional tribunals continued to function in their own way.'¹¹³ Indeed, in 1887 the Supreme Court of the Lagos Colony held in *Oppon v Ackinie*¹¹⁴ that the *Supreme Court Ordinance* No 4 1876 (as amended in 1886) which vested all civil and criminal jurisdictions in the Supreme Court of Lagos in the Protected territories did not extinguish the indigenous Native Courts.¹¹⁵ However, in 1900 through the authority of *The Native Courts Proclamation* No 9 1900, statutory Native Courts were established in the Protectorate of Southern Nigeria for the effective administration of justice.¹¹⁶ Two types of Statutory Native Courts were established: Native Courts presided over by a Native Authority (Minor Courts) and Native Courts presided over by a European Officer (Native

¹¹² Ibid, at 10.

¹¹³ TO Elias, (n 49) above at 93-94. See also, JA Yakubu, (n 49) above at 203.

¹¹⁴ *Oppon v Ackinie* [1887] 1 FLR 235.

¹¹⁵ Ibid.

¹¹⁶ TO Elias, (n 49) above at 94.

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Councils).¹¹⁷ A Minor Court was empowered to apply any local law and custom 'not opposed to natural morality and humanity'.¹¹⁸ The Minor Court had jurisdiction whenever both parties before it were either 'natives' or if any party was not a 'native' the Court would have jurisdiction if such non-native gave his/her consent in writing.¹¹⁹ The Native Councils also had concurrent original jurisdiction as the Minor Courts in all civil and criminal matters,¹²⁰ but in addition, the Commissioner in charge of a District could 'at any stage of any proceedings (civil or criminal) before a Minor Court transfer the same to a Native Council for trial'.¹²¹

In 1901, *The Native Court Proclamation 1900*¹²² discussed above was repealed and superseded by *The Native Courts Proclamation No 25 1901*¹²³ which retained the divisions of the Court into Minor Courts and Native Councils. This new Proclamation provided that the civil and criminal jurisdiction of a statutory Native Court in relation to 'natives' should be exclusive of all traditional jurisdictions in any District.¹²⁴ Elias argued that '[t]his was the first express legislative provision preserving for the traditional local courts their customary jurisdiction in areas served by the new statutory Native Courts'.¹²⁵ Therefore, this latter Proclamation accommodated pre-existing indigenous local courts presided

¹¹⁷ Section 2 (a) and (b) as referenced in TO Elias, (n 49) above at 94.

¹¹⁸ Section 6 of *Proclamation No 9 1900* as cited in TO Elias, (n 49) above at 94.

¹¹⁹ TO Elias, (n 49) above at 94 and AO Obilade, (n 63) above at 23.

¹²⁰ Section 20 as cited in TO Elias, (n 49) above at 94-97.

¹²¹ TO Elias, (n 49) above at 97.

¹²² No 9 1900 as cited in TO Elias, (n 49) above at 97.

¹²³ Section 45, this new Proclamation came into effect on 1 January, 1902 as cited in TO Elias, (n 49) above at 97-98.

¹²⁴ Section 12 as cited in TO Elias, (n 49) above at 97-98.

¹²⁵ TO Elias, (n 49) above at 98.

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over by local chiefs and allowed them to exist simultaneously with the statutory Native Courts.¹²⁶

Another major political change in the configuration of the Protectorate of Southern Nigeria occurred in 1906 as the Lagos Colony and Protectorate which had hitherto been under a different political administration as a distinct unit was amalgamated into the Protectorate of Southern Nigeria under the name of the 'Colony and Protectorate of Southern Nigeria'.¹²⁷ Consequently, it was necessary to unify the legal and judicial systems.

Accordingly, the *Supreme Court Ordinance* No 7 1906 established the Supreme Court of the Colony of Southern Nigeria.¹²⁸ Section 14 of the *Supreme Court Ordinance* No 4 1876 which made it possible to apply the common law, the doctrines of equity and the statutes of general application which were in force in England as at 24 July, 1874 to the old Lagos Colony, was amended so that the principles of English law in force in England as at 1 January, 1900 were made applicable to the entire Southern Nigeria.¹²⁹ Also, all the statutory Native Courts were brought under the direct control of the Supreme Court of Southern Nigeria. The *Native Courts Proclamation* 1906¹³⁰ retained the Native Courts as established under the *Native Courts Proclamation* No 25 1901.¹³¹ This signified the commencement of unification of laws and the continuing unification of different

¹²⁶ For how Native Courts administered customary law in the Gold Coast from the colonial era to the post-colonial era see, AN Allott, 'Native Tribunals in The Gold Coast 1844—1927' (1957) 1 *Journal of African Law* 163.

¹²⁷ *Ibid*, at 99.

¹²⁸ TO Elias, (n 49) above at 99.

¹²⁹ *Ibid*, at 100.

¹³⁰ No 7, which came into force on 1 May, 1906 as cited in TO Elias, (n 49) above at 99-100.

¹³¹ TO Elias, (n 49) above at 100 and JA Yakubu, (n 49) above at 206.

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political units into gradually emerging colonial Nigeria. It is the argument in this thesis also that this was the beginning of legal centralisation in Nigeria.

Another significant legal development in the Southern Nigeria Protectorate and Colony at this point relates to the existence of a different type of statutory Native Court created by *The Native House Rule Proclamation* No 26 1901. Under this Proclamation a 'House' was defined as 'a group of persons subject by Native Law and Custom to the control, authority and rule of a Chief, known as a Head of a House'.¹³² All members of a House, whether by birth or who were or came under the authority and control of a House, were to be bound by the 'native law and custom 'of such House'.¹³³ This legislation relating to the Native House Rule remained in force in Southern Nigeria until it was repealed in 1914.¹³⁴

The above narration about the legal history and colonial treatment of native law and customs as well as the entire indigenous legal systems relates to developments in Southern Nigeria. However, for a complete picture of the legal developments that shaped what is today Nigeria and its legal system and because the case study in this thesis which will be introduced in Chapter Four was in colonial times in Northern Nigeria, the colonial legal situation in relation to the introduced British legal system and indigenous legal system in Northern Nigeria is examined in sub-section 2.2.2 below.

2.2.2. The Protectorate of Northern Nigeria (1900–1914)

Prior to 1899, the territories which later became the Protectorate of Northern Nigeria were under the control and administration of the Royal Niger Company which administered and applied law in that area in the same way as had occurred in other parts of what was to become Nigeria. However, the British Government

¹³² Section 2 of *Proclamation* No 26 1901 as cited in TO Elias, (n 49) above at 101-102.

¹³³ TO Elias, (n 49) above at 102.

¹³⁴ *Ibid.*

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revoked the *Charter of the Royal Niger Company* in Northern Nigeria through the *Northern Nigeria Order in Council* 1899,¹³⁵ like they did in the Southern Nigeria Protectorate and established the Northern Nigeria Protectorate with a High Commissioner.¹³⁶ In accordance with the mandate granted to the High Commissioner by the afore-mentioned *Order in Council*, he enacted *The Protectorate Court Proclamation* 1900,¹³⁷ which established a Supreme Court and other courts for the administration of Justice.¹³⁸ The Proclamation empowered the Supreme Court to apply the common law, the doctrines of equity and the statutes of general application which were already in force in England as at 1 January, 1900 in the whole of Northern Nigeria.¹³⁹

The indigenous and traditional Native Courts already in existence (because a large part of the Muslim North already had long established indigenous local courts) in Northern Nigeria were accommodated under the *Native Courts Proclamation* No 5 1900¹⁴⁰ for the 'better regulation and control of Native Courts'.¹⁴¹ Each of these Native Courts 'consisted of one or more persons appointed by the Head Chief or Emir with the Resident's approval, but if a particular town had no head Chief or Emir, the Resident could make his own appointment.'¹⁴² The law to be administered and applied by the Native Courts was

¹³⁵ Made pursuant to the UK *Foreign Jurisdiction Act* 1890, the *Order in Council* took effect from 1 January, 1900 as cited in TO Elias, (n 49) above at 102.

¹³⁶ JE Flint, *Sir George Goldie and the Making of Nigeria* (Oxford University Press, 1960); CWJ Orr, *The Making of Northern Nigeria* (Barnes & Noble, 1966); and M Crowder, *The Story of Nigeria* (Faber & Faber, 1966).

¹³⁷ No 4 as cited in TO Elias, (n 49) above at 110.

¹³⁸ TO Elias, (n 49) above at 110.

¹³⁹ TO Elias, (n 49) above at 117.

¹⁴⁰ Incorporated *Proclamation* No 11 1904 as amended by *Proclamation* No 23 1904 as cited in TO Elias, (n 49) above at 117.

¹⁴¹ TO Elias, (n 49) above at 117. See also, AO Obilade, (n 63) above at 26-27.

¹⁴² TO Elias, (n 49) above at 117.

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the prevailing customary law in the territories where they had jurisdictions, to the extent that such customary laws were not repugnant to principles of natural justice equity and good conscience.¹⁴³ It should be noted at this point, that in the context of Nigeria, Islamic law was and is treated similarly to customary law, therefore henceforth references to customary law in Nigeria in both colonial and post-colonial times include Islamic law. The above developments demonstrate the attitude of the colonial administration towards customary law and indigenous legal institutions in the various Protectorates until the amalgamation of the Southern and Northern Protectorates of Nigeria in 1914 to create Nigeria thereby unifying all the pre-existing territories into one single and unified colonial State.

2.2.3. The Colony and Protectorate of Nigeria (1914–1960)

In 1914, the British colonial administration amalgamated the Northern and Southern Protectorates of Nigeria.¹⁴⁴ In this manner, the Westphalian system of statehood was imported from Europe into Nigeria through the merging of previously independent and indigenous political units – a process which began prior to 1914 as evidenced by the legal developments in sub-sections 2.2.1 – 2.2.2 above. The consequences of this amalgamation ‘entailed a process of unification of the laws and legal systems of both administrations.’¹⁴⁵ Therefore, the *Supreme Court Ordinance* No 6 1914, established the Supreme Court of Nigeria with similar jurisdiction as the Supreme Courts of the now defunct Southern and Northern Protectorates. Likewise, the new Supreme Court was mandated to observe and apply English common law, principles of equity and the

¹⁴³ Ibid.

¹⁴⁴ AE Afigbo, 'The Consolidation of British Imperial Administration in Nigeria: 1900-1918' (1971) 21 *Civilisations* 436; AHM Kirk-Greene, *Lugard and the Amalgamation of Nigeria: A Documentary Record* (Frank Cass, 1968); and GN Uzoigwe, 'The Niger Committee of 1898: Lord Selborne's Report' (1968) *Journal of the Historical Society of Nigeria* 467.

¹⁴⁵ TO Elias, (n 49) above at 122.

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statutes of general application in force in England as at 1 January, 1900.¹⁴⁶ *The Supreme Court Ordinance* 1914 also provided that:

Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any Native Law and Custom, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force.¹⁴⁷

In addition to the Supreme Court, Provincial Courts and Native Courts were established.¹⁴⁸ *The Native Courts Ordinance* No 5 1918 created a uniform system of Native Courts in the northern and southern parts of Nigeria with minor variations. Pursuant to Section 5 (1) of the Ordinance every Native Court consisted of an Alkali¹⁴⁹ with or without native assistants (known as Alkali Court) in the northern parts of Nigeria and Native Courts with a single native judge (who could be a Chief with or without minor chiefs as assessors) in the southern parts of Nigeria.¹⁵⁰ The basic law of Native Courts in the northern parts of Nigeria was Islamic law whereas the basic law for Native Courts in the south was native law and custom to the extent that both systems of laws were not inconsistent with any law of the State or repugnant to the principles of natural justice, equity and good conscience.¹⁵¹

However, because the basic law of Native Courts in most northern parts of Nigeria was Islamic law it was essential that another system of Native Court (Mixed Court) was established to adjudicate over non-Muslim litigants. The Mixed Court was

¹⁴⁶ Section 14 as cited in TO Elias, (n 49) above at 122.

¹⁴⁷ Section 19 as quoted in TO Elias, (n 49) above at 122.

¹⁴⁸ TO Elias, (n 49) above at 123 and AO Obilade, (n 63) above at 27.

¹⁴⁹ 'Alkali' is the Hausa word for a judge. See AO Obilade, (n 63 above) at 27.

¹⁵⁰ TO Elias, (n 49) above at 134. See also, AO Obilade, (n 63) above at 23-25.

¹⁵¹ Section 10 (1) (a) of the *Native Court Ordinance*, 1918 as cited in TO Elias, (n 49) above at 134.

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established in Kano in 1932.¹⁵² The Mixed Court administered and enforced both Islamic law and customary law.¹⁵³ Islamic law was applicable where any of the Parties before the Court was a Muslim.¹⁵⁴ By the provisions of the *Privy Council Appeals Ordinance* 1917,¹⁵⁵ appeals from the Nigerian Supreme Court established in 1914 went to the Privy Council in London. Therefore, the decisions made by the Nigerian Supreme Court were subject to the appellate jurisdictions of the English judges based in England. In this way, English law came to influence the evolution of law in colonial Nigeria.¹⁵⁶

2.3. The Nature of Law in the Colony and Protectorate of Nigeria: A Legal Pluralism Perspective

Before examining the legal scenario in post-independent Nigeria in terms of the co-existence of introduced English legal system with the indigenous legal system, it is important at this point to briefly review the key legal developments in colonial Nigeria as well as their jurisprudential implications in terms of legal pluralism. This is necessary because legal pluralism helps to contextualise the simultaneous co-existence of English law and indigenous customary law in colonial Nigeria. The principal means of legislation during the period of colonialism were Ordinances which had their origins with the establishment of Lagos as a British Settlement from 13 March 1862,¹⁵⁷ with the first Legislative Council established there on 24 June, 1862.¹⁵⁸ So, Ordinances remained the primary means of legislation through

¹⁵² TO Elias, (n 49) at 134-135.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Dated 11 October 1917 as cited in TO Elias, (n 49) above at 135.

¹⁵⁶ R Palmer, 'Some Observations on Capt. RS Rattray's Paper,' Present Tendencies of African Colonial Government" (1934) 33 *Journal of the Royal African Society* 37 at 37.

¹⁵⁷ TO Elias, (n 49) above at 164.

¹⁵⁸ Ibid.

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1866 when Lagos was temporarily annexed with Sierra Leone, it remained so when Lagos became part of the Gold Coast Colony and separated from Sierra Leone in 1874 and Ordinances remained the only recognised means of legislation in 1886 when Lagos became a separate Colony of its own.¹⁵⁹

As demonstrated in sub-section 2.2.1 above, the various Consular and Equity Courts in different trading areas were established by means of Orders in Council and although the Consul had administrative and judicial powers in the trading areas, he did not appear to have any legislative body to work with and make laws along with the Consul.¹⁶⁰ When the Protectorate of Southern Nigeria was created in 1899, the *Order in Council*¹⁶¹ provided that '[t]he said Protectorate shall be administered by a High Commissioner who shall have powers to make laws which will be styled Proclamations enacted by the High Commissioner.'¹⁶² Consequently, the High Commissioner made laws by Proclamations in the Protectorate until Lagos and its surrounding territories were merged in 1906 with the Southern Nigeria Protectorate under the name of the Colony and Protectorate of Southern Nigeria.¹⁶³ The effect of this merger was that legislation through Proclamations by the High Commissioner were terminated as the Legislative Council in Lagos was empowered to make laws for the entire Southern Nigeria Protectorate by means of Ordinances.¹⁶⁴

At the same time when the Southern Nigeria Protectorate was created, the territories of the Royal Niger Company in Northern Nigeria were also promulgated

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Dated 27 December 1899 as cited and quoted in TO Elias (n 49) at 164-165.

¹⁶² TO Elias, (n 49) above at 165.

¹⁶³ Ibid.

¹⁶⁴ Ibid, at 165.

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as the Northern Nigeria Protectorate in 1899.¹⁶⁵ The High Commissioner was also empowered to make laws for the administration of the Protectorate through Proclamations. Therefore, from 1900 until after the amalgamation of the Northern and Southern Protectorates of Nigeria, legislation 'still took the form of proclamations, by which ordinances of the Legislative Council were extended by the Governor, with or without modifications, to the Northern Nigeria Protectorate.'¹⁶⁶ The history of the legal development in colonial Nigeria as narrated above illustrates the relevance of engaging with the debates about legal pluralism.

Accordingly, it is argued that the debates about legal pluralism help in explaining the simultaneous co-existence of received English law and customary law as well as their respective institutions of enforcement in colonial Nigeria. In a seminal essay published in 1986, Griffiths introduces his version of legal pluralism as 'that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs'.¹⁶⁷ Griffiths distinguishes between the 'social science' view of legal pluralism which he describes as an empirical state of affairs in society in contrast to what he calls a 'juristic' view of legal pluralism as a particular problem of dual legal systems created when European States established colonies like Nigeria and superimposed their legal systems on the pre-existing legal systems.¹⁶⁸ He then argues that a conception of legal pluralism which is based on how a State deals with a situation of normative heterogeneity is on the wrong

¹⁶⁵ Ibid.

¹⁶⁶ TO Elias, (n 49) above at 165.

¹⁶⁷ J Griffiths, 'What is Legal Pluralism?' (1986) 18 *The Journal of Legal Pluralism and Unofficial Law* 1 at 2.

¹⁶⁸ Ibid, at 5 and 8.

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footing. At best, he maintains that this is a contribution to the theory of 'legal centralism'.¹⁶⁹

Griffiths' version of the social-scientific theory of legal pluralism 'refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, over-lapping "semi-autonomous" social fields...'¹⁷⁰ This perspective of legal pluralism is one where law, legal doctrines and legal institutions are not all encapsulated under one paradigm of law, but have their sources and grounds in all the various social fields of a given community.¹⁷¹ Thus conceived, law becomes a product and reflection of the complex and diverse patterns of societal norms. Griffiths criticises what he terms 'the ideology of legal centralism' as opposed to hard legal pluralism.¹⁷² He argues that the 'ideology of legal centralism' is to be distinguished from real legal pluralism as legal centralism is all about uniform law for the State, where State law's exclusive dominance over other forms of law is exemplified by the administration of a single chain of State institutions.¹⁷³

This was the kind of situation developed in Nigeria under British colonial administration. It is argued that this idea of 'legal centralism' was gradually introduced into Nigeria through the amalgamation of the Northern and Southern Protectorates of Nigeria. However, having criticised the 'ideology of legal centralism', Griffiths then makes a connection between it and 'weak' pluralism.¹⁷⁴ It is argued that the above situation of legal pluralism in the 'weak sense' identified

¹⁶⁹ Ibid, at 12.

¹⁷⁰ Ibid, at 38.

¹⁷¹ Ibid. See also, GR Woodman, 'Customary Land Laws within Legal Pluralism over the Generations', 4 SADC Law Journal 2014/15 189-208 at 191.

¹⁷² J Griffiths, (n 167) above at 38.

¹⁷³ Ibid, at 3.

¹⁷⁴ Ibid, at 5.

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by Griffiths was the exact situation in Nigeria under British colonial rule, in the context of how and to what extent the colonial authorities were willing to accommodate customary law. By subjecting customary law to the repugnancy test as well as to State law for its validity - a situation of Griffith's 'weak sense' of legal pluralism was therefore created in colonial Nigeria. Likewise, Gordon Woodman argues that such situations where State law assumes a validating role over other forms of law such as customary law is a situation of State law pluralism.¹⁷⁵

However, it must be acknowledged that because this thesis is primarily a doctrinal research based on State laws and legal institutions, it does not deal with issues about the evolution and continuous development of 'living' or 'sociologists' customary law in Nigeria and the case study of Abuja. Neither does it deal with questions of strong or deep legal pluralism as such questions require the conduct and application of empirical research methods that are not utilised in this thesis.

Clearly, the legal situation in colonial Nigeria where customary law was subjected to the validation of State law as represented by the various repugnancy clauses, is a situation of weak or State law pluralism and a triumph of the 'ideology of legal centralism'. It has been demonstrated in section 2.2 above that the idea of legal centralism in colonial Nigeria began with the merging of the legal system of the Colony of Lagos and Niger Coast Protectorate in 1886 to form what was then the Southern Nigeria Protectorate. Subsequently, this process of legal centralisation was crystallised by the amalgamation of the Northern and Southern Protectorates to form the Colony and Protectorate of Nigeria in 1914, with the attendant centralisation of the Nigerian legal system administered through the single apparatus of the colonial State. Griffiths maintains that Hooker attributed the modern origin of legal pluralism in this 'weak sense begins at least as early as

¹⁷⁵ GR Woodman, 'Legal Pluralism and the Search for Justice' (1996) 40 *Journal of African Law* 152 at 158. See also, GR Woodman, (n 171) above at 190

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1772¹⁷⁶ where it was provided that the 'laws of the Koran...and those of the Shaster with respect to the Gentoos shall invariably be adhered to.'¹⁷⁷

As the experience of Nigeria under British colonial rule illustrates, this system was exported to other parts of the world in Africa and Asia during the era of European imperialist expansionism through colonisation.¹⁷⁸ It is argued and will be demonstrated further in Chapter Three that with the unification of indigenous customary laws and received English laws as a strategy of State-building as well as social and economic development in both colonial and post-colonial Nigeria, legal pluralism in the weak sense appears to have taken stronghold in Nigeria.¹⁷⁹ In Chapters Three and Four, it will be demonstrated that this weak sense of legal pluralism has negative implications on the customary land rights of IPs at State levels.

The colonial unification of laws in Nigeria continued gradually until political independence as demonstrated further in Chapter Three. In 1922, however, the legal and legislative culture in Nigeria assumed a new dimension. The *Nigerian Constitution* 1922¹⁸⁰ became the basis of law and governance in Nigeria for the next twenty-five years. Consequently, the country adopted 'a unified legal system for the first time in its history.'¹⁸¹ This Constitution established a Legislative Council with law-making powers for Lagos and the Provinces in Southern

¹⁷⁶ J Griffiths, (n 167) above at 6.

¹⁷⁷ Griffiths quoting Hooker in J Griffiths, (n 167) above at 6. (See MB Hooker, *Legal Pluralism – An Introduction to Colonial and Neo-Colonial Law* (Oxford University Press, 1975) at 61).

¹⁷⁸ J Griffiths, (n 167) above at 6.

¹⁷⁹ For attempts at unification and codification of customary law in Kenya and Tanzania, see W Twining, 'The Restatement of African Customary Law: A Comment' (1963) 1 *The Journal of Modern African Studies* 221.

¹⁸⁰ The *Sir Clifford Constitution* 1951.

¹⁸¹ TO Elias, (n 49) above at 165.

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Nigeria.¹⁸² By 1946, a new Constitution¹⁸³ was introduced which made it possible for a larger Legislative Assembly to make Ordinances having force of law throughout Nigeria. The three Regional Administrations¹⁸⁴ which the Constitution created had no legislative powers and their functions were merely advisory to the Central Government.¹⁸⁵

The 1951 Constitution¹⁸⁶ retained the division of Nigeria into three Regions and additionally established Houses of Assembly for each of those regions with legislative powers to make laws in the Regions.¹⁸⁷ In a somewhat prophetic note, Elias predicted the problem of legal pluralism arising from such arrangements in the following terms '[a]ccordingly, cases of local conflicts of laws as between the three Regions will soon begin to trouble the courts to an extent not perhaps paralleled in any other federal system of government; for, already, the divergent local customary laws have been giving a good deal of worry of their own.'¹⁸⁸

The 1954 Constitution¹⁸⁹ did not change the legal, legislative and judicial arrangements in any significant way, but did take Lagos out of any Regional control (making it the Federal Capital of Nigeria).¹⁹⁰ The 1954 Constitution

¹⁸² See www.lawnigeria.com/CONSTITUTIONHUB/1960-1999ConstitutionofNigeria.html. Accessed 20 May, 2016.

¹⁸³ *The Arthur Richard Constitution* 1946.

¹⁸⁴ Northern, Western and Eastern Regions of Nigeria.

¹⁸⁵ TO Elias, (n 49) above at 165-166. See also, BO Nwabueze, (n 51) above at 35-61.

¹⁸⁶ *Sir John Macpherson's Constitution* 1951.

¹⁸⁷ TO Elias, (n 49) above at 166.

¹⁸⁸ TO Elias, (n 49) above at 167-168. The emphasis is added. Elias should have added international law to the list.

¹⁸⁹ The *Lyttleton Constitution*, 1954.

¹⁹⁰ See www.lawnigeria.com/CONSTITUTIONHUB/1960-1999ConstitutionofNigeria.html. Accessed 20 May 2016.

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remained in force until the political independence of Nigeria in 1960.¹⁹¹ John Ademola Yakubu correctly sums up the treatment of customary law during the colonial era in Nigeria by arguing that the situation was such that customary law became dependent on colonial State law for its validity and in 'its regulated state, its operation became dependent on the satisfaction of the rules of common law, equity and good conscience.'¹⁹² Likewise, Elias maintained that during colonial rule, indigenous African laws were applied only to the extent that they were 'not repugnant to the principles of natural justice, equity and good conscience, and if they are not inconsistent with any valid local enactment.'¹⁹³ Consequently, Robert and Mann concluded that colonial administration changed African laws and institutions significantly.¹⁹⁴

On the eve of political independence, the implication of the colonial encounter with Britain on the legal system of Nigeria was obvious. The legal rules and institutions of law in Nigeria had changed significantly in comparison to pre-colonial Nigeria. Legal pluralism became an inevitable phenomenon of the Nigerian legal system.¹⁹⁵ To put the inter-play and inter-connections between various normative or legal orders in a historical context, Tamanaha undertakes

¹⁹¹ JA Yakubu, (n 49) above at 206

¹⁹² Ibid, at 201.

¹⁹³ TO Elias, *The Impact of English Law on Nigerian Customary Law* (Nigerian Ministry of Information, 1958) at 7-8. See also, M Ocran, 'The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa' (2006) 39 *Akron Law Review* 465; S Nwabara, 'The "Received" Nigerian Law and the Challenge of Legal Independence' (1979) 14 *Journal of Asian and African Studies* 99 and S Roberts, 'Introduction: Some Notes on "African Customary law"' (1984) 28 *Journal of African Law* 1.

¹⁹⁴ RL Roberts and K Mann (eds), *Law in Colonial Africa* (Heinemann Educational Books, 1991) at 5. See also, SF Moore, 'From Giving and Lending to Selling: Property Transactions Reflecting Historical Changes on Kilimanjaro' in RL Roberts and K Mann (eds), *Law in Colonial Africa* (Heinemann, 1991) at 108-127. For a general analysis of the colonial African State, see C Young, *The African Colonial State in Comparative Perspective* (Yale University Press, 1994).

¹⁹⁵ See B Ige, *Constitutions and the Problem of Nigeria*, vol 1 (Nigerian Institute of Advanced Legal Studies, 1995).

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an overview of the history of the idea of State-building from Medieval Europe through to the 20th century.¹⁹⁶ In so doing, he demonstrates that the traditional idea of viewing law as mainly the monopoly of the State is evidence of the triumph of State-building efforts and the ideology behind such, a project that has its origins in the late medieval Europe.¹⁹⁷

The above legal tradition was then imported into Nigeria through British colonial administration of Nigeria between 1863 and 1960. In line with this argument, Tamanaha argues that the '[c]onsolidation of law in the hands of the state was an essential aspect of the state-building process ... The various heterogeneous forms of law described earlier were gradually absorbed or eliminated.'¹⁹⁸ Indeed, theories of legal pluralism 'require that law be seen pluralistically: not just as the unified, systematized law of the nation state, but as produced and interpreted in many competing sites and processes in and beyond the state and often relying on conflicting, unclear or controversial authority claims.'¹⁹⁹ The colonial consolidation of law at the hands of the Nigerian State implied that other forms of non-State law in Nigeria were subordinated to State law and in most cases customary laws lost their pre-colonial legal status.²⁰⁰

Indeed, the above legal developments in colonial Nigeria illustrate that the colonial Nigerian State monopolised law as legal pluralism was being increased

¹⁹⁶ BZ Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney Law Review at 379-389.

¹⁹⁷ Ibid, at 379.

¹⁹⁸ Ibid, at 380.

¹⁹⁹ R Cotterell, *Law, Culture and Society - Legal Ideas in the Mirror of Social Theory* (Ashgate, 2006) at 29. See also, F von Benda-Beckmann and K von Benda-Beckmann, 'The Dynamics of Change and Continuity in Plural Legal Orders' (2006) 38 *The Journal of Legal Pluralism and Unofficial Law* 1.

²⁰⁰ BZ Tamanaha, (n 196) above at 380.

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in Nigeria.²⁰¹ Through a system of 'indirect rule', British colonial authorities managed the affairs of colonial Nigeria through pre-existing indigenous political and legal institutions.²⁰² In the process, colonial laws were gradually introduced into Nigeria and they co-existed and as will be illustrated in the following Chapter Three, they still co-exist with the indigenous customary law system even after political independence.²⁰³

Conclusion

This Chapter has demonstrated how the British introduced English laws and legal institutions into Nigeria by entering into a treaty with the King of Lagos - the *Treaty of Cession* (disguised as a treaty of protection) in 1861 and the introduction of English law into Lagos in 1863, 'represented both the cultural and legal framework of the sense of European superiority'²⁰⁴ and the gradual establishment of Consular and Equity Courts as well as the appointment of Consuls for Lagos in the early stages of colonialism. And as Robert and Mann further note, '[t]he new faith of Europeans in the moral and material superiority of their own civilization convinced them that exporting their culture would be good for Africans.'²⁰⁵ It has also been shown that through the establishment of a Legislative Council in Lagos in 1862, the Colony of Lagos was administered through the enactments of

²⁰¹ Ibid.

²⁰² See M Crowder, 'Indirect rule—French and British Style' (1964) 34 *Africa* 197 and M Crowder, *West Africa under Colonial Rule* (Hutchinson, 1968) at 217-233.

²⁰³ See, GR Woodman, 'Customary Law in Common Law Systems' (2001) 32 *International Development Studies Bulletin* 28; GR Woodman, 'Some Realism About Customary Law—The West African Experience' in GR Woodman and AO Obilade (eds), *African Law and Legal Theory* (Dartmouth, 1995); GR Woodman, 'Customary Law, State Courts and the Notion of Institutionalization of Norms in Ghana and Nigeria' in AN Allott and GR Woodman (eds), *People's Law and State Law: The Bellagio Papers* (De Gruyter, 1985); HS Daannaa, 'The Acephalous Society and the Indirect Rule System in Africa: British Colonial Administrative Policy in Retrospect' (1994) 26 *The Journal of Legal Pluralism and Unofficial Law* 61; and LS Sheleff, *The Future of Tradition: Customary Law, Common Law and Legal Pluralism* (Routledge, 2013).

²⁰⁴ RL Roberts and K Mann, (n 36) above at 9-10.

²⁰⁵ Ibid, at 10.

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Ordinances and subsequently English law became applicable throughout Nigeria beginning in the year 1900 and the crystallising of this through the amalgamation of the Northern and Southern Protectorates of Nigeria in 1914 to create what is today Nigeria.

It has been demonstrated that the State-building efforts which started during British colonial rule in Nigeria ensured the monopolisation of law by the emerging State as the indigenous customary laws and legal institutions were gradually subjected to State control and accommodation. Consequently, a situation of legal pluralism which was already emerging because of prolonged contacts between Africans and Europeans was essentially consolidated during colonial rule in Nigeria. It has therefore been argued that the debates on legal pluralism over the years throw light on and help in contextualising the simultaneous co-existence between the received English laws and the indigenous customary laws in colonial Nigeria. In the following Chapter Three, the post-colonial retention of the colonial legal system and the judicial application of customary law will be highlighted. The impact of the retention of the colonial legacy on the definition of land rights in colonial and post-colonial Nigeria will also be demonstrated as a foundation for the introduction of the case study in Chapter Four.

CHAPTER THREE: CUSTOMARY LAW, STATE LAW AND

DEFINITION OF LAND RIGHTS IN COLONIAL AND

POST-COLONIAL NIGERIA

Introduction

In Chapter Two, the introduction of English law and legal system into Nigeria during the period of colonialism was examined. Equally, the relegation of customary law to an inferior status compared to colonial State law was illustrated. The main objective in this Chapter is to demonstrate the impact of colonialism on the development of the Nigerian legal system after political independence and the continuous co-existence and relegation of customary law to an inferior legal status by State law. In demonstrating this post-colonial hybrid legal system, the impact on the definition of land rights in a post-colonial Nigeria will be illustrated. In addition to the historical and background information provided in Chapter Two, this will provide the reader with additional foundational knowledge about the legal developments in post-colonial Nigeria before the case study is introduced later in Chapter Four. To achieve the above objective, this Chapter has been sub-divided into three main sections.

Section 3.1 will demonstrate the post-colonial retention of introduced English laws and legal institutions as well as confirming the relegation of customary law and indigenous legal institutions to the institutional apparatus of the post-colonial State of Nigeria. In the process of doing this, the Chapter will demonstrate the continuous existence of Nigeria as a unified State and the continuous monopolisation of law and legal institutions by the State from the time of political independence from colonial rule to the present day. Likewise, the judicial application of customary law will be critically examined in sub-section 3.1.1. In section 3.2, there will be a critical examination of the nature of pre-colonial customary land tenure and the subsequent introduction of English land tenure in colonial Nigeria. This will provide the foundation for the critical analyses of land

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control and management by the post-colonial State of Nigeria that follows in sub-sections 3.2.1 and 3.2.2. Sub-section 3.2.3 will examine the post-colonial retention of the colonial legacy of the State managing and controlling the ownership of land in Nigeria through legislation. In section 3.3 it will be argued that theories of legal pluralism explain the nature of the co-existence of State law and customary law in post-colonial Nigeria. This will provide the reader with important foundational legal information to understand the legal challenges and problems which the case study in this thesis will illustrate in Chapter Four.

3.1. Customary Law and State Law in Post-Colonial Nigeria (1960-Present)

The relegation of customary law to an inferior status in comparison to State law and subjecting it to the test of repugnancy which occurred throughout the period of colonialism in Nigeria, as demonstrated in Chapter Two continued after political independence of Nigeria on 1 October, 1960. However, it was not until 1963 that the British Monarch ceased to be the Head of State of Nigeria and the Privy Council no longer had appellate jurisdiction over the Nigerian judiciary as it was replaced by the Supreme Court of Nigeria as the final appellate Court for cases emanating from Nigeria.¹ The 1963 *Republican Constitution* retained the federal legislature with powers to make laws for the entire country as well as the three Regions of Nigeria with their respective Houses of Assembly with powers to make laws for the Regions which were created under the British colonial administration of Nigeria.²

¹ As provided under the *Nigerian Republican Constitution* 1963.

² For further information on the constitutional evolution of Nigeria, see AO Obilade, *The Nigerian Legal System* (Sweet & Maxwell, 1979). See also, OE Uma, *Federalism and Nation Building: The Nigerian Experience: 1954-1964* (Arthur H Stockwell Limited, 1977); JA Ballard, 'Administrative Origins of Nigerian Federalism' (1971) 70 *African Affairs* 333; K Ezera, *Constitutional Developments in Nigeria: An Analytical Study of Nigeria's Constitution-Making*

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Presently, Nigeria operates under the 1999 *Constitution of the Federal Republic of Nigeria* (as amended).³ Section 1 (1) of the Constitution provides that '[t]his Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.' In addition, it is also provided that '[i]f any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.'⁴ The Constitution divides Nigeria into thirty-six States⁵ and the Federal Capital Territory (FCT) – the case study in this thesis.⁶ It also establishes a National Assembly with law making powers for the Federation while State Houses of Assembly are established to make laws for each of the thirty-six States in Nigeria.⁷ In the event of a conflict between a law validly made by the federal legislature and a law made by a State legislature, the former prevails.⁸

Developments and the Historical and Political Factors that Affected Constitutional Change (Cambridge University Press, 1960); and JA Ajayi, *Milestones in Nigerian History* (Longman Publishing Group, 1980).

³ *Constitution of the Federal Republic of Nigeria*, 1999 (as amended). Available at: www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm, accessed 9 December 2016.

⁴ See section 1 (3).

⁵ See section 3 (1). They are: Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara.

⁶ See sections 2 (2), 3 (4) and Part II of the First Schedule to the 1999 Nigerian Constitution.

⁷ See section 4.

⁸ See section 4 (5).

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The Nigerian Constitution establishes several superior courts of record with judicial powers⁹ including a Sharia Court of Appeal¹⁰ and a Customary Court of Appeal,¹¹ the Court of Appeal and the Supreme Court as the apex Court.¹² The jurisdiction of the Sharia Court of Appeal is appellate and supervisory in civil proceedings on Islamic law and where all the litigants or one of them is a Muslim.¹³ The Customary Court of Appeal exercises appellate and supervisory jurisdiction in civil proceedings involving issues of customary law.¹⁴ To be appointed as a judge of the Customary Court of Appeal one must be a 'legal practitioner' in Nigeria and must have 'considerable knowledge and experience in the practice of Customary law.'¹⁵ Likewise, to be appointable as a judge of the Sharia Court of Appeal such person must be 'a legal practitioner' in Nigeria and must have 'a recognised qualification in Islamic law'.¹⁶

Appeals from the decisions of a Customary Court of Appeal lie to the Court of Appeal 'in any civil proceedings before the customary Court of Appeal with respect to any question of Customary law'.¹⁷ Similarly, appeals lie from decisions of a Sharia Court of Appeal to the Court of Appeal 'in any civil proceedings before

⁹ See section 6.

¹⁰ Established under section 260 for the Federal Capital Territory (FCT) and under section 275 for the various States.

¹¹ Established under section 265 for the FCT and under section 280 for the various States.

¹² Section 233 (1) and section 235.

¹³ Section 277 (1) and (2).

¹⁴ Section 282 (1).

¹⁵ Section 281 (3) (a).

¹⁶ Section 276 (3) (a).

¹⁷ Section 245 (1).

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the Sharia Court of Appeal with respect to any question of Islamic personal law'.¹⁸ For the purpose of hearing appeals emanating from the decisions of the Sharia and Customary Courts of Appeal, the Nigerian Court of Appeal must be duly constituted with 'not less than three Justices of the Court of Appeal learned in Islamic personal law'¹⁹ and 'not less than three Justices of the Court of Appeal learned in Customary law'²⁰ respectively. It is compulsory for judges of the Sharia and Customary Courts of Appeals; the Court of Appeal and the Supreme Court to be 'legal practitioners' with varying levels of experience having so qualified depending on the specific Court.²¹ A 'legal practitioner' is defined by the *Legal Practitioners Act 2004*²² to be 'a person entitled in accordance with the provisions of this Act to practice as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings.'²³ Therefore, these judges of the superior courts are persons trained as barristers and solicitors in accordance with the received and dominant English legal tradition.

At the lower hierarchy, each of the thirty-six States of Nigeria is entitled to establish State courts for the administration of justice.²⁴ Accordingly, all the States have established Customary Courts²⁵, Sharia Courts²⁶ and in some cases Area

¹⁸ Section 244 (1).

¹⁹ Section 247 (1) (a).

²⁰ Section 247 (1) (b).

²¹ See section 231 (3) with respect to the Supreme Court

²² *Legal Practitioners Act, Cap 207 Laws of the Federation of Nigeria 1990*. Available at: www.nigeria-law.org/Legal%20Practitioners%20Act.htm, accessed 20 December 2016.

²³ Section 24.

²⁴ See section 6 (4) of the 1999 Nigerian Constitution.

²⁵ Particularly in the Southern States but also in some Northern States.

²⁶ Only in the Northern States and the FCT.

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Courts²⁷ in addition to the various State High Courts.²⁸ The various High Court laws of the respective States have provisions with the equivalent of the *High Court Law of Lagos State, 1972*²⁹ which provides that:

The High Court shall observe and enforce the observance of customary law which is applicable and is not repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this Law shall deprive any person of the benefit of customary law.³⁰

Also the Nigerian *Evidence Act (EA) 2011*³¹ provides under section 16 that '[a] custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence.'³² It is the responsibility of the person claiming the existence of any customary law to prove it.³³ Any custom 'may be judicially noticed when it has been adjudicated upon once by a superior Court of Record.'³⁴ This implies that even when a custom has been recognised as law by customary courts or other courts not being superior Courts of Record, such customary laws will still not be recognised as law as such lower courts are not superior courts of record.

²⁷ Only in the Northern States.

²⁸ Mostly in some Northern States and the FCT.

²⁹ *High Court Law of Lagos State, 1972* Cap H3 *Laws of Lagos State*. Available at: http://resources.lawscopeonline.com/stateLaws/LAGOS/HIGH_COURT_LAW_CHAPTER_H3_LAWS_OF_LAGOS_STATE_.htm, accessed 20 December 2016.

³⁰ Section 26. See also, section 34 of the *High Court Law of Katsina State, Cap 28 Laws of Katsina State*.

³¹ *Evidence Act* No 18 2011. Available at: www.nassnig.org/document/download/5945, accessed 5 December 2016. Applicable before all Superior Courts of Record in Nigeria. Therefore, the Act does not apply before customary, area and sharia courts discussed above.

³² Section 16 (1) of the EA.

³³ *Ibid*, section 16 (2).

³⁴ *Ibid*, section 17.

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Therefore, so long as customs have not been 'established as one judicially noticed, it shall be proved as a fact' through the opinion of persons who may know of the existence of such customs.³⁵

Unlike customary law, the contents of State laws are deemed to be *prima facie* proof of such upon publication in a Gazette.³⁶ In this way, the post-independence Nigerian State treats customary law differently from State law. When it has not been judicially noticed, customary law may be proved through providing evidence to the courts in relation to facts 'deemed to be relevant which tends to show how in particular instances a matter alleged to be a custom was understood and acted upon by persons then interested.'³⁷ For courts to apply customary law, such customary law must undergo three main tests: the repugnancy test; the incompatibility with law test; and the incompatibility with public policy test. Under the repugnancy test, to be applicable by courts such customary laws must not be repugnant to natural justice, equity and good conscience.³⁸ Likewise, to be enforceable by courts of law, customary law must not be incompatible with the provisions of any law in Nigeria as well as any public policy.³⁹

In addition, such customary laws must not be inconsistent with the provisions of the Nigerian Constitution.⁴⁰ In the above manner, the repugnancy test⁴¹ and

³⁵ Ibid, section 18 (1) and (2).

³⁶ Ibid, section 106 (a) (i).

³⁷ Ibid, section 19.

³⁸ Ibid, section 18 (3).

³⁹ Ibid.

⁴⁰ See section 1 (3) of the Nigerian Constitution (*supra*).

⁴¹ For the how the repugnancy test has been applied in post-colonial Papua New Guinea, see M Demian, 'On the Repugnance of Customary Law' (2014) 56 *Comparative Studies in Society and History* 508.

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incompatibility tests which customary law must undergo are retained in a post-independence Nigeria.⁴² Indeed, as the *Evidence Act* is not applicable before lower courts such as the customary courts and sharia courts established by the various laws of each of the thirty-six States including the FCT, the laws establishing them also retain the repugnancy test.⁴³

In addition to the above, there exist in Nigeria choice of law rules that have to be complied with by Nigerian courts before determining whether customary law applies to a particular matter. For example, the various customary court laws have provisions similar to section 18(1) of the *Federal Capital Territory Customary Court Act 2007* which provides that:

A customary law shall be deemed to be binding upon a person where that person-

- (a) is an indigene of a place in which the customary law is in force;
- (b) being in a place in which the customary law is in force, does an act in violation of the customary law;
- (c) in cases of claim under a customary law of inheritance, makes a claim in respect of the property or estate of a deceased person and the deceased person was an indigene of the place in which the customary law was in force;

⁴² See D Asiedu-Akrofi, 'Judicial Recognition and Adoption of Customary Law in Nigeria' (1989) 37 *The American Journal of Comparative Law* 571 and AA Oba, 'The Administration of Customary Law in a Post-Colonial Nigerian State,' (2006) 37 *Cambrian Law Review* 95. For the situation in post-colonial Zimbabwe, see T Bennett, 'Conflict of Laws—The Application of Customary Law and the Common Law in Zimbabwe' (1981) 30 *International & Comparative Law Quarterly* 59 and for the situation in all the English-speaking Africa, AN Allott, 'What is to be Done with African Customary Law?' (1984) 28 *Journal of African Law* 56. Some scholars have also argued that this colonial accommodation of indigenous African law created official customary law, see for example SF Moore, 'Certainties undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999' (2001) 7 *Journal of the Royal Anthropological Institute* 95 at 98.

⁴³ See for example, section 16 (a) of the *Federal Capital Territory Customary Court Act, 2007* (FCT Customary Court Act). Available at: <http://faolex.fao.org/docs/pdf/nig120288.pdf>, accessed 5 December 2016. For more detailed analyses of the interaction between English law and customary law in West Africa, see WCE Daniels, 'The Interaction of English Law with Customary Law in West Africa' (1964) 13 *International and Comparative Law Quarterly* 574.

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(d) agrees or is deemed to have agreed to be bound by the customary law.

The general rule in Nigeria is that in a dispute between two Nigerians indigenous to a particular area where customary law is in force, there is a presumption that customary law is the applicable law based on the decision in *Labinjoh v Abake*.⁴⁴ However, there are two notable exceptions to this general rule. One of the exceptions is when both parties are expressly or by implication in agreement that other laws should apply to the matter in dispute.⁴⁵ The other exception is when customary law does not recognise or does not usually apply to the matter at issue.⁴⁶ For disputes between a 'native' of an area where customary law is in force and a 'non-native' of such area the general rule is that customary law will not apply unless both parties have agreed that it applies either expressly or by implication.⁴⁷

The colonial and post-independence treatment of customary is further illustrated by the decisions of the Nigerian courts in a long chain of cases as demonstrated in sub-section 3.1.1 below.

⁴⁴ *Labinjoh v Abake* [1924] 5 NLR 33 at 13 and 21. See also AO Obilade, (n 2) above at 149.

⁴⁵ See *Green v Owo* [1936] 14 NLR 43; *Griffin v Talabi* [1948] 12 WACA 371; *Nelson v Nelson* [1951] 13 WACA 248; and *Okolie v Ibo* [1958] NLR 80 as cited in AO Obilade, (n 2) above at xii-xv.

⁴⁶ See *Bakare v Coker* [1935] 12 NLR 31 and *Salau v Aderibigbe* [1963] WNLR 80 as cited in AO Obilade, (n 2) above at xii-xv.

⁴⁷ See *Nelson v Nelson* (supra) and *Koney v Union Trading Co Ltd* [1934] 2 WACA 188 as cited in AN Allott, *Essays in African Law* (Butterworths, 1960) at xxii-xxviii. A detailed discussion on the choice of law rules in relation to the application of customary law by courts in Nigeria and Africa is beyond the scope of this Chapter and the thesis. For such detailed analyses, see AN Allott, (1960) above at 154-202.

3.1.1. Judicial Application of Customary Law in Colonial and Post-Colonial Nigeria

The Courts in colonial and post-colonial Nigeria have expressed their views on the nature of customary law in several cases. For example, in the 1908 case of *Lewis v Bankole*,⁴⁸ the Court observed that customary law is not static and in some instances, it has been modified and that one of its striking features is its flexibility and ability to change with time.⁴⁹ This was confirmed by Moore's findings in relation to the Chagga people of Kilimanjaro, Tanzania.⁵⁰ In *Oyewunmi v Ogunesan*,⁵¹ the Nigerian Supreme Court (SC) described customary law as organic to the Nigerian peoples and in its organic state it was subject to change.⁵² In *Ohai v Akpoemonye*,⁵³ the same Court defined customary law in the following terms:

... any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway.⁵⁴

⁴⁸ *Lewis v Bankole* [1908] 1 NLR, 308.

⁴⁹ *Ibid*, Per Osborne CJ.

⁵⁰ SF Moore, *Social Facts and Fabrications" Customary" Law on Kilimanjaro, 1880-1980* (Cambridge University Press, 1986).

⁵¹ *Oyewunmi v Ogunesan* [1990] NWLR (Pt. 137) 182 at 207.

⁵² *Ibid*, at 207.

⁵³ *Ohai v Akpoemonye* [1991] SCN 73.

⁵⁴ *Ibid*, at 77. See, the earlier case of *Zaiden v Mohssen* [1973] 11 SC 1. See also the latter cases of *Adah v Adah* [1998] 6 NWLR (Pt. 552) 97 and *Oyebisi v Governor of Oyo State* [1998] 11 NWLR (Pt. 574) 441.

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This confirms that the Nigerian judiciary do recognise the existence of customary law and is amenable to applying it whenever the need arises. However, for courts to recognise and apply customary law such customs must be proved as a matter of fact. This was first given judicial imprimatur in the case of *Angu v Attah*.⁵⁵ Such requirements that customary law should be proved as a matter of fact was condemned in the case of *Nzekwo v Nzekwo*,⁵⁶ where Nnaemeka-Agu Justice of the Supreme Court (JSC) observed that '[i]t is bad enough that our customary law has to be proved as a fact in our own country nearly thirty years after independence from British rule.'⁵⁷ Similarly, in *Ugo v Obiekwe*,⁵⁸ the same judge noted that the requirement that customary laws should be proved as a question of fact was an 'annoying vestige of colonialism'.⁵⁹ Kwame Nkrumah rightly condemned this procedure of proving customary law as question of fact in the following terms:

African law in Africa was declared foreign law ... by reason of the vast variations in local and tribal custom. African law had to be proved by experts. But no law can be foreign to its own land and country, and African lawyers ... in the independent African states, must quickly find a way to reverse this juridical travesty.⁶⁰

Indeed, Ghana has abolished the procedure of proving customary law as a question of fact and replaced this process with establishing customary law as a question of law.⁶¹ It is argued that making customary law a question of fact makes

⁵⁵ *Angu v Attah* [1916] *Gold Coast Privy Council Judgments* 43 (1874 - 1928).

⁵⁶ *Nzekwo v Nzekwo* [1989] 2 NWLR (Pt. 104) 373.

⁵⁷ *Ibid*, at 428.

⁵⁸ *Ugo v Obiekwe* [1989] 1 NWLR (Pt. 99) 566 at 583.

⁵⁹ *Ibid*.

⁶⁰ K Nkrumah, 'Ghana: Law in Africa' (1962) 6 *Journal of African Law* 103 at 105.

⁶¹ See section 55 of the Ghanaian *Courts Act No 459* 1993, available at: www.parliament.gh/assets/file/Acts%202016/COURTS%20ACT%201993.pdf, accessed 5

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customary law susceptible to the creation of different forms of customary law from the real customary law in the community. Consequently, there is the possibility that the interpretation and application of customary law by courts of law may differ significantly from the 'living' or 'sociologists' customary law of the people as demonstrated by Gordon Woodman.⁶²

In line with the above arguments, Woodman has demonstrated that judicial application of customary law in Nigeria and Ghana has resulted in the emergence of two different forms of customary law.⁶³ The first is what he refers to as 'lawyers' or 'official' customary law which is the customary law as applied by the courts.⁶⁴ The second is the 'sociologists' customary law which is the actual customary law practiced by the people.⁶⁵ In addition to creating 'lawyers' customary law, the requirement that once a customary norm has been recognised by a superior court of record such customary laws can then be taken judicial notice of by other courts also has a negative effect on the development of customary law. In line with this it has been argued that through the doctrine of judicial notice, a completely different version of customary law may be erroneously applied by courts to

December 2016, which provides that '[a]ny question as to existence or content of a rule of customary law is a question of law for the court and not a question of fact.'

⁶² See GR Woodman, 'How State Courts Create Customary Law in Ghana and Nigeria' in BW Morse and GR Woodman (eds), *Indigenous Laws and The State* (Foris Publications, 1988) at 181-260.

⁶³ See GR Woodman, 'Customary Law, State Courts, and the Notion of Institutionalization of Norms in Ghana and Nigeria' in AN Allott and GR Woodman (eds), *People's Law and State Law: The Bellagio Papers* (Walter de Gruyter, 1985) at 143-163.

⁶⁴ GR Woodman, 'Some Realism About Customary Law-The West African Experience' (1969) *Wisconsin Law Review* 128 at 140-142.

⁶⁵ *Ibid.* See also, D Asiedu-Akrofi, 'Judicial Recognition and Adoption of Customary Law in Nigeria' (1989) 37 *American Journal of Comparative Law* 571 at 587.

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different cases in different places where such customs are not recognised by the people.⁶⁶

It has been argued that the doctrine of judicial precedent could combine with the doctrine of judicial notice of customary law to have the effects of homogenising customary law in Nigeria.⁶⁷ In line with this argument, it has been claimed that '[t]here is enough evidence to conclude that after superior courts of record ascertain a customary law rule, subsequent courts conveniently forget that it was meant for a particular area.'⁶⁸ An illustration of the above claim is demonstrated by the decision in the case of *Lewis v Bankole*,⁶⁹ which has been used as an authority to establish the customary law rule that the head of the family under customary law in Nigeria is the eldest living son of any deceased person,⁷⁰ without taking into account the fact that this customary law rule could vary in different localities and at different times.⁷¹

The above homogenising effect of judicial ascertainment of customary law through State courts is replicated in the interpretation of customary law as to when title in land passes when a person dies. Without considering the fact that the customary rules may differ from place to place, the Nigerian courts have consistently held in a chain of cases that the title to the land of a deceased person

⁶⁶ See SK Asante, 'Over a Hundred Years of a National Legal System in Ghana: A Review and Critique' (1987) 31 *Journal of African Law* 70 at 86.

⁶⁷ See GR Woodman, 'Customary Land Laws within Legal Pluralism over the Generations', (2014/15) 4 *SADC Law Journal*, 189-208 at 197.

⁶⁸ ES Nwauche, 'The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana,' (2010) 25 *Tulane European & Civil Law Forum* 37 at 45.

⁶⁹ *Supra*.

⁷⁰ *Ibid*.

⁷¹ See the decision in *Olowu v Olowu* [1985] 3 *NWLR* (Pt. 13) 372 and *Eyesan v Sanusi* [1984] 1 *SCNLR* 353.

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passes immediately customary rites are performed and the possession of such lands are handed over in the presence of witnesses.⁷² Indeed, in the case of *Akinterinwa v Oladunjoye*,⁷³ the Nigerian SC stated that this custom was of 'universal application' in the whole of Nigeria!⁷⁴ This demonstrates the danger of allowing State courts to apply and enforce customary law. This also illustrates that Woodman's findings that courts do in fact create 'lawyers' customary law which differs from 'sociologists' customary law are very valid and plausible.⁷⁵

Like the adage 'give a dog a bad name and hang him', the three-prong tests of the repugnancy doctrine, incompatibility with law and incompatibility with public policy have been used by the Nigerian courts to 'hang' customary law. It has been argued that in Nigeria the repugnancy test is the most widely used in the determination of whether to apply and enforce customary law.⁷⁶ In *Edet v Essien*,⁷⁷ a customary law rule which granted paternity of a child to the man who had paid the mother's bride price rather than the biological father was held to be repugnant to natural justice, equity and good conscience. In *Okonkwo v Okagbue*,⁷⁸ a customary law rule which required a woman to marry a dead person was considered repugnant.⁷⁹ However, it is not in all cases where the repugnancy

⁷² See the following cases: *Ajadi v Olarenwaju* [1969] 1 All NLR 382; *Folarin v Durojaiye* [1988] 1 NWLR (Pt. 70) 351; and *Akinterinwa v Oladunjoye* [2000] FWLR (Pt. 10) 1690.

⁷³ *Supra*.

⁷⁴ *Ibid*, at 1701. See also the case of *Egonu v Egonu* [1978] 11-12 SC 111.

⁷⁵ GR Woodman, (n 64) above at 140-142; GR Woodman, (n 63) above at 143-163 and GR Woodman, (n 62) above at 181-260.

⁷⁶ ES Nwauche, (n 68) above at 47.

⁷⁷ *Edet v Essien* [1932] 11 NLR 47.

⁷⁸ *Okonkwo v Okagbue* [1994] 9 NWLR (Pt. 368) 301.

⁷⁹ See also, the following cases: *Mariyama v Sadiku Ojo* [1961] NRNLR 81; *Ejanor v Okenome* [1976] 1 WTLR (Pt. III) 378; and *Ejanor v Okenome* [1976] 1 WTLR (Pt. III) 378. Customary laws have also been struck down on grounds of incompatibility with the provisions of the Nigeria constitution in the following cases: *Mojekwu v Mojekwu* [1997] 7 NWLR (Pt. 512) 283; *Muojekwu*

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doctrine is considered that customary law is found to be repugnant. For example, *In The Estate of Agboruja*,⁸⁰ the court enforced a customary law rule which required the wife of a deceased man to marry his brother. Likewise, in *Cole v Akinyele*,⁸¹ a rule of customary law which permitted the legitimacy of a child by mere acknowledgment of the father was upheld.

There is a divide among Nigerian legal scholars as to the significance of the repugnancy and incompatibility tests in relation to the application of customary law by courts of law in Nigeria. According to one school of thought, the repugnancy clauses have helped to eliminate acts and customs that are considered barbaric and incompatible with civilisation.⁸² According to the other school, the repugnancy doctrine imports standards external to a community and applies them to different communities for the purpose of meeting 'the standard of an ordinary civilized society.'⁸³ However, in this thesis a third school of thought is advanced. In the first place, the repugnancy test should never have been introduced during colonialism. Rather the reverse should have been the case. All foreign laws and principles that were introduced during colonialism ought to have been subjected to the incompatibility tests in relations to customary law, so that

v Iwuchukwu [2004] All FWLR (Pt. 211) 1406; *Muojekwu v Ejikeme* [2000] 5 NWLR (Pt. 657) 419; *Asika v Atuanya* [2004] All FWLR (Pt. 433) 1293; *Uke v Iro* [2001] 11 NWLR 196; *Ukeje v Ukeje* [2001] 27 WRN 142; *Agbai v Okogbue* [1991] 7 NWLR(Pt. 204) 391; *Anigbogun v Uchejigbo* [2002] 10 NWLR (Pt. 776) 472; and *Salubi v Nwariakwu* [1997] 5 NWLR (Pt. 504) 459.

⁸⁰ *In The Estate of Agboruja* [1949] 19 NLR 38.

⁸¹ *Cole v Akinyele* [1960] 5 FSC 84.

⁸² See F Ajayi, 'The Interaction of English Law with Customary Law in Western Nigeria: I' (1960) 4 *Journal of African Law* 40; F Ajayi, 'The Interaction of English Law with Customary Law in Western Nigeria: II' (1960) 4 *Journal of African Law* 98 at 103; and TO Elias, 'Towards a Common Law in Nigeria' in Elias TO (ed), *Law and Social Change in Nigeria* (University of Lagos Press/Evans Bros, 1972) at 266.

⁸³ AO Obilade, *The Nigerian Legal System* (Sweet & Maxwell, 1979) at 103. See also, I Agede, 'Repugnancy Clause as an Instrument of Legal Developments' in TO Elias and M Jegede (eds), *Nigerian Essays in Jurisprudence* (MIJ Publishers, 1993) at 407.

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any such foreign laws or principles that were incompatible with customary law, should to the extent of their incompatibility have been void. In line with the above argument, Julio Faundez has maintained that African indigenous customary law 'is not an add-on to the received (Western) law, but the reverse. It is the received Western legal traditions that should adapt and adjust to Africa's indigenous law.'⁸⁴

Taiwo argues that the repugnancy test has outlived its relevance and suggests that Nigeria should repeal it.⁸⁵ In Ghana, Sierra Leone, Botswana and Tanzania the repugnancy doctrine has been abandoned.⁸⁶ Kiye calls for the scrapping of the repugnancy doctrine in Anglophone Cameroon.⁸⁷ A South African (SA) writer argues that in the context of SA 'the repugnancy clause has left African law distorted beyond recognition'⁸⁸ and results in the erosion of African moral values.⁸⁹ Akuffo submits rather bluntly in the context of West Africa that '[a]s a colonial juridical device, in addition to its traditional facility, equity bears prime responsibility for the dislocation of indigenous customary law in West Africa.'⁹⁰

⁸⁴ J Faundez, 'Legal Pluralism and International Development Agencies' in BZ Tamanaha, C Sage and M Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, 2012) at 181.

⁸⁵ E Taiwo, 'Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigerian Positions-Some Lessons for Nigeria' (2009) 34 *Journal for Juridical Science* 89.

⁸⁶ JM Ocran, 'The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa' (2015) 39 *Akron Law Review* 465 at 477-478.

⁸⁷ ME Kiye, 'The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon' (2015) 15 *African Studies Quarterly* 85 at 100.

⁸⁸ D Ndima, 'The African Law of the 21st Century in South Africa' (2003) 36 *Comparative & International Law Journal of Southern Africa* 325.

⁸⁹ *Ibid.*

⁹⁰ K Akuffo, 'Equity in Colonial West Africa: A Paradigm of Juridical Dislocation' (2006) 50 *Journal of African Law* 132 at 144. For the situation in Francophone Africa, see M Prinsloo, 'Recognition and Application of Indigenous Law in Francophone Africa' (1993) *Journal of South African Law* 189 and for the situation in Burundi, Zaire, Rwanda and Lusophone Africa, see M

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Indeed, the South African Law Reform Commission (SALRC) has rejected the repugnancy clause.⁹¹ Demian argues that many African States have embraced the South African example.⁹² It is argued that there is no justification for the continuous retention of the repugnancy test in a post-colonial Nigeria, when the colonial authorities are no longer the makers and enforcers of law in Nigeria. Indeed, like other writers cited above, Derek Asiedu-Akrofi has concluded that 'the tests applied in the judicial recognition of and adoption of customary law be abolished because they have outlived their usefulness.'⁹³

In line with Woodman's findings that State courts are creating lawyers' customary law,⁹⁴ it is argued that courts of law established by the State and administered by lawyers are not suitable enforcers of the 'living' customary law. The validity of customary laws has always been founded on their acceptability by members of a community as binding upon them. This was acknowledged in the case of

Prinsloo, 'Recognition and Application of Indigenous Law in Zaire, Rwanda, Burundi and Lusophone Africa' (1993) *Journal of South African Law* 541.

⁹¹ South African Law Reform Commission (SLRC), *The Harmonization of the Common Law and the Indigenous Law: Report on Conflict of Laws Project 90* (SLRC, 1999) at para 2.2. Available at: http://salawreform.justice.gov.za/reports/r_prij90_conflict_1999sep.pdf, accessed 27 January 2017.

⁹² M Demian, 'On the Repugnance of Customary Law' (2014) 56 *Comparative Studies in Society and History* 508 at 511.

⁹³ D Asiedu-Akrofi, (n 61) above at 572. For similar treatment of Islamic law by State law in Nigeria see the following: A Christelow, 'Islamic Law and Judicial Practice in Nigeria: An Historical Perspective' (2002) 22 *Journal of Muslim Minority Affairs* 185; VOO Nmehielle, 'Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality is the Question' (2004) 26 *Human Rights Quarterly* 730; AA Oba, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 51 *International & Comparative Law Quarterly* 817; AH Yadudu, 'Colonialism and the Transformation of Islamic Law: In the Northern States of Nigeria' (1992) 24 *The Journal of Legal Pluralism and Unofficial Law* 103; and TM Naniya, 'History of Shari'a in Some States of Northern Nigeria to Circa 2000' (2002) 13 *Journal of Islamic Studies* 14.

⁹⁴ GR Woodman, (n 64) above at 140-142; GR Woodman, (n 63) above at 143-163 and GR Woodman, (n 62) above at 181-260.

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Eshugbayi v Government of Nigeria,⁹⁵ where Lord Atkin observed that '[i]t is the assent of the native community that gives a custom its validity.'⁹⁶ However, this position has also been criticised for ignoring the fact that customary law is not timeless and it changes with the social, economic and political circumstances of the times.⁹⁷ It could equally be argued that these changes are reflected in the 'living' customary law as well. In an article,⁹⁸ Allott answers the question '[w]hat is to be done with African customary law?' in the following nebulous terms:

... Whether the end result is an African system with western trimmings, or a western system with African trimmings, or ... a reconciliation of the two types of system, I cannot say; all I know is that ... the end result will be harmonisation, by the people subject to these disparate laws, of the exigencies and the rules of each system.⁹⁹

In this thesis, it is argued that what 'is to be done with African customary law', is to return it where it belongs, in the community.¹⁰⁰ While there may be legitimate concerns that returning customary law to the community may result in traditional elites presenting their own version of traditional justice, Sally Falk Moore has argued to the contrary that '... the idealized court-as-it-should-be of the British ... appear as tantalizing artefacts of the colonial imagination ... could easily and

⁹⁵ *Eshugbayi v Government of Nigeria* [1932] AC 622.

⁹⁶ *Ibid.* See also, M Jegede, *Principles of Equity* (Ethiopia Publishing Corporation, 1981).

⁹⁷ K Akuffo, 'Equity in Colonial West Africa: A Paradigm of Juridical Dislocation' (2006) 50 *Journal of African Law* 132 and D Asiedu-Akrofi, 'Judicial Recognition and Adoption of Customary Law in Nigeria' (1989) 37 *American Journal of Comparative Law* 571.

⁹⁸ AN Allott, (n 42) above. See also, AN Allott, 'The Judicial Ascertainment of Customary Law in British Africa' (1957) 20 *The Modern Law Review* 244.

⁹⁹ AN Allott, (n 42) above at 70-71.

¹⁰⁰ For a contrary view on this, see F Ajayi, 'The Interaction of English Law with Customary Law in Western Nigeria: II' (1960) 4 *Journal of African Law* 98 at 113. For previous attempts to abolish customary courts in Nigeria, see E Nwogugu, 'Abolition of Customary Courts—The Nigerian Experiment' (1976) 20 *Journal of African Law* 1.

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accurately be characterized as self-serving discourses on power, as justificatory representations of the ideology of control.’¹⁰¹

As a form of law the validity of which is founded on the acceptance of members of a community, the logical thing to do is to allow the communities to determine what happens to customary law. Indeed, in an empirical study conducted in Tanzania Moore found that:

... communities try to control their own members and do everything to maximize their internal autonomy, allowing their members effective use of the courts only as they see advantage in doing so, bypassing the courts and setting their own affairs internally as they choose ...¹⁰²

It is the argument in this thesis that local chiefs and community heads in their respective communities should be the ones enforcing customary laws in their domains in the resolution of all civil disputes. State courts administered by lawyers who are trained in a British legal tradition are certainly not properly positioned to apply Woodman’s ‘sociologists’ customary law applied by people in real life. Like Moore’s findings in Tanzania, support for this argument is provided by research which has demonstrated that among the Igbo people of Nigeria indigenous modes of justice resolution operate effectively and ‘has innovated to preserve its independence and influence, while maintaining a cooperative relationship with the

¹⁰¹ SF Moore, 'Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans About Running "Their Own" Native Courts' (1992) *Law and Society Review* 11 at 13.

¹⁰² *Ibid*, at 12.

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court and police.¹⁰³ Similar findings have been made in Mozambique.¹⁰⁴ South Africa is already making progress in this regard where attempts are being made to create traditional courts headed by local chiefs that will not accept legal representation by lawyers.¹⁰⁵ The Constitution of South Africa already allows traditional leaders to enforce customary law.¹⁰⁶ Even in the United States (US) tribal courts administered by traditional authorities have existed since the nineteenth century with jurisdiction in criminal matters which was validated by the Supreme Court of the US.¹⁰⁷

¹⁰³ EE Uwazie, 'Modes of Indigenous Disputing and Legal Interactions among the Ibos of Eastern Nigeria' (1994) 26 *The Journal of Legal Pluralism and Unofficial Law* 87 at 100. See also, AE Afigbo, *The Warrant Chiefs: Indirect Rule in Southeastern Nigeria, 1891-1929* (Cambridge University Press, 1972); P Bohannon, *Justice and Judgment among the Tiv* (Waveland Inc, 1989); A Sachs and GH Welch, *Liberating the Law: Creating Popular Justice in Mozambique* (Zed, 1990); CK Meek and E Arnett, 'Law and Authority in a Nigerian Tribe: A Study in Indirect Rule' (1938) 37 *Journal of the Royal African Society* 115; CA Odinkalu, 'Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa' (2006) 2 *The World Bank Legal Review* 141; GR Woodman, 'The Alternative Law of Alternative Dispute Resolution' (1991) 32 *Les Cahiers de Droit* 3; and SF Moore, *Social Facts and Fabrications" Customary" Law on Kilimanjaro, 1880-1980* (Cambridge University Press, 1986).

¹⁰⁴ See D Pimentel, 'Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique' (2011) 14 *Yale Human Rights & Development Law Journal* 59 and Open Society Initiative, *Mozambique: Justice Sector and Rule of Law*, 2006) at 121. Available at: [www.unicef.org/mz/cpd/references/21-Mozambique%20Justice%20report%20\(Eng\).pdf](http://www.unicef.org/mz/cpd/references/21-Mozambique%20Justice%20report%20(Eng).pdf), accessed 26 January, 2017.

¹⁰⁵ See JM Iyi, 'Fair Hearing without Lawyers? The Traditional Courts Bill and the Reform of Traditional Justice System in South Africa' (2016) 48 *The Journal of Legal Pluralism and Unofficial Law* 127. See also, section 271 of the *Constitution of Ghana*, 1992 which recognises traditional chieftaincy institutions by providing that 'the institutions of chieftaincy, together with its traditional councils as established by customary law and usage' should be preserved.

¹⁰⁶ See section 211 (2) *Constitution of the Republic of South Africa* 1996. See also, H Ludsin, 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law' (2003) 21 *Berkeley Journal of International Law* 62 and RL Ellett, 'Courts and the Emergence of Statehood in Post-Colonial Africa' (2012) 63 *Northern Ireland Legal Quarterly* 343.

¹⁰⁷ See *Ex parte Crow Dog* [1883] 109 US 556. See also, D Pimentel, 'Can Indigenous Justice Survive? Legal Pluralism and the Rule of Law' (2010) 32 *Harvard International Review* 32.

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The contradiction between conventional State courts and traditional modes of communal justice is exemplified by the facts and decisions in the US Supreme Court Case *Exparte Crow Dog*.¹⁰⁸ In that case, the accused murdered the victim and admitted guilt. Since the crime occurred within the territory of the indigenous Indian territory of Dakota, it was within the exclusive jurisdiction of the tribal courts, which resolved the matter through tribal authorities.¹⁰⁹ The victim's family and that of the accused were reconciled by the tribal authorities through compensating the former with money, horses and a blanket.¹¹⁰ The aim of these tribal proceedings was to 'heal the wounded Brule Sioux community. The wrong doer needed to be integrated back into society, and the crime had to be acknowledged so that healing could begin.'¹¹¹ However, white settlers within the community opposed this outcome and got federal authorities involved.¹¹² The result was that the accused was sentenced to death by State courts.¹¹³ But, before hanging the accused an appeal was made to the Supreme Court.¹¹⁴ It was unanimously held that State courts lacked jurisdiction in the matter and the accused was set free.¹¹⁵ Although subsequent legislation in the US has limited the jurisdiction of tribal courts, the significance of this case is best captured by a commentator who wrote:

What would have happened to the Sioux community, had Crow Dog been executed? It would have wounded them a second time, as

¹⁰⁸ *Exparte Crow Dog* (supra).

¹⁰⁹ *Ibid*, at para 7.

¹¹⁰ *Ibid*.

¹¹¹ D Pimentel, (n 104) above at 33.

¹¹² *Exparte Crow Dog* (supra) at para 7.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid*, at para 7 per Mr. Justice Matthews delivering the opinion of the Court.

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Crow Dog's death would have been another blow to the Sioux community, another act of violence that would deprive the community of yet another of its members, harming the community all over again.¹¹⁶

It is argued that over and above the community being injured some more, a contrary decision by the Supreme Court would have delegitimised the authority of tribal courts in resolving these kinds of cases, thereby destroying an important cultural aspect of the community in question. This is the kind of cultural destruction that State courts administered by lawyers are doing in Africa and in Nigeria.¹¹⁷ In line with this argument, Woodman submits that State institutions are unable to reproduce many of the characteristics of 'living' customary law.¹¹⁸ Indeed, the impact of English legal culture on lawyers in Anglophone Africa has been comprehensively studied. For example, Harrington and Manji argue that law in post-colonial Africa has been shaped by a category of lawyers 'imbued with the virtues characteristic of English practitioners'.¹¹⁹ They credit the work of Lord Denning in a 1960 London Conference on the Future of Law in Africa and as the Chairman of a 1961 Committee on Legal Education for Students from Africa with this legal development in post-colonial Africa.¹²⁰

¹¹⁶ D Pimentel, (n 104) above at 33.

¹¹⁷ See GR Woodman, 'Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated from the Field of Land Law', in H Mostert and T Bennett (eds), *Pluralism and Development: Studies in Access to Property in Africa* (Juta & Co. Ltd., 2012) 35-58 at 58.

¹¹⁸ GR Woodman, (n 67) above at 198.

¹¹⁹ JA Harrington and A Manji, "'Mind with Mind and Spirit with Spirit": Lord Denning and African Legal Education' (2003) 30 *Journal of Law and Society* 376 at 376.

¹²⁰ *Ibid*, at 378. See, *Report of the Committee on Legal Education for Students from Africa*, C1255 (1961).

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For Denning, in Africa 'law was essentially practitioners' law and the teaching of law needed to reflect this'.¹²¹ Indeed, some people challenged the suitability of training lawyers in Britain who would have to go back to Africa to work in plural legal systems.¹²² Harrington and Manji maintain that although the impracticality of the approach adopted by British towards training African lawyers in Britain in their legal traditions established a link between some African States and Britain, it nevertheless resulted in the 'disintegration' of the network so established in the late 1960s.¹²³ The unsuitability of lawyers to administer customary law can be summed up in the words of William Twining who argued in the context of legal education in East Africa that '[s]et a group of lawyers ... to devise a programme of training and their natural instinct is to re-create as closely as possible the system that they themselves underwent. We all have to guard against this tendency, academics as much as practitioners, Africans as much as expatriates.'¹²⁴

Although Allott regarded an approach towards customary law that aims to preserve it from the influence of English law as 'romantic',¹²⁵ it is argued that Twining's argument in relation to legal education above equally applies to the

¹²¹ JA Harrington and A Manji (n 119) above at 379. See also, AN Allott, 'London Conference on the Future of Law in Africa' (1959) 3 *Journal of African Law* 148.

¹²² JA Harrington and A Manji, (n 119) above at 380. See also, TO Elias, 'Organisation and Development of the Legal Profession in Africa, in Particular the Ability of the Bar and Judiciary to Uphold the Rights of both the Citizen and the State' (1986) 1 *Denning Law Journal* 49 at 50.

¹²³ JA Harrington and A Manji, 'The Emergence of African Law as an Academic Discipline in Britain' (2003) 102 *African Affairs* 109. For the situation in Ghana, see GR Woodman, 'Ghana: How Does State Law Accommodate Religious, Cultural, Linguistic and Ethnic Diversity?', in M-C Foblets, J-F Gaudreault-Desbiens and AD Renteln (eds), *Cultural Diversity and the Law: State Responses from Around the World* (Bruylant, Éditions Yvon Blais, 2010) 255-280 at 259.

¹²⁴ W Twining, 'Legal Education within East Africa' (1966) 12 *International & Comparative Law Quarterly Supplementary Publication* 115 at 149.

¹²⁵ AN Allott, 'Twenty Years on—The Journal of African Law and African Law: A Look at the Past and the Future I' (1977) 21 *Journal of African Law* 125 at 146.

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issue of whether lawyers should be administering customary law through State courts in Africa.¹²⁶ That the State in colonial and post-colonial Nigeria interfered with indigenous customary systems of administering law in Nigeria is surprising, given the claim that ‘...a cardinal principle of British colonial policy was that the interests of a large native population shall not be subject to the will either of a small European class or of a small minority of educated and Europeanised natives who have nothing in common with them, and whose interests are often opposed to theirs.’¹²⁷

In a work in which the role of the legal profession in a post-colonial Africa is critically examined in the peculiar cultural and social context of Africa, Gower rightly concludes that colonialism did not leave behind a system based on the traditional African ways operating through the control of traditional rulers but by ‘British-educated [or American-educated] and politically minded progressives’.¹²⁸ This is contrary to the natural *modus operandi* of customary law in Africa.

However, the problem in post-colonial Nigeria is compounded by ‘most of the trained lawyers ... whose belief in the perfection of English law surpasses that of the complications flowing from the duality of English law and customary laws.’¹²⁹ As noted in Chapter Two, in the context of Nigeria, Islamic law is treated as

¹²⁶ See generally, SF Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39 *The Journal of Modern African Studies* 571; Y Ghai, 'Law, Development and African Scholarship' (1987) 50 *The Modern Law Review* 750; and S Manteaw, 'Legal Education in Africa: What Type of Lawyer Does Africa Need?' (2016) 39 *McGeorge Law Review* 903.

¹²⁷ F Lugard, *Report by Sir Frederick Lugard on the Amalgamation of Northern and Southern Nigeria and Administration, 1912–1919* at 468, particularly at para 40. See also, F Lugard, *The Dual Mandate in British Tropical Africa* (Perham Ltd, 1965) at 86.

¹²⁸ LCB Gower, *Independent Africa: The Challenge to the Legal Profession* (Harvard University Press, 1967) at 9. See also, CJ Dias, *et al*, (eds), *Lawyers in the Third World: Comparative and Developmental Perspectives* (Scandinavian Institute of African Studies and the International Centre of Law in Development, 1981).

¹²⁹ LCB Gower, (n 128) above at 30.

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customary law, and for that reason the analyses and arguments made in the previous Chapter and this Chapter apply equally to the treatment of Islamic law by State law and courts in colonial and post-colonial Nigeria.¹³⁰ Hence, there is no need for any detailed and separate examination of Islamic law and its application by State law and courts in Nigeria. Attention in section 3.2, will focus on the impact of the above legal developments on the definition of land rights in colonial and post-colonial Nigeria.

3.2. Customary Land Tenure in Pre-Colonial, Colonial and Post-Colonial Nigeria

Before examining the post-colonial definition of land rights in Nigeria it is important for the reader to be presented with the nature of customary land tenure before colonialism and during British colonial administration of Nigeria. During the period prior to and until the commencement of British colonial rule in Nigeria, customary land tenure operated in Northern Nigeria where Abuja was geographically located.¹³¹ Although the arrival of the emirs and their followers heralded the introduction of a kind of feudal land tenure under which they claimed over-lordship of the land after their Islamic conquest of Northern Nigeria this existed side-by-side with customary land tenure.¹³² In theoretical terms, this was the beginning of

¹³⁰ For similar treatment of Islamic by State law in Nigeria see the following: A Christelow, 'Islamic Law and Judicial Practice in Nigeria: An Historical Perspective' (2002) 22 *Journal of Muslim Minority Affairs* 185; VOO Nmehielle, 'Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality is the Question' (2004) 26 *Human Rights Quarterly* 730; AA Oba, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 51 *International & Comparative Law Quarterly* 817; AH Yadudu, 'Colonialism and the Transformation of Islamic Law in the Northern States of Nigeria' (1992) 24 *The Journal of Legal Pluralism and Unofficial Law* 103; and TM Naniya, 'History of Shari'a in Some States of Northern Nigeria to Circa 2000' (2002) 13 *Journal of Islamic Studies* 14.

¹³¹ The jihad took place between 1804-1810 and was led by an Islamic scholar named Usman Dan Fodio and was the beginning of the introduction of Islamic law into northern Nigeria.

¹³² PE Oshio, 'The Indigenous Land Tenure and Nationalization of Land in Nigeria,' (1990) 10 *Boston College Third World Law Journal* 43 at 54; K Akuffo, 'The Conception of Land Ownership in African Customary Law and Its Implications for Development,' (2009) 17 *African Journal of*

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legal pluralism in the context of land tenure law in the area known today as Abuja, Nigeria. Similarly, Oshio argues that prior to the colonial encounter with Britain, land '[t]enure law in Southern Nigeria as regulated by customary law had its roots in the traditional conception of land.'¹³³ Like pre-British colonial Northern Nigeria, land in the southern part of Nigeria was conceived as 'having economic, social, political and religious significance.'¹³⁴ It was also seen 'as a sacred institution given by God for the sustenance of all members of the community'.¹³⁵ Land was conceived as belonging 'to the dead, the living and the unborn. Since the view was that the living merely held land as a kind of "ancestral trust" for the benefit of themselves and generations yet unborn.'¹³⁶ Therefore, individual ownership of land was not prevalent in pre-colonial Nigeria and there was no State to manage and control it through State law.¹³⁷

It is also important to note that in Africa and Nigeria in particular people's identities are linked to land.¹³⁸ To take away a community or family land is akin to taking the lives of members of that community or group.¹³⁹ The idea of group or

International & Comparative Law 57 and TO Elias, *Nigerian Land Law and Custom* (Routledge & Kegan Paul Ltd, 1951) at 88-109.

¹³³ PE Oshio, (n 132) above at 46.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ See W Adebani, 'Terror, Territoriality and the Struggle for Indigeneity and Citizenship in Northern Nigeria' (2009) 13 *Citizenship Studies* 349; A Sayne, *Rethinking Nigeria's Indigene-settler Conflicts*, (US Institute of Peace, 2012); and AO Adesoji and A Alao, 'Indigeneship and Citizenship in Nigeria: Myth and Reality' (2009) 2 *Journal of Pan African Studies* 151.

¹³⁹ See, CL Temple, *Native Races and their Rulers: Sketches and Studies of Official Life and Administrative Problems in Nigeria* (Argus Printing & Publishing Co Ltd and Way & Co Ltd, 1918).

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communal ownership of land appears to have been prevalent in the whole of Africa.¹⁴⁰ Writing in 1918, Temple stated that '[f]rom further enquiries and observation I am fully convinced that those conditions are not peculiar to Northern Nigeria but are common to all the tribes of Africa untouched by the civilisation of Europe.'¹⁴¹ Such was the nature of customary land tenure before the advent of British colonial administration of Nigeria.

3.2.1. British Colonial Nigeria and Land Administration – (1861-1960)

In the preceding Chapter Two (sub-section 2.1.2), it was demonstrated that formal colonialism in Nigeria began with the signing of a Treaty in 1861 in which the King of Lagos purportedly ceded territories to the British colonial authorities.¹⁴² There have been different interpretations of the provisions of the Treaty concerning the exact nature of the rights that were passed to the British Crown by King Docemo.¹⁴³ Some argue that it transferred the ownership of all the lands in Lagos to the Crown¹⁴⁴ while others contend that the treaty was 'a mere cession of rights

¹⁴⁰ Ibid, at 140.

¹⁴¹ Ibid.

¹⁴² See TO Elias, *Nigerian Land Law and Custom* (Routledge & Kegan Paul Ltd, 1951) at Appendix 1.

¹⁴³ See A Oyebode, 'Treaties and the Colonial Enterprise: The Case of Nigeria' (1990) 2 *African Journal of International & Comparative Law* 17; Y Kawashima, 'Native Claims: Indigenous Law against Empire, 1500–1920' (2013) 100 *Journal of American History* 182; A von Bogdandy and R Wolfrum, *Dependent Territories* (Max Planck Institute for Comparative Public Law & International Law, 2009); and AD Elegbede-Fernandez, *Lagos, A Legacy of Honour: Dosumu (1861) --Babangbida (1991)* (Spectrum Books, 1992).

¹⁴⁴ See AG Hopkins, 'Property Rights and Empire Building: Britain's Annexation of Lagos, 1861' (1980) 40 *The Journal of Economic History* 777; TO Elias, 'Nigeria's Contribution to Colonial Law' (1951) 33 *Journal of Comparative Legislation & International Law* 49; R Smith, 'The Lagos Consulate, 1851–1861: An Outline' (1974) 15 *The Journal of African History* 393; and J Mugambwa, 'Treaties or Scraps of Paper? A Second Look at the Legal Character of the Nineteenth Century British/African Colonial Agreements' (1987) *The Comparative and International Law Journal of Southern Africa* 79.

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and not a cession of territory'.¹⁴⁵ In the case of *Attorney-General of Southern Nigeria v John Holt*,¹⁴⁶ the Privy Council was of the opinion that terms of the Treaty meant what they said with the implication that the territory of Lagos and its environs were ceded to the Crown, the Council however, noted that this was 'subject to the condition that all rights of property existing in the inhabitants under grant or otherwise from King Docemo and his predecessors, were to be respected.'¹⁴⁷

In the famous case of *Amodu Tijani v Secretary of Southern Nigeria (Amodu Tijani's case)*,¹⁴⁸ Viscount Haldane found that 'this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected.'¹⁴⁹ In *Oduntan Onisiwo v Attorney-General of Southern Nigeria*,¹⁵⁰ Osborne, CJ held that: 'I am clearly of the opinion that the ownership rights of private land owners, including the families ... were left entirely unimpaired, and as freely exercisable after the Cession as before...'¹⁵¹ Therefore, the attitude of the colonial courts towards the Treaty was that the effect of the treaty implied that both territory and sovereignty were passed to the Crown but in practice the wordings of the Treaty were to be interpreted as relating primarily to sovereign rights whilst recognising the customary land rights of the inhabitants.¹⁵²

¹⁴⁵ See *Attorney General of Southern Nigeria v John Holt* [1910] 2 NLR at 8.

¹⁴⁶ *Supra*.

¹⁴⁷ *Ibid*, at 58-59.

¹⁴⁸ *Amodu Tijani v Secretary of Southern Nigeria* [1921] AC 399.

¹⁴⁹ *Ibid*, at 55.

¹⁵⁰ *Oduntan Onisiwo v Attorney-General of Southern Nigeria* [1912] 2 NLR at 77.

¹⁵¹ *Ibid*.

¹⁵² See TO Elias, (n 142) above at 8-9.

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Indeed, prior to contact with Europeans, under customary law individual ownership of land in fee simple in the European sense was unknown.¹⁵³ Quite early on in the colonial encounter, the nature of customary land tenure in Nigeria was recognised by the Privy Council in *Amodu Tijani's* case.¹⁵⁴ In that case, the Privy Council succinctly identified and enumerated the essential features of Nigerian customary land law as community ownership, family ownership, and a rule that grantee of land could not dispose of land without the consent of elders of the community or family head,¹⁵⁵ which bears similarities with the findings of several authors.¹⁵⁶

Customary law in relation to land is largely unwritten and it varies from place to place. However, this form of land tenure is characterised by the payment of annual tributes as opposed to rent under English law by the customary tenant to the overlord.¹⁵⁷ Such lands are held by the grantee subject to good behaviour. As Oshio rightly argues: 'In essence, the customary land tenant is not a lessee or borrower, he is a grantee of land under customary land tenure and holds a determinable interest in land which may be enjoyed in perpetuity subject to good

¹⁵³ For further information on customary land tenure in pre-British colonial Nigeria, see PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011); CK Meek, *Land Law and Custom in the Colonies* (Oxford University Press, 1946); CK Meek, *Land Tenure and Administration in Nigeria and the Cameroons*, (Her Majesty's Stationary Office (HMSO), 1957); and BO Nwabueze, *Nigerian Land Law* (Nwamife Publishers, 1972).

¹⁵⁴ *Supra*.

¹⁵⁵ *Ibid*.

¹⁵⁶ For example, see SD Cameron, *A Note on Land Tenure in the Yoruba Provinces* (Government Printer, 1933); CK Meek, *Tribal Studies in Northern Nigeria* (Kegan Paul, 1931); CL Temple, (n 135) above; TO Elias, (n 142) above at 89-109; AK Ajisafe, *The Laws and Customs of the Yoruba People* (Trubner, 1924); CK Meek, *Law and Authority in a Nigerian Tribe* (Oxford University Press, 1950) and G Jones, *Ibo Land Tenure* (Cambridge University Press, 1949).

¹⁵⁷ See the Nigerian Supreme Court case of *Abudu Lasisi v Oladapo Tubi* [1974] 12 SC 71.

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behaviour on the part of the tenant.¹⁵⁸ As the case study of Abuja is located in what was then Northern Protectorate and later Northern Region of Nigeria under British colonial administration of Nigeria, it is important to examine the legal developments on customary land tenure and the introduced English land tenure in colonial Northern Nigeria.

3.2.2. Colonial Land Administration in the Northern Protectorate of Nigeria

In the preceding Chapter Two, it was demonstrated that Northern Nigeria was occupied by the British colonial army and British colonial administration through indirect rule which began there in 1904.¹⁵⁹ It was also demonstrated in Chapter Two, that the British colonial administration revoked the *Charter of the Royal Niger Company* through which the Company had been exercising rights over land in this part of Nigeria between 1885 and 1899, because of treaties entered with local rulers. However, the validity of the treaties through which the local chiefs purportedly ceded territories to the Royal Niger Company¹⁶⁰ is debatable.¹⁶¹ Indeed, it has been argued that the local Emirs as well as other indigenous rulers were merely trustees of land.¹⁶²

However, Flora Shaw (Lady Lugard)¹⁶³ argued that '[b]y their treaties with the Royal Niger Company (the Company) some of them had nominally surrendered

¹⁵⁸ PE Oshio, (n 132) above at 47. See also the decision of the courts in the following cases: *Chief Etim v Chief Eke*, [1941] 16 NLR 43; *Mohammed Ojomu v Salawu Ajao*, [1983] 9 SC; *Bassey and Others v Chief Eteta* [1938] 4 WACA.

¹⁵⁹ Ibid.

¹⁶⁰ Formerly African National Company

¹⁶¹ TO Elias, (n 142) above at 28-31.

¹⁶² CK Meek, (n 153) at 12-13.

¹⁶³ She later became Lady Lugard.

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their territories with sovereign rights'.¹⁶⁴ By contrast, Lord Lugard¹⁶⁵ observed in relation to the treaty between the Company and the Sultan of Sokoto in an official report¹⁶⁶ that no such agreement as to the transfer of land was made.¹⁶⁷ Lugard's views are corroborated by Sir William Geary.¹⁶⁸ Elias argued that it appears as though Lugard came to the conclusion that 'the arrangement between the Company and the African rulers were really private agreements and not treaties in the international sense; it was the grant of the *Royal Charter* that lifted them out of their obscurity to the status of international treaties.'¹⁶⁹ From the above discussion it seems logical to conclude in the words of Christopher Temple that '[a]ll those acts of native chiefs which, by means of treaties made with strangers, alienated the tribal lands are ... according to native law and custom, *ultra vires*.'¹⁷⁰ Note that similar arguments have been proffered in relation to the purported cession of lands by local rulers to the Colonial Authorities and the Company in Southern Nigeria.¹⁷¹

Consequently, the Company could not have had a valid interest in the right to use all lands in the Northern Nigeria Protectorate, except where such rights were contained in an agreement. All lands were held in accordance with customary law

¹⁶⁴ FL Shaw, *A Tropical Dependency: An Outline of the Ancient History of the Western Sudan with an Account of the Modern Settlement of Northern Nigeria* (James Lisbett & Co, 1905) at 417.

¹⁶⁵ He was appointed as High Commissioner for the Northern Protectorate and later as Governor-General of the Colony and Protectorate of Nigeria in 1914.

¹⁶⁶ See *Annual Report of Northern Nigeria* 2 September, 1903.

¹⁶⁷ *Ibid* at 157-160. The emphasis is added.

¹⁶⁸ WM Geary, *Nigeria Under British Rule* (Methuen & Co Ltd, 1927) at 354-355.

¹⁶⁹ TO Elias, (n 142) above at 30 and BO Nwabueze, *A Constitutional History of Nigeria* (Addison-Wesley Longman Ltd, 1982) at 9-19.

¹⁷⁰ CL Temple, (n 139) above at 140.

¹⁷¹ See TO Elias, (n 142) above at 6-26.

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of the natives.¹⁷² Whatever is made of the implications of the treaties between the local rulers and the Company, upon the revocation of the *Charter of the Royal Niger Company* and the subsequent Proclamation of the Protectorate of Northern Nigeria, agreements were made between Lord Lugard - the High Commissioner - and the Company wherein all rights in land possessed by the Company were to be vested in the High Commissioner to be held in trust for the British Monarch.¹⁷³ Accordingly, *The Crown Lands Proclamation No 16 1902*¹⁷⁴ provided that:

The lands, rights, and easements mentioned or referred to in the Agreements and Instruments set out in the schedule are to the extent and in the degree to which such lands, rights, and easements were vested in the Royal Niger Company, Chartered & Ltd. hereby vested in the High Commissioner for the time being, in trust for His Majesty his heirs and successors.¹⁷⁵

The Colonial administration however reserved certain rights to the Company under the agreements in some lands in the Northern Provinces where the Company had trading and commercial sites and stations.¹⁷⁶ But all other rights reserved to the Company in the agreements were bought by the Colonial administration for the sum of £865, 000 with an additional fifty per cent royalty for a period of ninety-nine years.¹⁷⁷ Consequently, all other lands purportedly belonging to the Company privately were 'transferred to the Government as

¹⁷² CWJ Orr, *The Making of Northern Nigeria* (Macmillan & Co Ltd, 1911) at 248.

¹⁷³ TO Elias, (n 142) above at 32.

¹⁷⁴ Ibid, at 32 as cited by Elias.

¹⁷⁵ Ibid, at 32 as quoted by Elias.

¹⁷⁶ TO Elias, (n 142) above at 33.

¹⁷⁷ Ibid.

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“Crown lands”, while other lands in the Protectorate were regarded as “Public lands” the ultimate title to which the Government claimed by right of conquest.¹⁷⁸

At a general level it has been argued that under British colonial and constitutional theory, land in any colonial Protectorate was regarded as foreign territory.¹⁷⁹ Therefore, although colonial Protectorates were regarded as Crown territories, the Crown did not own the lands.¹⁸⁰ It appears then that it was as a result of the principle that colonial Protectorates are foreign territories that the theory arose that the inhabitants of British colonial Protectorates were not British subjects but British protected persons who might owe allegiance to the Crown.¹⁸¹ Nevertheless, to give legal imprimatur to the claim that ‘Public lands’ in colonial Northern Nigeria were under the ultimate title of the colonial Government by right of conquest the *Crown Lands Proclamation* No 13 1902, as quoted by Elias provided in section 2 as follows:

The High Commissioner may by writing under his hand and the Seal of the Protectorate declare to be public lands:

- (1) All lands not in the actual occupation of persons or of the tenant’s agents or servants of persons having an original or derivative title to such lands under any Proclamation enacted for the Protectorate or under any law or custom prevailing in that part of the Protectorate where such lands are situated.
- (2) Lands being the property of any conquered or deposed ruler.¹⁸²

Due to the confusion that arose as to the difference between ‘Crown lands’ and ‘Public lands’ and the apparent contradiction that the afore-mentioned provisions

¹⁷⁸ Ibid.

¹⁷⁹ Ibid, at 21.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Ibid, at 33-34.

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implied in the context of British constitutional theory about Crown rights in land located in colonial Protectorates, the Northern Nigeria Protectorate Committee¹⁸³ was set up by the Colonial Government.¹⁸⁴ Elias argued that the recommendations of the Committee led to the enactment of the *Land and Native Rights Proclamation* No 9 1910 which provided that '[t]he whole of the lands of the Protectorate of Northern Nigeria, whether occupied or unoccupied on the date of the commencement of this Proclamation, are hereby declared to be native lands'.¹⁸⁵ The equivalent of this provision was reproduced under section 3 of the *Land and Native Rights Ordinance* No1 1916. This latter Ordinance which was modified by the *Land and Native Rights Ordinance* No 18 1918, provided under sections 3 and 4 as follows:

- (3) All native lands, and all rights over the same, are hereby declared to be under the control and subject to the disposition of the Governor, and shall be held and administered for the use and common benefit of the natives of Northern Nigeria; and no title to the occupation and use of any such lands shall be valid without the consent of the Governor.
- (4) The Governor, in exercise of the powers conferred upon him by this Proclamation with respect to any land, shall have regard to the native laws and customs existing in the district in which such land is situated.¹⁸⁶

In a somewhat confusing way the *Crown Lands Ordinance* No 7 1918 which made provisions for 'Crown lands', defined such lands as:

'Crown lands' means all public lands in Nigeria which are for the time being subject to the control of His Majesty by virtue of any treaty, cession, convention or agreement, or by virtue of his Majesty's protectorate, and all lands which have been or may

¹⁸³ Ibid, at 34.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid, at 35 as quoted by Elias.

¹⁸⁶ As quoted in TO Elias, (n 142) above at 35.

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hereafter be acquired by or on behalf of his Majesty for any public purpose or otherwise howsoever, but does not include lands subject to the Land and Native Rights Ordinance.¹⁸⁷

Although it is clear that the definition of 'Crown lands' above was subject to the sections 3 and 4 of the *Land and Native Rights Ordinance* 1918 in relation to the Northern Region of Nigeria reproduced above, there was confusion as to what the implications of this definition of 'Crown lands' really meant in relation to Southern Nigeria.¹⁸⁸ However, the legal position in both Northern and Southern Provinces of the Protectorate and Colony of Nigeria remained the position taken by the Privy Council in the already cited *Amodu Tijani's* case in 1921.¹⁸⁹ Consequently, it is argued that the position of the Crown in relation to lands in Colonial Nigeria was that in theory, the Crown, on the basis of British constitutional tradition, did not own lands in the Protectorates unless such lands were acquired from the Royal Niger Company or for public purposes.¹⁹⁰ Indeed, in practice the Crown limited its right to merely controlling native interests in land against acquisition by aliens.¹⁹¹

In the above manner, the introduced English land tenure and the management of land by the State through statutory law came to co-exist with the indigenous customary land tenure in colonial Nigeria. In addition to the above legal developments in relation to land tenure law in colonial Nigeria, on the eve of political independence, the nature of customary land tenure in Nigeria was gradually changing as individual ownership of land was beginning to take hold in

¹⁸⁷ As quoted in TO Elias (n 142) above at 45.

¹⁸⁸ Ibid.

¹⁸⁹ *Supra*.

¹⁹⁰ TO Elias, (n 142) above at 52.

¹⁹¹ Ibid.

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urban areas while communal forms of land holdings continued in the larger rural areas.¹⁹² However, the colonial consolidation of the idea of the State managing land through State legislation continued after political independence of Nigeria in 1960, with State law purportedly accommodating customary land tenure as demonstrated further in sub-section 3.2.3 below.

3.2.3. Post-Colonial Nigeria and the Administration of Land (1960-Present)

The 1918 *Land and Native Rights Ordinance* discussed above remained the major legislation on native lands in the Northern Region of the Colony and Protectorate of Nigeria until political independence in 1960. However, it was subsequently repealed in 1962 and the *Land Tenure Law* 1962 was enacted.¹⁹³ This latter legislation designated certain lands in Northern Nigeria as 'native lands' but conferred the management of these lands on a Minister.¹⁹⁴ Section 6 of the 1962 law empowered the minister to grant rights of occupancy to natives while the approval of the minister was required for the occupation and enjoyment of land by non-natives.¹⁹⁵ This law defined a non-native as a person whose father was not a member of any tribe indigenous to Northern Nigeria.¹⁹⁶

¹⁹² Ibid, at 297. See also, E Colson, 'The Impact of the Colonial Period on the Definition of Land Rights' in V Turner (ed), *Colonialism in Africa 1870-1960*, vol., 3 (Cambridge University Press, 1971). For the impact of colonialism on the nature of customary land tenure on the Chagga people of Kilimanjaro, Tanzania, see SF Moore, 'From Giving and Lending to Selling: Property Transactions Reflecting Historical Changes on Kilimanjaro' in R Roberts and K Mann (eds), *Law in Colonial Africa* (Heinemann, 1991) and L Cotula and JP Chauveau, *Changes in Customary Land Tenure Systems in Africa* (International Institute for Environment and Development (IIED), 2007).

¹⁹³ See PE Oshio, (n 132) above at 45.

¹⁹⁴ See sections 6 and 5 of the *Land Tenure Law* 1962 as cited in PE Oshio, (n 132) above at 45.

¹⁹⁵ PE Oshio, (n 132) above at 45.

¹⁹⁶ See Section 2 of the *Land Tenure Law* 1962 as cited in PE Oshio, (n 132) above at 45.

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In Africa, post-colonial African States like Nigeria have not only retained the colonial legacy of foreign laws but have consolidated them in various areas including managing land.¹⁹⁷ Although the Nigerian Constitution 1999¹⁹⁸ provides that all citizens have the right to acquire and own immovable property,¹⁹⁹ the current *Land Use Act* 1978 (LUA)²⁰⁰ essentially nationalises all lands in Nigeria, thereby replacing the customary system of land tenure described above. The LUA is now the main statutory instrument that regulates ownership and management of all lands in Nigeria. The law vests all land within the territory of each State (except for land vested in the Federal Government) exclusively in the Governor of each State, who holds the land in trust for the benefit of all Nigerians indigenous to such States.²⁰¹

3.3. Post-Colonial State Law and Customary Law through the Lens of Legal Pluralism

The above post-colonial legal developments in Nigeria demonstrate that the colonial heritage of legal pluralism in the weak sense have continued as customary law continues to be applied only on the terms and conditions upon which State law is willing to accommodate it. Similarly, the idea of legal unification

¹⁹⁷ GR Woodman, 'European Influence on Land law and Land Use in Colonial Ghana and Nigeria' in JD Moor and D Rothermund (eds), *Our Laws, Their Lands: Land Laws and Land Use in Modern Colonial Societies* (Lit Verlag, 1994).

¹⁹⁸ *Constitution of the Federal Republic of Nigeria*, 1999. Available at: www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm, accessed 9 December 2016.

¹⁹⁹ See section 43.

²⁰⁰ *Land Use Act*, 1978 CAP., 202 *Law of the Federation of Nigeria*, 1990. Available at: www.nigeria-law.org/Land%20Use%20Act.htm, accessed 9 December 2016.

²⁰¹ See section 1. In section 2 the Governor has responsibility for land in urban areas while lands in non-urban areas are the responsibility of the Local Governments. See also, section 49 where land vested in the federal Government are excluded from the control of State Governments. For a more detailed discussion on the LUA see Chapter Four under sub-section 4.1.2.

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and monopolisation of law by the Nigerian State has been consolidated post-colonially. Griffith's view that unification of laws is driven by the idea that it is 'a condition of progress toward modern nationhood (as well as of economic and social 'development'),²⁰² is validated by the post-colonial legal developments in Nigeria. This will be further demonstrated later in Chapter Four where the case study in this thesis will be introduced. Like Griffiths, Allott observes that in the context of Africa and in the post-colonial period most if not all African States tried to establish their authority and maintain national unity by ensuring that the inherited colonial legal system reflects the quest for national unity.²⁰³ Consequently, post-colonial African States embarked on a process of unification of laws with the objective of giving expression to such unity 'in legal terms'.²⁰⁴

However, Santos cautions against the idea of centralisation and unification of laws as he argues that it is important not to destroy 'the capacity for traditional popular creativity, at a local and regional level, without which it will not be possible to create a true national identity towards a more just society.'²⁰⁵ Indeed, it will be demonstrated in Chapter Four that in the context of the case study in this thesis, Santos' admonition that an excessive focus on unity at the expense of pluralism

²⁰² J Griffiths, 'What is Legal Pluralism?' (1986) 18 *The Journal of Legal Pluralism and Unofficial Law* 1 at 7-8. For a comprehensive analysis of the pros and cons of unification of laws in the African context, see AN Allott, 'Towards the Unification of Laws in Africa' (1965) 14 *International & Comparative Law Quarterly* 366. See also, C Himsworth, 'The Botswana Customary Law Act, 1969' (1972) 16 *Journal of African Law* 4. For the post-colonial situation in Botswana, see JF Holleman, 'Trouble-Cases and Trouble-less Cases in the Study of Customary Law and Legal Reform' (1973) 7 *Law in Society Review* 585. And for articles criticising attempts at codification of customary law as inconsistent with African values, see TW Bennett and T Vermeulen, 'Codification of Customary Law' (1980) 24 *Journal of African Law* 206 and SF Moore, 'Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans About Running' Their Own' Native Courts' (1992) *Law and Society Review* 11.

²⁰³ AN Allott, (n 202) above at 389.

²⁰⁴ *Ibid.*

²⁰⁵ BdS Santos, 'From Customary Law to Popular Justice' (1984) 28 *Journal of African Law* 90 at 98.

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may be counter-productive as people whose human rights are jeopardised by such excessive quest for unity may end up with resentments and grievances against the Nigerian State. This leads to disunity rather than the purported unity that the Nigerian State aims to achieve.

Hard or deep legal pluralism requires the recognition that law is not a unified phenomenon or based on a single system of laws. In line with this, Griffiths argues that real legal pluralism (deep or strong legal pluralism) must have a different objective of demonstrating that law is not 'unified', 'single' or based on a hierarchy determined by the State, as opposed to weak or soft legal pluralism.²⁰⁶ Having distinguished between legal pluralism in the strong and weak sense, Griffiths goes on to cite with approval the ideas of Pospisil,²⁰⁷ Smith,²⁰⁸ Ehrlich²⁰⁹ and Moore²¹⁰ and whilst he appears to align more towards Moore's idea of the 'semi-autonomous social field' he concludes that all of them²¹¹ 'have no difficulty in recognizing legal pluralism in the strong, empirical sense as a feature of the social groups with which they are concerned.'²¹² In this way, Griffiths succeeds in demonstrating that the situation such as we have in post-colonial Nigeria in which

²⁰⁶ Ibid.

²⁰⁷ See L Pospisil, *Anthropology of Law: A Comparative Theory* (Harper & Row, 1971).

²⁰⁸ See MG Smith, *Corporations and Society* (Transaction Publishers, 1974).

²⁰⁹ See E Ehrlich, *Fundamental Principles of the Sociology of Law* (Russell & Russell Inc, 1962).

²¹⁰ See SF Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) *Law and Society Review* 719, reprinted in SF Moore, *Law as Process: An Anthropological Approach* (Routledge and Kegan Paul, 1978). See also, B Malinowski, *Malinowski Collected Works: Crime and Custom in Savage Society*, vol 3 (Routledge, 2002).

²¹¹ J Griffiths, (n 202) above at 15-37. Pospisil's Idea of 'Legal Levels', Smith's Idea of 'Corporations', Ehrlich's Idea of the 'living law' and Moore's concept of the 'Semi-autonomous Social Field'.

²¹² J Griffiths, (n 202) above at 14-15.

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State law seeks to accommodate and validate customary law is not legal pluralism in the empirical sense. Rather it is a triumph of legal centralism.

It is argued that strong or deep legal pluralism is the best way to account for the effective protection and preservation of customary law and the rights of people that are founded upon such customary laws, not just in Nigeria but also across the African continent. This is in line with Santos' arguments in favour of expanding the concept of legal pluralism to cover all forms of social orderings.²¹³ In his studies in Portugal²¹⁴, Brazil²¹⁵ and in the Cape Verde Islands²¹⁶, Santos demonstrates the existence of 'three forms of legal spaces and their correspondent forms of law: local, national and world-legality.'²¹⁷ He maintains that '[l]ocal law is large scale reality; nation-state law is medium-scale reality'.²¹⁸ Whereas local law is the most realistic in view of its proximity to its objects, international (world) law is the least realistic and national law has a mid-level reality.²¹⁹

In using the metaphor of the 'symbolic cartography of law'²²⁰ Santos submits that the 'struggle against the monopolies of interpretation must be conducted in such

²¹³ See BdS Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press, 2002).

²¹⁴ BdS Santos, *Law and Revolution in Portugal: The Experiences of Popular Justice After the 25th April, 1974* (Academic Press, 1976).

²¹⁵ BdS Santos, 'Law, State and Urban Struggles in Recife, Brazil' (1992) 1 *Social & Legal Studies* 235.

²¹⁶ BdS Santos, *A Justiça Popular em Cabo Verde* (Estudo Sociológico, Centro de Estudos Sociais, Faculdade de Economia da Universidade de Coimbra, 1984).

²¹⁷ BdS Santos, 'Law: A Map of Misreading-Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law & Society* 279 at 287.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ BdS Santos, (n 216) above at 297.

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way as to lead to proliferation of political and legal interpretive communities.²²¹ His arguments are that a post-modern conception of law ought to be pluralistic, considering 'interlegality' by uncovering other latent and suppressed forms of legality.²²² However, Gunther Teubner has compared legal pluralism (in the strong, deep or hard sense as advocated by Griffiths and de Sosa Santos) to '...the old Roman god Janus, guardian of gates and doors, beginnings and ends, with two faces, one on the front and the other at the back of his head, legal pluralism is at the same time both: social norms and legal rules, law and society, formal and informal'.²²³ The critique is that legal pluralism in this broad sense seems unable to explain the connections or differences between social and legal norms thereby creating ambiguity in its conception of law.²²⁴

Indeed, deep, hard or strong legal pluralism defines law in a very broad way. Griffiths' views 'that "legal" and "non-legal" forms of social control'²²⁵ are not 'distinguishable types'²²⁶ has been opposed by scholars, as Sally Merry asks: 'Where do we stop speaking of law and find ourselves simply describing social life? Is it useful to call all these forms of ordering law?'²²⁷ Similarly, Galanter has argued that '... it may be useful to have a cut-off point further "up" the scale to demarcate what we want to describe as "law" of any sort, indigenous or

²²¹ BdS Santos, *The Post-Modern Transition: Law and Politics* (Oficina Do CES, 1989) at 33.

²²² BdS Santos, (n 217) above at 299.

²²³ G Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism, ' (1991) 13 *Cardozo Law Review* at 1443.

²²⁴ See also, BZ Tamanaha, 'The Folly of the 'Social Scientific' Concept of Legal Pluralism' (1993) *Journal of Law & Society* 192 at 192-193.

²²⁵ J Griffiths, (n 202) above at 39.

²²⁶ *Ibid.*

²²⁷ SE Merry, 'Legal Pluralism' (1988) *Law and Society Review* 869 at 878.

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otherwise.²²⁸ The problem of differentiating law from other normative orderings associated with deep legal pluralism has been also criticised by Tamanaha, who argues that there is nothing wrong with understanding law in such expansive ways, but such expansive definition of legal pluralism implies that 'we are swimming, or drowning, in legal pluralism.'²²⁹

However, Woodman maintains that it should be accepted that all forms of social control are part of the subject of legal pluralism.²³⁰ In what appears to be an approval of legal pluralism in the expansive way articulated by the legal sociologists – Griffiths and Santos - Woodman concludes 'that law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control.'²³¹ Nevertheless, it appears that Griffiths has recalibrated from his earlier ideas.²³²

Woodman appears to sum up the debates on legal pluralism by arguing that the scholarship on legal pluralism has been centred around whether there is any remarkable difference between State law and non-State law as well as the meaning of law itself.²³³ He identifies various categories of normative orderings

²²⁸ M Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 13 *The Journal of Legal Pluralism and Unofficial Law* 1 at 18, see particularly note 26.

²²⁹ BZ Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375 at 393.

²³⁰ See GR Woodman, 'How State Courts Create Customary Law in Ghana and Nigeria' in BW Morse and GR Woodman, (eds), *Indigenous Laws and The State* (Foris Publications, 1988) at 44-45.

²³¹ *Ibid*, at 45.

²³² J Griffiths, 'The Idea of Sociology of Law and its Relation to Law and to Sociology' (2005) 8 *Current Legal Issues* 49 at 63-64.

²³³ GR Woodman, (n 230) above at 50.

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including: ethnicity, economic activity, voluntary activity and commons status.²³⁴ On his part Tamanaha summarises the reasons for the lengthy debates on legal pluralism by arguing that: 'law' '... cannot be formulated in terms of a single scientific category because over time and in different places people have seen law in different terms.'²³⁵

In the above theoretical way, the debates on legal pluralism help in rationalising the gradual monopolisation of law by the colonial Nigerian State and the continuation of such monopoly of law by the post-colonial Nigerian State. In the process of such monopolisation of law, the indigenous customary laws and legal institutions in Nigeria have been merged into the State legal system by relegating customary law and indigenous legal institutions to an inferior status in comparison to State law and its legal institutions,²³⁶ thereby creating a situation of Griffiths' legal pluralism in the 'weak sense'²³⁷ and Woodman's 'state law pluralism'.²³⁸

Conclusion

This Chapter has demonstrated the application of customary law by courts of law in colonial and post-colonial Nigeria. It has illustrated how customary law and indigenous legal institutions have been subjected to the validation of colonial and post-colonial State legal apparatus in Nigeria. The nature of pre-colonial African

²³⁴ See GR Woodman, 'The Development "Problem" of Legal Pluralism' in BZ Tamanaha, C Sage and M Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press, 2012) at 134.

²³⁵ BZ Tamanaha, (n 229) above at 396. For a comprehensive analysis of all the various version of legal pluralism, see BZ Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001) at 171-205.

²³⁶ See GR Woodman, 'Constitutions in a World of Powerful Semi-Autonomous Social Fields' (1989) *Third World Legal Studies* 1.

²³⁷ J Griffiths, (n 202) above.

²³⁸ GR Woodman, 'Legal Pluralism and the Search for Justice' (1996) 40 *Journal of African Law* 152.

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customary land tenure in Nigeria has been examined and the impact of colonial rule on the definition of land rights in colonial and post-colonial Nigeria have also been discussed. It has been argued that the simultaneous co-existence of customary land tenure and English land tenure law in colonial and post-colonial Nigeria is a situation of legal pluralism in Griffith's 'weak sense' and in the sense of Woodman's 'state law pluralism'.

With political independence of Nigeria in 1960, another layer of normative legal order was added to the already pluralist legal situation in Nigeria as it regained sovereignty and became a Member of the UN and later the African Union, thereby making it subject to the obligations and duties of a State under the UN Charter, international law and regional African obligations arising therefrom.²³⁹ In Chapter Four, the case study will be used to illustrate that situations of legal pluralism in Griffith's 'weak sense' and Woodman's 'state law pluralism' have negative implications on the rights of people founded on the basis of customary law.

²³⁹ See Volume 2 of this thesis below where the emergence of international law and the human rights obligations of States are discussed in more details in the context of the rights of indigenous peoples.

CHAPTER FOUR: LAND RIGHTS OF ABUJA PEOPLES OF NIGERIA - A CASE STUDY

Introduction

In Chapters Two and Three, the emergence of colonialism and the relegation of customary law to an inferior status compared to State law in colonial and post-colonial Nigeria was demonstrated. The implications of the above on the definition of land rights in colonial and post-colonial Nigeria was also highlighted. The main purpose of this Chapter is to introduce the case study of Abuja, Nigeria. The case study is then used as a vehicle through which to demonstrate the impact of colonialism and the implications of the relegation of customary law to an inferior status compared to State law on the land rights of Abuja peoples in post-colonial Nigeria. This case study will also be used to critically analyse the concept of indigeneity under international law later in Chapter Six.

In 1976, the Nigerian Government compulsorily acquired the ancestral lands of Abuja peoples of Nigeria without payment of compensation or resettlement. As demonstrated later in sub-section 4.1.2 below, this is legitimised under Nigerian State laws. This Chapter will illustrate the legal implications of the monopolisation of law by the post-colonial Nigerian State on the land rights of Abuja peoples. The Chapter is comprised of two main sections. Section 4.1 introduces the case study of Abuja. In section 4.2, the relevance of this case study to this thesis and the legal challenges in this thesis will be examined. It will also be demonstrated that the ideas of post-colonial thinkers like Frantz Fanon, Edward Said, Gayatri Spivak and Homi Bhabha are helpful in the understanding of the legal problems presented by the case study. Likewise, the ideas of John Griffiths, Gordon Woodman and Sally Falk Moore help in contextualising the legal challenges which the case study of Abuja will illustrate. So, who are the Abuja peoples and what are the challenges presented by the case study of Abuja, Nigeria's current administrative capital?

4.1. The Case Study of Abuja, Nigeria

The territory of Abuja is currently the administrative capital of the Federal Republic of Nigeria.¹ In the First Schedule to the Nigerian *Federal Capital Territory Act* 1976 (FCT Act)² more specific geographical description is provided.³ Abuja is at the geographical centre of Nigeria.⁴ The peoples of Abuja are minority ethnic groups in Nigeria and are predominantly members of the Gbagyi (Gwari) ethnic group but also there are the Koros, Gades, Bassas, Igbiras, Amwamwas, Ajiri Afos and Gwandaras.⁵ People from other parts of Nigeria now reside in this territory given its status as the capital of Nigeria. Anthropological and historical studies have demonstrated that the peoples of Abuja have occupied this territory

¹ See International Consortium of Planners, *The Abuja Master Plan* (International Planning Associates, 1978). See also, Map of Nigeria showing States including Abuja at Appendix 1 below and Table showing States in Nigeria including Abuja by land size at Appendix 3 below.

² *Federal Capital Territory Act, 1976* (FCT Act), CAP 128 *Laws of the Federation of Nigeria* 1990. Available at: www.nigeria-law.org/Federal%20Capital%20Territory%20Act.htm, accessed 9 December 2016.

³ See First Schedule, Part II of the *Constitution of the Federal Republic of Nigeria, 1999* (as amended), where specific geographical information defines the territory as: 'Starting from the village called Izom on 7° E Longitude and 9° 15' Latitude, project a straight line westwards to a point just north of Lehu on the Kemi River; then project a line along 6° 47 1/2' E southwards passing close to the villages called Semasu, Zui and Bassa down to a place a little west of Abaji in Kwara State; thence project a line along parallel 8° 27 1/2' N Latitude to Ahinza village 7° 6' E (on the Kanama River); thence project a straight line to Buga village on 8° 30' N Latitude and 7° 20' E Longitude; thence draw a line northwards joining the villages of Odu, Karshi and Karu. From Karu the line shall proceed along the boundary between the Niger and Plateau States as far as Karu; thence the line should proceed along the boundary between Kaduna and Niger States up to a point just north of Bwari village; thence the line goes straight to Zuba village and thence straight to Izom.'

⁴ The area falls within the Guinean forest-savannah zone of the West African sub-region and features a tropical wet and dry climate. Demographically, the latest census indicates that Abuja has a population of about 1,406,239. See, National Population Commission, *Federal Republic of Nigeria 2006 Population and Housing Census of the Federal Republic of Nigeria* (Volume., I) at 1, available at: www.population.gov.ng/images/Priority%20Tables%20Volume%20I-update.pdf, accessed 01/01/2015, and Y Adamu and AE Ichaba, *Abuja: Man and Society* (Abuja Council for Arts and Culture, 1997) at 2.

⁵ See further anthropological details about these groups below.

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prior to British colonial rule.⁶ They are mainly farmers, hunters and fishermen.⁷ They depend on the occupation of their ancestral lands which they have held under customary law to practice their occupations.⁸ Rural and subsistence farming seems to cut across all the various ethnic groups.⁹ However, the different ethnic groups seem to have their respective specialties in different crafts.¹⁰

To understand the challenges that Abuja peoples currently face in relation to their ancestral lands and the relevance of this case study to this thesis, it is necessary to examine the emergence of the territory of Abuja as the administrative capital of Nigeria simultaneously with the evolution of formal State land tenure law in Nigeria. The justification for the historical narration that follows is the need to establish that Abuja peoples have inhabited this territory since pre-British colonial era, under customary law before the introduction of the idea of the State managing land through statutory law. This history is also important for understanding the theoretical explanations about the case study as a vehicle

⁶ For anthropological notes on the history, culture and geographical locations of these tribes in Nigeria, see generally, CL Temple, *Native Races and their Rulers: Sketches and Studies of Official Life and Administrative Problems in Nigeria* (Argus Printing & Publishing Co Ltd and Way & Co Ltd, 1918) at 29-79; OSMM Temple and CL Temple, *Notes on the Tribes, Provinces, Emirates and States of the Northern Provinces of Nigeria* (2nd edn, CMS Bookshop, 1922); OSMM Temple and CL Temple, *Notes on the Tribes, Provinces, Emirates and States of the Northern Provinces of Nigeria* (Cass, 1965); HD Gunn and F Conant, *Peoples of the Middle Niger Region: Northern Nigeria*, vol 1 (International African Institute, 1960); CK Meek, *The Northern Tribes of Nigeria: An Ethnographical Account of the Northern Provinces of Nigeria together with a Report on the 1921 Decennial Census*, vol I (Cambridge University Press, 1925); CK Meek, *The Northern Tribes of Nigeria: An Ethnographical Account of the Northern Provinces of Nigeria together with a Report on the 1921 Decennial Census*, vol II (Cambridge University Press, 1925) and Y Adamu and AE Ichaba (n 4) above at 2. See also, Linguistic Map of Nigeria at Appendix 4 below.

⁷ They have been reported by historians to have inhabited the Abuja areas of Zuba, Kawali, Bwari, Kuje, Abaji, Gwagwalada, Karu, Karshi and Garki among other towns and villages. See, S Na'ibi and A Hassan, *The Gwari Tribe in Abuja Emirate* (Nigeria Magazine Special Publications, Federal Government Print Department, 1961) at 7-13. Also, see S Na'ibi and A Hassan, *The Gwari, Gade and Koro Tribes* (Ibadan University Press, 1969) and R Blench, 'Atlas of Nigerian Languages, volume III (Crozier & Blench, 1992).

⁸ See Abuja Council of Arts and Culture, *A Socio-cultural Study of the Peoples of Abuja Vol 1* (Research & Documentation Unit, Abuja Council for Arts and Culture, 1995) at Chapters 1-5.

⁹ Ibid.

¹⁰ Ibid.

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through which to study the effects of law in society and its implications on the rights of IPs in a post-colonial Nigeria. The historical narration has been subdivided into the following historical periods: pre-British colonial Nigeria and British colonial Nigeria as well as post-colonial Nigeria.

4.1.1. Pre-British Colonial Nigeria (1800-1904)

The earliest settlers in the area now known as Abuja¹¹ were peoples from the Kwa speaking language group.¹² They settled there many centuries before the Islamic jihad of the nineteenth century.¹³ This area became part of and under the political hegemony of the ancient Habe (Hausa) kingdom of Zazzau (Zaria) in the early part of the nineteenth century.¹⁴ The presence of the Hausa Emirs in Abuja had some impact on the socio-cultural and economic conditions in this area prior to British colonial administration. In addition to the indigenous peoples enumerated above, many Hausas and Fulanis came to settle in the area.¹⁵ As a result, Thomas-Emeagwali reports that:

On the eve of the British conquest of the area in 1900, the struggle for power in the region involved the ruling circles of the Hausa, the Fulani, the Gbagyi and the Koro principally...and the extent to which the dominant ruling factions in these groups succeeded in wielding effective military power. Equally important, the influx of immigrants into the Abuja region was related to the economic viability of the area.¹⁶

¹¹ See current Map of Abuja at Appendix 2 below.

¹² Y Adamu and AE Ichaba, (n 4) above at 4. See also, G Thomas-Emeagwali, 'Notes on the History of Abuja, Central Nigeria' *African Study Monographs* 9, No 4 (1989) at 191-196.

¹³ A Hassan and S Na'ibi, (n 7) above at 10.

¹⁴ See Table of 'Abuja Genealogy' showing the order of succession in years of these Emirs in OSMM Temple and CL Temple (n 6) above at 518.

¹⁵ G Thomas-Emeagwali, (n 12) above at 192.

¹⁶ *Ibid*, at 192-193.

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The above development led to an increased incidences of class formation among the various ethnic groups in the area as was already the case in other areas of the Middle Belt region of Nigeria.¹⁷ Indeed, some of the indigenous ethnic nationalities were enslaved by the dominant Hausa and Fulani ethnic groups.¹⁸ This area of the former Zaria Kingdom continued to be increasingly populated by several semi-independent tribes.¹⁹ In the early 1800s when the Zaria Kingdom fell to Fulani invaders, one Muhammadu Makam (a Zaria King) is reported to have fled south of Zaria with some of his followers and brothers (Abu Ja and Abu Kwaka), all of whom successively became Emirs of Abuja.²⁰ Abu Ja (who the town was named after) is said to have succeeded Makam in the year 1837.²¹

The fleeing emirs from the old Zaria Kingdom came with and super-imposed their culture on the peoples of Abuja as well as taking over control of the lands in this area until their conquest by the British colonial army in 1902.²² Like indigenous peoples (IPs) in other parts the world, the above development highlights the early vulnerability of these groups of people to external forces prior to British colonial rule.²³ Indeed, many of the minority and indigenous ethnic populations in this area saw the Emirs and the immigrant Hausa populations that came along with them as settlers, a situation that often leads to violent conflicts across the Middle Belt

¹⁷ Ibid, at 195.

¹⁸ A Hassan and S Na'ibi, *A Chronicle of Abuja* (African University Press Ltd, 1962) at 1-37.

¹⁹ Ibid.

²⁰ See table of 'Abuja Genealogy' showing the order of succession in years of these Emirs in OSMM Temple and CL Temple (n 6 above) at 518.

²¹ Ibid.

²² Y Adamu and AE Ichaba, (n 4) above at 4.

²³ Ibid.

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region of Nigeria where some of the Hausa and Fulani settlers are currently settled.²⁴

Another effect of the arrival of Emirs was the introduction of Islam and many members of the pre-existing indigenous ethnic groups embraced Islam and its tenets came to influence various areas of their lives including Islamic law on property and inheritance. Indeed, 'under Islamic law of the Maliki School, land was expropriated from non-Muslims'.²⁵ However, as King noted in the context of pre-British colonial Northern Nigeria, 'though the Caliphate created a Fulani aristocracy, and replaced the ideological underpinnings of the Hausa states with an Islamic superstructure, it nevertheless, remained an ethnically heterogeneous polity in which territorial identification superseded any sense of being Hausa-Fulani'.²⁶ Therefore, like other parts of Northern Nigeria in pre-British colonial Abuja land tenure in the area was governed by Islamic law for Muslims and customary law among non-Muslims.²⁷ The situation regarding land tenure in this area on the eve of British colonial take over is reported by Na'ibi and Hassan who wrote:

ALL PEOPLE WHO TAKE UP LAND have to own the sarki as their chief and pay him a tax. All land is owned by the community, and every village has its well-defined boundaries, be they in the bush or in the cultivated land. Disputes on village boundaries are settled by the District head or Emir; and disputes over farm boundaries by the Village Headman and his Elders.²⁸

²⁴ W Adebani, 'Terror, Territoriality and the Struggle for Indigeneity and Citizenship in Northern Nigeria' (2009) 13 (4) *Citizenship Studies* 349 at 349.

²⁵ SN Nwabara, 'The "Received" Nigerian Law and the Challenge of Legal Independence' (1979) 14 (1) *Journal of Asian and African Studies* 99 at 104.

²⁶ LD King, 'State and Ethnicity in Precolonial Northern Nigeria' (2001) 36 (4) *Journal of Asian and African Studies* 339 at 339.

²⁷ SN Nwabara, (n 25) above at 104-105.

²⁸ S Nai'ibi and A Hassan, (n 7) above at 34. Emphasis as in the original text.

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The Islamic Jihad of the nineteenth century that engulfed Northern Nigeria, including Abuja, throws light on the role of narratives in the political domination of others in a similar way as Western imperialism. For example, the Hausa and Fulani colonial domination of Northern Nigeria was facilitated by a grand-narrative around the so-called 'legend of Bayajida'.²⁹ According to this myth and legend, the origins of the whole Hausa ethnic group of Northern Nigeria relates to how one Bayajida who arrived in the would-be Hausa land from Baghdad, married into an existing ruling family, and became the father of the rulers of the seven city-States through his legitimate wife who made up the Hausa Bakwai (seven authentic Hausa States).³⁰

Bayajida is also claimed to have had seven other 'illegitimate' children which he fathered through his legitimate wife's slave!³¹ These latter 'illegitimate' children of Bayajida purportedly founded the *Banza Bakwoi* (seven unauthentic Hausa States).³² According to this legend the Gbayis originated from one of the seven 'illegitimate' children of Bayajida.³³ While the authenticity of the aforementioned legend in terms of explaining the origins of the States in Northern Nigeria remains contested³⁴ and has been claimed to exist only in the imaginations of those who concocted it,³⁵ its role in feeding into the narratives of political domination by the dominant Hausa and Fulani ethnic groups in Northern Nigeria remains in present-

²⁹ W Hallam, 'The Bayajlbida Legend in Hausa Folklore' (1966) 7 *The Journal of African History* 47.

³⁰ *Ibid.* The seven Hausa States named are: Daura, Kano, Katsina, Gobir, Rano, Zaria and Biram.

³¹ See D Lange, 'The Bayajlbidda Legend and Hausa History ' in E Bruder and T Parfitt, (eds), *African Zion: Studies in Black Judaism* (Cambridge Scholars Publishing, 2012) 139-174.

³² These so-called inauthentic States are: Zamfara, Kebbi, Nupe, Gwari, Yauri, Yoruba and Kwararafa (Jukun).

³³ D Lange, (n 31) above at 140.

³⁴ *Ibid.*, at 141-167.

³⁵ See for example, A Smith, 'Some Considerations Relating to the Formation of States in Hausaland' (1970) *Journal of the Historical Society of Nigeria* 329.

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day Nigeria.³⁶ Indeed, the use of narratives in the political domination of others, is a theme that has resonated with many post-colonial scholars.

For example, Edward Said's famous book *Orientalism*,³⁷ examines how the colonial powers of the West got involved in colonialism and imperialism. Said, specifically identifies Great Britain, France and America³⁸ and narrates how they created and continue to represent an idea of the 'Orient' for their interests and consumption that has no connection with the reality of the 'Orient'.³⁹ By 'Orient', Said is referring to the Middle East although in his later work *Culture and Imperialism*,⁴⁰ he also focused on India and Africa and other parts of world. Indeed, scholars have maintained that Said has demonstrated 'how imperialism changes other lands – to look more like Europe; to produce in a more European way (or at least in a way which benefits Europe).'⁴¹ For example, some have argued that the very idea of statehood in the Westphalian sense that was imported into Africa through colonialism by Europeans was aimed at facilitating European engagement with the colonies.⁴²

However, Said's Oriental has been criticised because it 'neglects evidence of native agency in general and indigenous resistance in a manner which parallels

³⁶ See M Smith, *The Affairs of Daura: History and Change in a Hausa State 1800-1958* (University of California Press, 1978) and WF Miles, *Hausaland Divided: Colonialism and Independence in Nigeria and Niger* (University of California Press, 1978).

³⁷ E Said, *Orientalism* (Pantheon, 1978). See page 3, where Said acknowledges that 'I have found it useful here to employ Michel Foucault's notion of discourse, as described by him in *The Archaeology of Knowledge* and in *Discipline and Punish*, to identify Orientalism.'

³⁸ Ibid, at 4.

³⁹ Ibid.

⁴⁰ E Said, *Culture and Imperialism* (Random House LLC, 1993).

⁴¹ Ibid, at 103.

⁴² See RH Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, vol 12 (Cambridge University Press, 1993) and A Anghie, *Imperialism, Sovereignty the Making of International Law* (Cambridge University Press, 2005).

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Western or Orientalist attitudes.¹⁴³ Said's *Orientalism* is too monolithic as the focus of its discourse is only on the Arab world.⁴⁴ It focuses on a large amount of diverse ways through which the West engaged in 'Orientalism', the focus was too narrowly based on the Arab world in the Middle East. In response to this criticism Said produced his later work- *Culture and Imperialism*. As he described it 'I... have tried here to expand the arguments of the earlier book to describe a more general pattern of relationships between the modern metropolitan West and its overseas territories'.⁴⁵

In general, Said does not appear to recognise the various hierarchies of representations (Orientalism) that other dominant groups seem to exercise in their relationship and cultural contacts with smaller groups within even the colonised societies that he studies. Nevertheless, Said's work leads to an understanding that '[t]he battle in imperialism is over land ... but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future – these issues were reflected, contested, and even for a time decided in narrative.'⁴⁶ Indeed, the power of narration which entails representation and misrepresentation is significant in our understanding of the power dynamics that are involved in the control over land. It is argued that as narration aided the colonial authorities in their acquisition of territories in Africa, the case study of Abuja demonstrates that the use of narration as a means of acquiring territory and exercising power over people with little or no political power did not begin with European colonialism (as the use of the 'legend of Bayajida' in Northern Nigeria demonstrates), nor did it end with political independence of African States as demonstrated in sub-section 4.1.2 and section 4.2 below.

⁴³ P Childs, *et al*, *An Introduction to Post-Colonial Theory* (Prentice Hall London, 1997) at 107.

⁴⁴ For further criticism of Said's work on orientalism see, J McLeod, *Beginning Postcolonialism* (Manchester University Press, 2000) at 46-55.

⁴⁵ E Said, (n 37) above at xi.

⁴⁶ *Ibid*, at xiii.

4.1.2. Colonial and Post-Colonial Nigeria (1904-Present)

The British colonial land tenure law in Northern Nigeria described in Chapter Three,⁴⁷ operated in the territory of Abuja until political independence in 1960. The colonial authorities merely retained the political structure existing in this area and governed through a process of indirect rule.⁴⁸ The Abuja Emirate was designated a Native Authority known as the Abuja Native Authority under the administration of the Emir who was answerable to the British colonial District Officers.⁴⁹ The position in relation to the land rights of the indigenous inhabitants remained the position taken by the Privy Council in *Ahmodu Tijani v Secretary Southern Nigeria*,⁵⁰ to the effect that whatever interest the Crown had on the lands in this territory was subject to the land rights of the 'natives' under customary law.

Once the decision had been made by the Nigerian Government to relocate the Nigerian Capital from Lagos to Abuja, 'the Emir of Abuja at the time...was asked to meet with his Emirate Council to approve contributing four of the five districts of Abuja to become the new capital.'⁵¹ Hence, 'the Abuja Emirate in Niger States contributed 80%, Plateau State (now Nassarawa State) contributed 16 percent of the South-east territory and Kwara States (now Kogi State) contributed about four percent of the South-west territory.'⁵² The old Abuja town (the headquarters of the defunct Abuja Emirate) which was not included in the territory of the new FCT was asked to relinquish its name for the FCT while it (the old Abuja town) was

⁴⁷ See sub-section 3.2.2

⁴⁸ See KP Maddocks and DA Pott, *Report on Local Government in the Northern Provinces of Nigeria* (1950) at 26.

⁴⁹ *Ibid*, at 26-28.

⁵⁰ *Amodu Tijani v Secretary of Southern Nigeria* [1921] AC 399.

⁵¹ F Rodd *et al*, (n 96) below at 7.

⁵² *Ibid*, at 7-8. See also, Appendix 1 for the location of the neighbouring States that purportedly made this contribution.

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renamed Suleja after the then Emir.⁵³ Thereafter, on 4 February 1976 the military Government in Nigeria promulgated Decree No 6 of 1979 (now known as the *Federal Capital Territory Act*)⁵⁴ compulsorily acquiring the ancestral lands of the Abuja peoples without payment of compensation or resettling them.

The Nigerian *Land Use Act* 1978 (LUA)⁵⁵ discussed in Chapter Three is not applicable in Abuja Nigeria. It is the narrative of the government of Nigeria that Abuja is a symbol of the political unity and all lands there belong exclusively to the Federal Government of Nigeria.⁵⁶ Consequently, the *Federal Capital Territory Act* 1976 (FCT Act)⁵⁷ vests all of Abuja lands in the Federal Government.⁵⁸ As Abuja is not a State within the Nigerian federation, there is no Governor, hence, the non-applicability of the LUA. The effect is that the powers to manage land in Abuja are vested in the President of Nigeria.⁵⁹ This compulsory acquisition of the customary land rights of Abuja peoples is then given constitutional imprimatur under Section 297 (2) of the *Constitution of the Federal Republic of Nigeria* 1999 (Nigerian Constitution). That section provides that '[t]he ownership of all lands comprised in the Federal Capital Territory, Abuja shall vest in the Government of the Federal Republic of Nigeria.' Indeed, section 1(3) of the FCT Act states that:

⁵³ F Rodd *et al*, (n 96) below at 8.

⁵⁴ *Infra*, (n 57) below.

⁵⁵ *Land Use Act*, 1978 CAP., 202 *Law of the Federation of Nigeria*, 1990. Available at: www.nigeria-law.org/Land%20Use%20Act.htm, accessed 9 December 2016.

⁵⁶ See KT Imoro, *Federal Capital Territory Abuja: Centre of Unity = Territoire de la Capitale Federale Abuja: Centre d' Unite* (Episteme Global Concepts, 2006); S Ago, *Federal Capital Territory Abuja, Nigeria: Report of Ministerial Committee for the Appraisal of Physical Planning and Development Issues in the Federal Capital Territory Abuja* (Federal Capital Territory Development Authority, 1999); and Y Adamu and AE Ichaba, *Abuja: Man and Society* (Abuja Council for Arts and Culture, 1997).

⁵⁷ *Federal Capital Territory Act*, CAP. 128 *Laws of the Federation of Nigeria* 1990. Available at: www.nigeria-law.org/Federal%20Capital%20Territory%20Act.htm, accessed 16 December 2016.

⁵⁸ See Section 1 (3).

⁵⁹ Who often delegates his powers to the Minister.

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The area contained in the Capital Territory shall, as from the commencement of this Act, cease to be a portion of the States concerned and shall thenceforth be governed and administered by or under the control of the Government of the Federation to the exclusion of any other person or authority whatsoever and the ownership of the lands comprised in the Federal Capital Territory shall likewise vest absolutely in the Government of the Federation.

The introduction of English law and the idea of State managing land into Nigeria have given rise to several difficulties that have generally affected the customary land rights of Nigerians in general.⁶⁰ However, the preservation of certain aspects of customary land tenure within the LUA implies the survival of some aspects of customary land tenure in the 36 States, of which people indigenous to those States are beneficiaries.⁶¹ Hence, some Nigerians have benefited from this hybrid land tenure system compared to Abuja peoples whose customary land rights are terminated. Nigerians indigenous to other States within Nigeria who occupied land under customary tenure before the commencement of the LUA on 27th March, 1978 are beneficiaries of section 36 of LUA which provides that:

(1) The following provisions of this section shall have effect in respect of land not in an urban area which was immediately before the commencement of this Act held or occupied by any person.

⁶⁰ See PE Oshio, 'The Indigenous Land Tenure and Nationalization of Land in Nigeria,' (1990) 10 Boston College Third World Law Journal 43 at 49. See also, I Smith, 'Effects of the Land Use Act on Customary Land Tenure System in Nigeria' (1990) 2 Journal of Contemporary Legal Problems 119; FA Salamone, 'The Clash between Indigenous, Islamic, Colonial and Post-colonial Law in Nigeria' (1983) 15 The Journal of Legal Pluralism and Unofficial Law 15; VC Uchendu, 'State, Land, and Society in Nigeria: A Critical Assessment of Land Use Decree (1978)' (1979) 6 Journal of African Studies 62; L Agbosu, 'The Land Use Act and the State of Nigerian Land Law' (1988) 32 Journal of African Law 1; and I Umezulike, 'The Customary Tenant and the Land Use Act' (1978) 20 People's Law Journal 1.

⁶¹ PE Oshio, (n 60) above at 53-54. For example, section 24 of the Act preserves the customary law rules governing devolution of property. Section 25 prohibits partitioning of land but it exempts cases which are regulated by customary law. Under section 29 the holder or occupier entitled to compensation is a community and the governor is empowered to direct payment of the compensation either to the community or to its chief or leader to be disposed of by him for the benefit of the community in accordance with the applicable customary law. Section 50 then defines a 'customary right of occupancy' as 'the right of a person or community lawfully using or occupying land in accordance with customary law ...' while an 'occupier' is defined as 'any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law'

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(2) Any occupier or holder of such land, whether under customary rights or otherwise howsoever, shall if that land was on the commencement of this Act being used for agricultural purposes continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder by the appropriate Local Government...

(4) Where the land is developed, the land shall continue to be held by the person to whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a customary right of occupancy issued by the Local Government...

As mentioned above, the LUA is not applicable in Abuja. Indeed, the FCT Act which was enacted in 1976 pre-dates the 1978 LUA. Therefore, the protection of customary land rights of occupiers of land before the commencement of the LUA does not apply to the benefit of holders or occupiers of land under customary land tenure in Abuja.

The combined effects of the provisions of the Nigerian Constitution and the FCT Act alienates Abuja peoples from their ancestral lands. Consequently, any rights to land that they are entitled to under customary tenure is under the Nigerian laws invalid. The above legal situation in relation to customary land tenure in Abuja has been confirmed by the decisions of the Nigerian Court of Appeal (CA) in the only known case on the issue as at the time of writing. In the case of *Ona v Atenda*,⁶² the Nigerian CA relied on the provisions of the afore-mentioned provision of the FCT Act and the Nigerian Constitution when it held rather brutally, per Akinta Justice of the Court of Appeal (JCA) (as he then was) who delivered the lead judgment that:

The law is settled that where land is acquired for public purposes under a statute, as in the instant case, the Government takes such land as of right and no implied contract by the Government to pay compensation can be inferred from the taking. Similarly, claims for compensation for lands acquired by the Government for public purposes under a statute are statutory: and no owner of land so

⁶² *Ona v Atenda* [2000] 5 NWLR 244.

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expropriated by statute, is entitled to compensation unless he can establish a statutory right to such compensation.⁶³

Clearly, the express decision of the Nigerian CA in the above case implies that claims for payment of compensation for Abuja lands compulsorily acquired by the Government based upon customary law cannot be validly and successfully made. Effectively, customary land rights have been terminated in Abuja. The above legal developments demonstrate that the colonial legacy of the State managing land continued after Nigeria's political independence from Britain. Sue Farran describes the situation generally as a phenomenon of post-colonial States.⁶⁴ Indeed, Frantz Fanon categorically admonished African States against retaining the structures put in place by colonialism. In his *The Wretched of the Earth*⁶⁵ Fanon exposes the trauma of colonisation. He argued that to break free from colonialism in any nation, a national culture must be recovered and imbibed.⁶⁶ Fanon was particularly concerned with the lasting effects of colonialism and the foreign culture which it superimposes on the colonised. He demonstrated that, by its nature, colonialism tends to disrupt the cultural life of colonised people.⁶⁷ He further demonstrated that this act of cultural annihilation is achieved through a deliberate negation of the cultural reality of colonised people by the colonisers, through 'new legal relations introduced by the occupying power'.⁶⁸

One example of the above is the gradual erosion of customary land tenure by the received English land tenure system introduced into Nigeria during colonialism. Towards the end of his essay on national culture, Fanon metaphorically made the

⁶³ Ibid, at 268.

⁶⁴ S Farran, 'Navigating between Traditional Land Tenure and Introduced Land Laws in Pacific Island States' (2011) 43 *The Journal of Legal Pluralism and Unofficial Law* 65 at 65.

⁶⁵ F Fanon, *The Wretched of the Earth* (Grove, 1963).

⁶⁶ Ibid, at 210.

⁶⁷ Ibid.

⁶⁸ Ibid, at 236.

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case that if Africa is to make any meaningful progress, it would be necessary for Africans to figuratively create a 'new man' that is different from the 'Man' from Europe.⁶⁹ Fanon therefore enjoined Africa not to mimic Europe, thereby drawing from a theme that appears to have been well received amongst other post-colonial theorists.⁷⁰ Fanon tackles the problem of culture as a factor in the subjugation of non-Western peoples. He warned Africa against paying 'tribute to Europe by creating states, institutions, and societies which draw their inspiration from her.'⁷¹ Rather, he encouraged Africa to 'turn over a new leaf ... work out new concepts, and try to set afoot a new man.'⁷²

Fanon has been rightly commended for providing a framework for 'international and intercultural affairs' as well as giving a specific road-map for groups that need cultural liberation.⁷³ Indeed, Fanon's work is a call for the revival of the culture of colonised peoples. Others have credited his work for being 'a kind of internationalism which will reunite into its own humanness in an open-ended way - a world where no human being will be subject to dehumanization.'⁷⁴ His work

⁶⁹ By 'Man' Fanon seems to figuratively and metaphorically refer to societies or nation-states.

⁷⁰ F Fanon, (n 65) above at 314.

⁷¹ Ibid, at 315.

⁷² Ibid, at 316. See also, S Hall, 'Ethnicity: Identity and Difference' (1991) 23 *Radical America* 9, where Hall argues like Fanon, that it is at the point when colonial societies first recognise and confront colonial structures that their influences on the indigenous and dominant culture can be more effectively dis-empowered.

⁷³ See HH Fairchild, 'Frantz Fanon's The Wretched of the Earth in Contemporary Perspective' (1994) *Journal of Black Studies* 191 at 191. See also, HK Bhabha, *The Location of Culture* (Routledge, 1994); HK Bhabha, 'Is Frantz Fanon Still Relevant?' (2005) 51 *Chronicle of Higher Education* 14; HH Fairchild, 'Frantz Fanon's The Wretched of the Earth in Contemporary Perspective' (1994) *Journal of Black Studies* 191; IL Gendzier, *Frantz Fanon: A Critical Study* (Pantheon, 1973); N Lazarus, 'Disavowing Decolonization: Fanon, Nationalism, and the Problematic of Representation in Current Theories of Colonial Discourse' (1993) *Research in African Literatures* 69; W Rodney, *How Europe Underdeveloped Africa* (London and Dar es Salaam, 1972); and C Tiffin and A Lawson, *De-scribing Empire: Post-colonialism and Textuality* (Taylor & Francis, 1994).

⁷⁴ AM Agathangelou, 'Fanon on Decolonization and Revolution: Bodies and Dialectics' (2015) *Globalizations* 1 at 1.

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also presents a challenge to intellectuals from Africa to embark on 'cultural nationalism' as a pre-condition to real liberation.⁷⁵

The colonial and post-colonial co-existence of customary land tenure and the received land tenure in Nigeria also creates a situation of John Griffith's legal pluralism in the 'weak sense'⁷⁶ and Gordon Woodman's 'state law pluralism'⁷⁷ discussed in Chapters Two (section 2.3) and Three (section 3.3). Consequently, as demonstrated by the case of Abuja, customary land tenure is extinguished on the altar of State-building. The argument then is that this case study demonstrates the capacity of State law to terminate legal pluralism irrespective of the practical circumstances of people in social life. In line with the above argument, it is also argued that the case study of Abuja throws up insights about the implications of the power of State law. Accordingly, the argument is made that with the exception of 'living' customary law, the power of State law to extinguish other forms of law raises critical concerns about land rights of IPs in a post-colonial State with a plural legal system such as Nigeria.

It must be emphasised that, the ability of State law to terminate legal pluralism or other forms of non-State law is only possible in situations of Woodman's 'State law pluralism' or legal pluralism in Griffith's 'weak sense'. State law is certainly not capable of terminating 'deep pluralism' or legal pluralism in the 'strong sense'

⁷⁵ For further works on the relevance of Fanon's work see, HM Adam, 'Frantz Fanon as a Democratic Theorist' (1993) *African Affairs* 499; E Burke, 'Frantz Fanon's "The Wretched of the Earth"' (1976) *Daedalus* 127; PA Beckett, 'Frantz Fanon and Sub-Saharan Africa: Notes on the Contemporary Significance of His Thought' (1972) *Africa Today* 59; IL Gendzier, *Frantz Fanon: A Critical Study* (Pantheon, 1973) and HK Bhabha, 'Is Frantz Fanon Still Relevant?' (2005) 51 *Chronicle of Higher Education* 14.

⁷⁶ See J Griffiths, 'What is Legal Pluralism?' (1986) 18 *The Journal of Legal Pluralism and Unofficial Law* 1.

⁷⁷ See GR Woodman, 'The Idea of Legal Pluralism', in B Dupret, M Berger and L Al-Zwaini (eds), *Legal Pluralism in the Arab World* (BRILL 1999) 3-20 and GR Woodman, 'Ideological Combat and Social Observation: Recent Debate about Legal Pluralism' (1998) 30 *The Journal of Legal Pluralism and Unofficial Law* 21.

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particularly in the context of the relationship between State law and 'living' customary law.⁷⁸

Locating Nigeria as a 'semi-autonomous social field' illustrates the divide between the *de jure* situation where the legal ownership of land in the FCT vests in the Federal Government of Nigeria and the *de facto* situation where the peoples of Abuja are in actual occupation of their ancestral lands. Sally Falk Moore's study of the 'semi-autonomous social field'⁷⁹ of the Chagga people of Mount Kilimanjaro, Tanzania illustrates that the semi-autonomous social field 'is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.'⁸⁰ For Moore, the entire society (for example a State) is a larger 'social matrix' or 'complex society', that may or not 'invade' the smaller 'semi-autonomous social-field'. While different 'semi-autonomous social-fields' may overlap, a particular 'semi-autonomous social field' is an appropriate locus of studying the effect or otherwise of law (originating from a larger 'social matrix) for the purposes of any anthropological investigation.⁸¹

Indeed, the 'semi-autonomous social field' of Abuja is 'invaded' by State law with the effects of a *de jure* termination of customary land tenure. However, Moore maintains that 'the decisions people make, the actions they take and the relationships they have...[and] important aspects of the connection between law and social change emerge only if law is inspected in the context of social life.'⁸² The reality of the situation in relation to land tenure in Nigeria generally and Abuja

⁷⁸ See GR Woodman, Customary Land Laws within Legal Pluralism over the Generations' (2014/15) (1) SADC Law Journal 189 at 200.

⁷⁹ SF Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) Law and Society Review 719, reprinted in SF Moore, *Law as Process: An Anthropological Approach* (Routledge and Kegan Paul, 1978) at 54.

⁸⁰ SF Moore, (n 79) above at 720.

⁸¹ Ibid.

⁸² Ibid, at 743.

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in particular validates her findings as notwithstanding the above provisions of the LUA, and in the context of Abuja the FCT Act and the Nigerian Constitution, Nigeria's customary land tenure is still the most widely practiced and is recognised by the general populace as a valid way of acquiring rights in land.⁸³ In line with this it has been reported that: 'Customary law continues to govern land tenure for the majority of Nigerians, even though tenure security in urban areas (and as against the government and community outsiders in rural areas) is low. Land rights are transferred mostly in informal markets.'⁸⁴ In terms of rights to rural land held under customary law such rights are considered to be secure as against other claims from within the community or from other communities recognising customary law.⁸⁵

In the particular context of Abuja and the Abuja peoples, it has been reported that:

As the vast majority of indigenes have survived through farming as their sole occupation, they were forced to find an alternative means of earning income. Many indigene households chose to use the additional land in their settlements to supply additional income, while also meeting the urgent need for affordable housing for non-indigenes. Although illegal under the FCT Act for individuals to rent land or build housing for rental purposes without the approval of the FCDA, indigenes have been doing so for several decades.⁸⁶

Whereas some of the indigenes of Abuja have been pushed out of the Capital City most of them still live in satellite towns and villages away from the Federal Capital City (FCC).⁸⁷ Evidence that the indigenes still believe that they occupy their lands on the basis of customary law is provided by one of the most recent

⁸³ See PE Oshio, (n 60) at 47-51.

⁸⁴ See USAID (2010), <https://www.land-links.org/country-profile/nigeria/>, accessed 07/04/ 17.

⁸⁵ Ibid.

⁸⁶ Centre on Housing Rights and Evictions (COHRE) and Social and Economic Rights Action Centre (SERAC), *The Myth of the Abuja Master Plan: Forced Evictions as Urban Planning in Abuja, Nigeria* (COHRE & SERAC, 2008) at 32.

⁸⁷ For an idea of the actual area covered by buildings in the FCC of the FCT, see Appendix 6 below.

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study of the Gbayis (one of the indigenous ethnic groups in Abuja) which found that 'communities are governed traditionally by Esu, the head of the community'.⁸⁸ Indeed, it was observed that '...the settlements believe that their land was bequeathed to them by their ancestors. The land serves the purposes of practicing their farming livelihood and other uses. They believe that leaving their land for another place is not only against their interest but a permanent loss of identity and heritage.'⁸⁹ The study also found that: 'Wasa is also an original native community in the FCT with indigenes also of the Gbagyi extraction. The indigenes are mainly local farmers and grow crops such as yams, maize and guinea corn. The community however lacks basic social amenities like primary school, access road, electricity supply, water supply and health centres.'⁹⁰ A situation that epitomises the situation of most of the indigenes in various villages and satellite towns in the FCT.

The above findings corroborated the work of an earlier research which found that:

Speaking on condition of anonymity recently, a local Gbagyi chief described the stand-of situation between official land policy and the rights of indigenous people as being like 'a pregnant woman— anything can happen any time, either in our time, or in the future.' The sense one gets speaking with community leaders is that the Gbagyi people...are standing their ground over the few remaining pockets still under their control.⁹¹

⁸⁸ Federal Ministry of Industry, Trade and Investment (FMITI), *Resettlement and Social Audit: Abuja Technology Village* (FMITI, 2015) at 24.

⁸⁹ *Ibid*, at 20.

⁹⁰ *Ibid*, at 14.

⁹¹ S Gusah, (n 142) below at 144. See also, AA Babatunde *et al*, 'Analysis of the Activities of Land Administration Machineries in Abuja and Minna, Nigeria' (2014) 8 (1) *Journal of Environmental Science, Toxicology and Food Technology* 31 at 34 which found that: 'From the response, it is clear that informal land market is a fundamental source of access to land at the study areas.'

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In a 2003 anthropological study of the Gbagyi indigenes in Abuja, Ada Okau argued that due to the negative:

...effects of the establishment of Abuja on the organisation of labour and agricultural production, it is necessary to consider the important consequences of the alienation of land and the restricted traditional economic activities of the Gwari such as hunting, fishing, farming and grazing. These economic activities were part of a system of social relationships and were supported by certain value systems which have been destroyed by the alienation of Gwari's land.⁹²

Indeed, Ibrahim Jibril notes that although the Abuja peoples 'hold customary titles, they are not supposed to alienate (after 1976, the year the FCT Act gained legal force), without the consent of the Authority. This provision of the law was observed mostly in breach thereby leading to the flourishing of a vibrant illegal land market.'⁹³

The above situation in Abuja in which local traditional rulers and Abuja peoples are still involved in alienating their ancestral lands which they believe to be theirs under customary law has created what the Government terms 'illegal markets'. This in turn has led to the emergence of squatter settlements inhabited by people migrating from other parts of Nigeria into the FCT. As the Centre on Housing Rights and Evictions (COHRE) and Social and Economic Rights Action Centre (SERAC) found: 'Owners thus began to sell in the open market rather than wait for Government acquisition and subsequent perceived low compensations. That led to a flourishing illegal land market, which was operated mainly by leaders of

⁹² A Okau, *Perspectives on Urban Anthropology: Abuja and Gbagyi Grievances* (Aboki Publishers, 2003) at 64.

⁹³ IU Jibril, 'Resettlement Issues, Squatter Settlements and the Problem of Land Administration in Abuja, Nigeria's Federal Capital', paper presented at the 5th International Federation of Surveyors (FIG) Regional Conference entitled: 'Promoting Land Administration and Good Governance' in Accra, Ghana 8-11 March 2006 at 9. At page 10, Jibril states that 'the local traditional Rulers got seriously involved in the operation of the illegal land "markets" and subsequent outright alienation of their ancestral land.'

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local communities. The illegal markets were the easiest way for Abuja residents to acquire land.⁹⁴

The continuous alienation of ancestral lands by Abuja peoples and the emergence of illegal squatter settlements is happening despite the fact that section 7 (1) of the FCT Act prevents any such alienation and development of land in the FCT as it provides that:

...no person or body shall within the Federal Capital Territory, carry out any development...unless the written approval of the Authority has been obtained by such person or body: Provided that the Authority may make a general order with respect to the interim development of land within the Federal Capital Territory and may make special orders with respect to the interim development of any portion of land within any particular area.

The legal problems which this case study demonstrates in relation to the indigenous peoples of Abuja and their land rights as well as in the general context of this thesis are summed up in section 4.2 below.

4.2. The Case Study and the Problem in this Thesis

Upon the creation of the FCT, the misleading view was that the territory of the FCT did not belong to any ethnic group within Nigeria.⁹⁵ Hence, the recommendations of a Panel constituted for that purpose was accepted by the Nigerian Government which promulgated the FCT Act establishing Abuja as the capital of Nigeria and setting up the Federal Capital Development Authority (FCDA) - the organisation tasked with developing the capital.⁹⁶ Consequently,

⁹⁴ COHRE and SERAC, (n 86) above at 22. See also, W Adebani, (n 95) below at 98-99 and IU Jibril, (n 93) above at 9-13. Similar findings have been made in relation to three villages in Abuja, see S Gusah, (n 142) below at 150-152.

⁹⁵ See W Adebani, 'Abuja' in S Bekker and G Therborn (eds), *Capital Cities in Africa: Power and Powerlessness* (Human Science Research Council (HSRC) Press and Council for the Development of Social Science Research (CODESRIA), 2012) at 94.

⁹⁶ F Rodd *et al*, *Around and About Abuja* (Spectrum Books, 2005) at 5-6.

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Abuja began to operate officially as the new capital of Nigeria in 1991.⁹⁷ It appears that the original intention of the Nigerian Government was to evacuate all the peoples of Abuja and resettle them at some 'suitable' locations outside the territory at the expense of the Government.⁹⁸ However, as the Government later admitted it had no sufficient resources for such.⁹⁹

Hence, the authorities decided that the peoples of Abuja should continue living in the FCT unless their lands were needed for developmental projects.¹⁰⁰ As the government remained unsure about how to proceed, in May 1980 an ad-hoc Committee on the Resettlement of the Inhabitants of Abuja was set up by the President.¹⁰¹ The Committee conducted an in-depth study and recommended that the Government should assume full responsibility for the resettlement of those compelled to leave Abuja.¹⁰² Such resettlements were meant to provide for planned housing, alternative farmlands, employment and basic infrastructural facilities for the indigenous communities.¹⁰³ It was also recommended that the Government should render financial assistance to the indigenes that chose to leave the territory out of their volition.¹⁰⁴ However, while the issue of resettlement and financial assistance remained unresolved, the President took over the administration of Abuja with effect from 1st January, 1981.¹⁰⁵ Lamenting the

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ MJ Vatsa, *The Poetry of Abuja: Nigeria's Capital* (Cross Continent Press, 1983) at xii and MJ Vatsa, 'Abuja' (1981) *Okike-African Journal New Writ* 62.

¹⁰⁰ MJ Vatsa, (n 99) above at xii.

¹⁰¹ It was headed by Senator AD Rufa'i of the Senate Committee on the FCT.

¹⁰² MJ Vatsa, (n 99) above at xii.

¹⁰³ Ibid.

¹⁰⁴ Ibid, at xii-xiii.

¹⁰⁵ Ibid, at xiv. See Rodd F *et al*, (n 96) above at 7- 8.

human rights implications of this development, in 1983 Frank Salamone wrote that:

This scheme is affecting the Gbagyi ... The size alone is startling, 365,000 square miles ... There would be new laws regarding property holding, essentially taking away communal ownership of land and vesting it in the state ... New, and artificial, political units would be established which would nullify indigenous political leadership.¹⁰⁶

4.2.1. Policy Considerations in Relation to the FCT and Abuja Peoples

The main reason for the choice of Abuja as the FCT is reflected in the words of General Murtala Mohammed who was the Nigerian Head of State in 1976 who stated that the Government needed a place 'with easy accessibility from all parts of the country by road, rail and air which would facilitate the administration of the country,...serve as a symbol of our unity and greatness and from the view point of national security, be less vulnerable to external aggression as it would be practically immune to sea-borne attack.'¹⁰⁷ However, having selected Abuja as the appropriate location of the new Capital of Nigeria, the policy challenges before the Nigerian Government in relation to the indigenous peoples of Abuja and their ancestral lands could be summed up through the words of Okau who argues that '[t]he main challenge facing the Federal Government of Nigeria and the administration of Abuja...is how to save the Gbagyi from possible cultural and economic annihilation. The major means of achieving this goal is the appraisal of the Gbagyi indigenous social structures especially as it affects land and land use.'¹⁰⁸

¹⁰⁶ FA Salamone, (n 60) above at 44-45.

¹⁰⁷ As quoted in IU Jibril, (n 93) above at 2. See also, W Adebani, (n 95) above at 93; F Rodd *et al*, (n 96) above at 7. OI Obateru, *The Genesis and Future of Abuja* (Penthouse Publications, 2003) at 8-11.

¹⁰⁸ A Okau, (n 92) above at 87.

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Between 1976 and 2017 the Nigerian Government has made four policy changes in relation to the indigenous peoples of Abuja. As noted in section 4.2 above, the first policy direction of the Government of Nigeria in relation to the indigenous peoples of Abuja was to resettle them out of the territory at the expense of the Government. Jibril contends that the Government's intention was to enshrine a principle of 'equal citizenship' in the FCT wherein 'no one can "claim any special privilege of 'indigeneity' as was the case with Lagos.'¹⁰⁹ The idea was to evacuate all the pre-existing indigenous communities so that Abuja may be conceived as place for all Nigerians with equal citizenship rights in contrast to the thirty-six States of Nigeria where people have indigenship rights.¹¹⁰

However, as this initial policy direction appeared to be very costly for the Government it decided to jettison it for another policy.¹¹¹ In addition to the costly nature of wholesale resettlement of the indigenes, in 1978 the Government realised that the territory was infested with tsetse fly and that the farming activities of Abuja peoples helped in destroying the habitats of dangerous tsetse fly.¹¹² This discovery and the cost of resettlement motivated the Government to revise its initial wholesale resettlement policy as it decided that resettlement and payment of compensation would be 'undertaken only in respect of those occupying the site chosen for building the city.'¹¹³

The second policy change came in 1992 when the Government adopted an 'integration policy' in relation to the indigenes of Abuja still living in the FCT as against the initial policy of wholesale resettlement.¹¹⁴ However, no legislative

¹⁰⁹ IU Jibril, (n 93) above at 2.

¹¹⁰ Ibid.

¹¹¹ Ibid, at 2-3.

¹¹² Ibid, at 5.

¹¹³ Ibid.

¹¹⁴ Ibid.

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action was taken by the Government to implement this so called 'integration' policy. In another reversal of policy made in 1999, the Government decided to revert to its initial policy of complete resettlement and evacuation of the indigenous people of Abuja.¹¹⁵ This time, several villages and settlements 'were slated for resettlement outside the FCC to the north.'¹¹⁶ Houses were built and prepared for the occupation of those to be resettled by 2002 but this was never actualised as the houses were rather allocated to security officials for the purpose of ensuring security in Abuja in the build up to the Nigerian 2003 general election.¹¹⁷

In the current and fourth policy change the government claims to have again reverted to its initial policy of complete resettlement of the indigenous peoples as the 'cardinal principles of this policy is of course the complete resettlement of all areas hitherto earmarked for resettlement'.¹¹⁸ This inconsistency in policy in relation to the Abuja peoples has been rightly criticised by human rights non-governmental organisations.¹¹⁹

It is the argument herein that the concept of hybridity and legal pluralism converge to provide jurisprudential explanations to the legal challenges which this case study presents. There is a relationship between the legal scholarship on legal pluralism with Homi Bhabha's concept of hybridity.¹²⁰ As a post-colonial theorist

¹¹⁵ Ibid, at 5-6.

¹¹⁶ Ibid, at 5.

¹¹⁷ Ibid, at 6.

¹¹⁸ Ibid, at 7.

¹¹⁹ See COHRE and SERAC, (n 94) above at 49-61.

¹²⁰ The concept of hybridity has its origin in the natural sciences. For example, in horticulture it refers to the process of cross-breeding through which two or more species of plants produce a hybrid specie. On the origin of this concept see, RJ Young, *Colonial Desire: Hybridity in Theory, Culture and Race* (Routledge, 2005); MM Kray, 'Hybridity in Cultural Globalization' (2002) 12 *Communication Theory* 316; S Mabardi, 'Encounters of a Heterogeneous Kind: Hybridity in Cultural Theory' (2000) 13 *Critical Studies* 1; and P Nikos, 'Tracing Hybridity in Theory' in P

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often compared with his contemporaries,¹²¹ Bhabha is known for his theory of hybridity¹²² and his concept of 'mimicry'.¹²³ In his 1994 publication,¹²⁴ Bhabha argues that hybridity arises as a result of several forms of colonialism, which results in 'cultural interchanges',¹²⁵ in the process of creating colonial subjects.¹²⁶ For Bhabha, hybridity is a contradiction that arises in the bid to manage indigenous cultures after colonialism.¹²⁷ Hybridity is a situation where the structures left behind by colonialism like the laws that co-exist with the indigenous laws such as customary law, leading to interfusion that takes place between the two, creating a situation of hybridity.¹²⁸ Hybridity explains the co-existence of State land tenure and customary land tenure in post-colonial Nigeria.

Equally relevant to this thesis is Bhabha's concept of mimicry. According to Bhabha, mimicry is the result of the doubling that takes place when one culture dominates another as happens during colonialism.¹²⁹ Some of those dominated will attempt to mimic those in the dominant culture and members of the dominant culture will encourage mimicry among those they dominate.¹³⁰ This applies to the

Werner and M Tariq (eds), *Debating Cultural Hybridity: Multi-Cultural Identities and Politics of Anti-Racism* (Zed Books, 1997) 257-281.

¹²¹ Edward Said and Gayatri Spivak. The three are often regarded as the 'trinity' of post-colonialism.

¹²² See HK Bhabha, 'Signs Taken for Wonders: Questions of Ambivalence and Authority under a Tree outside Delhi, May 1817' (1985) 12 *Critical Inquiry* 144 and HK Bhabha, *The Location of Culture* (Psychology Press, 1994) at 145-174.

¹²³ HK Bhabha, 'Of Mimicry and Man: The Ambivalence of Colonial Discourse' (1984) 28 *Discipleship: A Special Issue on Psychoanalysis* 125 and HK Bhabha, (n 79) above at 121-131.

¹²⁴ HK Bhabha, (1994) (n 70) above at 121-131.

¹²⁵ *Ibid.*, at 111.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, at 175.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, at 121-131.

¹³⁰ *Ibid.*

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colonial situation but Bhabha maintains that this is also applicable in the context of post-colonial situations, where minorities are assimilated into the dominant or majority culture.¹³¹ Consequently, with mimicry comes hybridity – between colonised and coloniser, which takes the colonised away from their culture.¹³² This results in an identity crisis that shapes the people (colonised) into people who are neither themselves nor their colonisers.¹³³ Bhabha's notion of mimicry and hybridity leads him to the concept of the 'third space' in cultural spaces.¹³⁴ Bhabha maintains that: 'For me the importance of hybridity is not to be able to trace two original moments from which the third emerges, rather hybridity to me is the "Third Space", which enables other positions to emerge.'¹³⁵

To function fully in the second space with the colonial structures put in place, a new form of identity in the 'third space' is created.¹³⁶ For Bhabha hybridity is a form of panacea which creates the 'third space' and enables the colonised to rearticulate meaning out of the structures put in place through colonialism.¹³⁷ Indeed, this is the situation in Nigeria where the post-colonial Nigerian State aims to rearticulate meaning out of the colonial structures put in place during British

¹³¹ Ibid. See also, R Williams, *Marxism and Literature*, vol 1 (Oxford University Press, 1977) at 121-128, where he makes the point like Bhabha that dominant cultures have the tendency to imbibe values that were prevalent in a previous cultural period. Williams maintains that dominant cultures tend to appropriate values from a previous cultural period and incorporate them into current definitions of cultural practices in a later stage in each society.

¹³² HK Bhabha, (n 70) above at 145-174.

¹³³ Ibid. See also, PE Oshio, (n 60) above at 89 who maintain that '...post-colonial countries are marked by a crisis of Identity, bounded on the one side by the constructions of the colonial past and on the other by the onset of an international postmodernism that dispels ideas of a stable, whole, or single identity.'

¹³⁴ J Rutherford, 'The Third Space: Interview with Homi Bhabha' in J Rutherford (ed), *Identity: Community, Culture, Difference* (Lawrence and Wishart LTD, 1990) and HK Bhabha, 'Cultures in Between' in S Hall and P du Gay, (eds), *Questions of Cultural Identity* (Sage Publications, 1996).

¹³⁵ J Rutherford, (n 134) above at 211.

¹³⁶ Ibid.

¹³⁷ See HK Bhabha, (n 70) above.

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colonial administration of Nigeria with the indigenous system of customary land tenure. Nigeria does this through the accommodation of customary land tenure law that existed prior to the commencement of the LUA. Bhabha's concept of hybridity in the 'third space' has been commended for 'the creation of new transcultural forms within the contact zone produced by colonisation'.¹³⁸

However, this thesis aligns with the criticism levelled against Bhabha's concept of hybridity that it neglects several other ways in which hybridity has been used to maintain inequalities within the 'third space'.¹³⁹ By accommodating the customary land rights of Nigerians indigenous to the other 36 States of Nigeria under the LUA,¹⁴⁰ while the customary land rights of Abuja peoples are terminated through the instrumentality of the FCT Act and the Nigerian Constitution,¹⁴¹ the criticism of Bhabha's concept of hybridity that it neglects inequalities in the 'third place' becomes obvious to the reader. Indeed, the case study demonstrates that the concept of hybridity and the 'third space' appears to celebrate a false sense of liberation from the continuous negative influences of colonialism.¹⁴²

The case study also highlights the various categorisations of representations among different groups at different levels nationally and internationally. This is a theme that is examined by the post-colonial theorist - Gayatri Spivak. The lack of awareness in Said's works of the complicity of dominant indigenous groups in carrying out their own forms of 'Orientalism' in their relations with smaller groups

¹³⁸ B Ashcroft, G Griffiths and H Tiffin, *The Empire Writes Back* (Routledge, 2002) at 118.

¹³⁹ A Acheraiou, *Questioning Hybridity, Postcolonialism and Globalization* (Palgrave Macmillan, 2011).

¹⁴⁰ See section 1 (3) of the FCT Act.

¹⁴¹ See section 297 (2).

¹⁴² See P Meredith, 'Hybridity in the Third Space: Rethinking Bi-cultural Politics in Aotearoa/New Zealand', paper presented at the Oru Rangahau Maori Research and Development Conference, 7-9 July 1998, Massey University, New Zealand at 3. For general discussion on post-colonial theory see, H Schwarz and S Ray, (eds), *A Companion to Postcolonial Studies* (John Wiley & Sons, 2008). For general criticisms of post-colonial theory see, A Loomba, *Colonialism/Postcolonialism* (Routledge, 2007) at 246-257 and A Dirlik, 'The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism' (1994) *Critical Inquiry* 328 at 328-356.

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within previously colonised territories whether before, during or after colonialism is a theme that is addressed by Gayatri Spivak. In her essay,¹⁴³ Spivak's 'Subaltern' refers to the least powerful in society. For her, 'Subaltern' is a term for those in the lower economic, and social status of society.¹⁴⁴ It is an important term in the writings of Antonio Gramsci,¹⁴⁵ adopted by a group of Indian intellectuals who formed the Subaltern Studies Group.¹⁴⁶ Spivak's essay appears to be a direct response to the studies of the Subaltern Studies Group.¹⁴⁷

By 'speak' she means can the lowest members of society express their concerns and engage in dialogue with those who hold political power? Indeed, if they speak will they be heard? She argues that those around the 'Subaltern' who possess either State or non-State power, tend to create an environment where there are no infrastructures and institutions that will either enable them to speak or if they do, to be heard.¹⁴⁸

She identifies four class positions in Indian society which are: dominant foreign groups - as in the case of colonial powers such as the Portuguese, British and French; international powers such as the Americans and Russians as well as international corporations.¹⁴⁹ The second class is the dominant indigenous groups at the national level - this includes Indian politicians and business interests, national governments and national companies in India.¹⁵⁰ The third are

¹⁴³ GC Spivak, 'Can the Subaltern Speak?' in C Nelson and L Grossberg, (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press, 1988) at 271-314.

¹⁴⁴ It is originally taken from military references and refers to a person of junior or inferior rank.

¹⁴⁵ See A Gramsci, *Prison Notebooks*, vol 2 (Columbia University Press, 1996).

¹⁴⁶ GC Spivak, (n 143) above at 283. See also, L Gandhi, *Postcolonial Theory: A Critical Introduction* (Columbia University Press, 1998) at 1-2.

¹⁴⁷ GC Spivak, (n 143) above at 283.

¹⁴⁸ Ibid, at 295-296.

¹⁴⁹ Ibid, at 284.

¹⁵⁰ Ibid.

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the dominant indigenous groups at the local and regional levels.¹⁵¹ Finally the fourth class – the ordinary people (Subaltern class).¹⁵² Spivak appears to answer her question in the last paragraph of her essay, no she maintains, ‘the Subaltern cannot speak’!¹⁵³ She argues that female intellectuals must speak for the Subaltern (in her case the peasant Indian women).

In the context of this case study, it is argued that like Spivak’s ‘Subaltern’ the peoples of Abuja have been silenced by the domestic laws of post-colonial Nigeria. Hence, there is need for their empowerment. The case study illustrates the need for a viable relationship and interaction between national law and other forms of law such as customary law and international law so that the ‘subaltern’ peoples of Abuja can ‘speak’. In line with this argument, in Volume 2 of this thesis, the significance of international human rights law and the need for its enforceability within the Nigerian legal system will be demonstrated.

It is also the argument herein that in a society where identities are linked to land and where land is customarily conceived as sacred and where the means of livelihood of people depends on occupying such lands, compulsorily acquiring such lands even for public purposes without adequate remedies remains a violation of human rights. As Farran argues ‘[i]n subsistence economies and among rural communities land represents a communal resource and association with the land reflects ties of ancestry and belonging as well as being important to identity.’¹⁵⁴ Indeed, other writers have argued that in the case of Abuja the government has been unable to balance state interests and the rights of the IPs

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid, at 309.

¹⁵⁴ S Farran, 'Navigating between Traditional Land Tenure and Introduced Land Laws in Pacific Island States' (2011) 43 *The Journal of Legal Pluralism and Unofficial Law* 65 at 71.

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still living there.¹⁵⁵ Abuja peoples have expressed their grievances about their land rights to no avail against the Nigerian Government in various ways.¹⁵⁶

Before enumerating the central and sub-research questions which this case study generates, comparative analyses will be made between this case study and the land rights of the Ogiek people of Kenya in the following Chapter Five. The purpose of such comparative analyses is to demonstrate how Kenya has responded to similar legal challenges in relation to customary land rights and how Nigeria should respond to similar problems.

Conclusion

In addition to the discussion on the definition of land rights in colonial and post-colonial Nigeria in Chapter Three, this Chapter has illustrated the effects of the colonial introduction of English land tenure law and the idea of State managing land through legislation as well as the co-existence of statutory land law and customary land tenure in colonial and post-colonial Nigeria on the case study of Abuja. The case study of Abuja has been introduced and its significance within the broader context of this thesis has been explained. The main significance of this case study is that it demonstrates that the compulsory acquisition of Abuja peoples' ancestral lands which is legitimised under the domestic laws of Nigeria, implies that it is impossible for Abuja peoples to obtain a legal remedy domestically in respect of their customary land rights.

¹⁵⁵ S Gusah, 'Community Land Trusts: A Model for Integrating Abuja's Urban Villages within the City Master Plan' in LE Herzer (ed), *Changing Cities: Climate, Youth, and Land Markets in Urban Areas* (Wilson Centre Comparative Urban Study Project, 2011) 141-159 at 141. See also, W Adebani, (n 95) above at 94.

¹⁵⁶ See 'Justice for Abuja's Original Inhabitants' Editorial of *Thisday* Newspaper, 12 October, 2012 available at: www.thisdaylive.com/articles/justice-for-abuja-s-original-inhabitants/128267/, accessed 14 December 2014.

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Indeed, the decision of the Nigerian CA in *Ona v Atenda*¹⁵⁷ illustrates this point vividly. It has been argued that post-colonial theories help in contextualising the challenges that Abuja peoples currently face in relation to their customary land rights as this has its origins in the colonial encounter between Britain and Nigeria. Theories of pluralism also help in explaining the superiority of State law over customary land tenure as the land rights of Abuja peoples are effectively extinguished by State law. In the following Chapter Five, comparative analyses will be made between the land rights of Ogiek peoples of Kenya and the Abuja peoples of Nigeria in search of a solution within Africa to the problems highlighted by the case study.

¹⁵⁷ *Supra*.

CHAPTER FIVE: LAND RIGHTS OF ABUJA AND OGIEK PEOPLES - A COMPARATIVE PERSPECTIVE

Introduction

In the preceding Chapter Four, the case study of Abuja, Nigeria was introduced. It was demonstrated that the compulsory acquisition of the ancestral lands of Abuja peoples by the Nigerian government without payment of compensation or resettlement is legitimate under Nigeria's domestic laws. The legal challenges which the case study illustrates was also highlighted. The main purpose of this Chapter is to undertake some comparative analyses of the land rights of Abuja peoples of Nigeria and Ogiek peoples of Kenya, in search of a solution within Africa to the legal challenges that the case study reveals.

In section 5.1, the land rights of the Ogiek people of Kenya will be introduced for comparative analyses with Abuja peoples. It will be demonstrated that like Abuja peoples, the Ogiek peoples of Kenya have historically suffered injustices in relation to their land rights, but recent legal developments in Kenya appear to have resolved the problems with land rights of the Ogiek. Consequently, in the following section 5.2 comparative analyses will be made between Abuja and Ogiek peoples. The main purpose of the comparative exercise is to illustrate how Kenya has responded to customary land rights of Kenyans and how Nigeria should respond to resolve the challenges with the land rights of Abuja peoples.

There will then be an examination of whether Nigeria can replicate similar land law reforms towards the customary land rights of Abuja peoples and customary land rights generally in Nigeria. One reason for the choice of Kenya as a comparator is the fact that although both States have similar legal systems, because of their common colonial heritage, Kenya more than Nigeria appears to have responded directly to the challenges of dealing with customary land rights of its citizens through recent law reforms. This comparative examination will also be additional background about the relevance of international law in determining

land rights of indigenous peoples (IPs) in the following Volume 2 of this thesis in further search for solutions.

5.1. State Law and Customary Land Tenure in Kenya

The State of Kenya came into existence in the colonial period.¹ However, like most pre-colonial African States, prior to the colonial encounter the various communities of peoples living in Kenya each had their distinct ways of maintaining law and order through customary law.² Many of these peoples were involved in fishing, hunting and gathering as well as being pastoralists.³ They also had various modes of political organisation.⁴ After the colonial conquest of Kenya by the British colonial army, institutions were established to serve the interests of the colonial authorities thereby introducing changes into the socio-cultural and political lives of Kenyans.⁵ In the specific context of managing land, the colonial authorities acquired land as a commodity and this enabled them to grant parcels of land to white settlers.⁶ Consequently, the colonial administration made efforts to secure large chunks of land through signing of treaties, such as the *Maasai Agreements* in 1904 and 1911.⁷

The colonial administration consolidated its control over Kenyan lands by enacting various combination of land legislation to give legal backing to these

¹ See MO Makoloo, *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*, (Minority Rights Groups International (MRG), 2005) and I Mwachane, 'Land Policies in East Africa: Is There A Way and Goodwill for Implementation?' paper presented at the International Conference on Land policies in East Africa, held 4-5 October, 2012 at Kampala, Uganda.

² MO Makoloo, (n 1) above at 5.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ YP Ghai and P McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial times to the Present* (Oxford University Press, 1970) at 25.

⁷ MO Makoloo, (n 1) above at 5.

acquisitions.⁸ Examples of such colonial legislation include: the *Crown Lands Ordinance*, 1902 and 1915.⁹ The combined effects of these laws and agreements were that all Kenyans became tenants at the will of the British Crown at the risk of displacement from their ancestral lands in the colonial era.¹⁰ One effect of colonialism in Kenya is that it introduced and imposed statutory land tenure, whilst also instigating changes in the hitherto existing customary land tenure and to some extent disrupted customary land tenure.¹¹ Consequently, customary land tenure and any rights in land acquired therefrom were relegated to an inferior status in comparison to land rights acquired on the basis of introduced English land tenure which was the tenure law for white settlers during colonial rule.¹²

It appears that the colonial administration was of the opinion that private and individual ownership of land was a more suitable tenure regime for the purpose of enhancing agricultural productivity as opposed to the communal system of customary land tenure.¹³ Another consequence of the colonial encounter was the simultaneous co-existence of introduced English land tenure and the indigenous customary land tenure in the early colonial period.¹⁴ This situation resulted in a dual system of land tenure with English law applying to areas occupied by white settlers while customary law applied to the areas occupied by 'natives' known as

⁸ Ibid.

⁹ Other colonial legislation is discussed below under sub-section 5.1.1 below.

¹⁰ See also, B Berman, *Control and Crisis in Colonial Kenya: The Dialectic of Domination* (James Currey Publishers, 1990) and H Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (African Centre for Technology Studies Press, 1991).

¹¹ P Kameri-Mbote, *et al*, *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press, 2013) at 26-31.

¹² Ibid. See also, RL Tignor, *Colonial Transformation of Kenya: The Kamba, Kikuyu, and Maasai from 1900-1939* (Princeton University Press, 2015).

¹³ P Kameri-Mbote, *et al*, (n 11) above at 23. See also, G Feder and R Noronha, 'Land Rights Systems and Agricultural Development in Sub-Saharan Africa' (1987) 2 *The World Bank Research Observer* 143.

¹⁴ P Kameri-Mbote, *et al*, (n 11) above at 26-27.

'native reserves'.¹⁵ However, later in the colonial encounter, the colonial administration embarked on a policy of abolishing customary land tenure and made legal arrangements to convert the communal system of customary land tenure in Kenya into individual and private ownership.¹⁶ To this end, in 1954 the colonial administration adopted the Swynnerton Plan (the Plan)¹⁷ which was aimed at promoting agricultural commercialisation among 'native' Kenyans *inter alia* by granting 'secure' individual land titles to indigenous Kenyan farmers.¹⁸ The Plan was implemented through the colonial enactment of the *Native Lands Registration Ordinance*, 1959 and the *Lands Control (Native Lands) Ordinance*, 1959 along with their respective Regulations.¹⁹

5.1.1. Post-Colonial Kenya (1963-Present)

Kenya became independent from colonial rule in 1963.²⁰ Despite this political change, the above colonial developments in which the colonial administration aimed to convert communal customary land tenure into individual and private ownership were retained in the early post-colonial period.²¹ Although colonial and early post-colonial State law in Kenya appears to have focused on the process of individualising land rights to the detriment of customary rights to land, thereby

¹⁵ See M Adams and S Turner, 'Legal Dualism and Land Policy in Eastern and Southern Africa' in E Mwangi and E Patrick, (eds) *Land Rights for African Development: From Knowledge to Action* (Collective Action and Property Rights (CAPRI), United Nations Development Program (UNDP) & International Land Coalition, 2005) at 6-8.

¹⁶ Ibid.

¹⁷ The Swynnerton Plan was a Kenyan colonial government report put together in 1954 with the purpose intensifying agricultural production in the Kenyan Colony.

¹⁸ L Cotula, Toulmin C and Hesse C, *Land Tenure and Administration in Africa: Lessons of Experience and Emerging Issues* (International Institute for Environment and Development (IIED), 2004).

¹⁹ Ibid.

²⁰ MO Makoloo, (n 1) above at 5.

²¹ L Juma, 'The Legitimacy of Indigenous Legal Institutions and Human Rights Practice in Kenya: An Old Debate Revisited,' (2006) 14 *African Journal of International & Comparative Law* 176.

undermining the indigenous customary land rights of Kenyans,²² many communities in Kenya continued to use, occupy and manage community lands through customary law.²³ In 2010, the United States Agency for International Development (USAID) observed that '[a]lthough not part of the formal land system, customary land holding systems continue to exist, and vary among ethnic groups...The elders and other local leaders monitor these informal arrangements, often in tandem with local authorities.'²⁴ The resilience of customary land tenure in Kenya despite sustained subjugation by State law,²⁵ is evidence that contemporary assumptions regarding wholesale modernisation of customary land tenure in colonial and post-colonial Africa are not founded on sound empirical evidence and theories.²⁶

5.1.2. IPs and Customary Land Rights in Post-Colonial Kenya

According to a Report²⁷ commissioned by Minority Rights Group International (MRG),²⁸ Kenya is home to several groups of IPs that include: the Turkana,

²² Ibid.

²³ United States Agency for International Development (USAID), Property Rights and Resource Governance: Kenya, (USAIBID, 2010). Available at: www.usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAIBID_Land_Tenure_Kenya_Profile.pdf, accessed 18 June 2016.

²⁴ Ibid, at 5. For a general discussion on the treatment of customary land law by colonial and early post-colonial State law in Kenya see, S Coldham, 'Colonial Policy and the Highlands of Kenya, 1934–1944' (1979) 23 *Journal of African Law* 65; S Coldham, 'Land Reform in Kenya—Some Problems and Perspectives' (1982) *Third World Legal Studies* 82; S Coldham, 'A Comparative Study of Land Tenure Legislation in Africa' (1985) *Acta Jurica* 189 at 191-196; S Coldham, 'The Settlement of Land Disputes in Kenya—An Historical Perspective' (1984) 22 *The Journal of Modern African Studies* 59 and S Coldham, 'Land Control in Kenya' (1978) 22 *Journal of African Law* 63.

²⁵ P Kameri-Mbote *et al.* (n 11) above.

²⁶ Ibid, at 11. See also, S Coldham, 'Land-Tenure Reform in Kenya: The Limits of Law' (1979) 17 *The Journal of Modern African Studies* 615 at 627 and S Coldham, 'The Effect of Registration of Title upon Customary Land Rights in Kenya' (1978) 22 *Journal of African Law* 91 at 109-111.

²⁷ Available at: <http://minorityrights.org/wp-content/uploads/old-site-downloads/download-147-Kenya-Minorities-Indigenous-Peoples-and-Ethnic-Diversity.pdf>, accessed, 23 June 2016.

²⁸ See <http://minorityrights.org/>, accessed, 23 June 2016.

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Nubian, Maasai, Ogiek and Endorois among others.²⁹ Although all of them are historic victims of dispossession of lands,³⁰ it is the Ogiek that will be discussed here in detail because of the notoriety of recent legal developments concerning their land rights at both national and international levels.³¹ A critical examination of the land rights of all the IPs in Kenya is beyond the scope of this thesis. However, before examining the legal developments about land rights of the Ogiek in further details, it is important to first examine recent post-colonial legal development in relation to customary land rights in Kenya generally because in 2010, Kenya embarked on a series of land law reforms.

The current land rights regime in Kenya is a combination of both colonial and post-colonial legislation.³² In addition, there are the *Constitution of the Republic of Kenya 2010* (Kenyan Constitution)³³ and a *National Land Policy* (NLP).³⁴ The

²⁹ MO Makoloo, (n 1) above at 9-19. See also, African Commission on Human and Peoples Rights (ACHPR) and International Work Group on Indigenous Affairs (IWGIA), *Report of the African Commission's Working Group on Indigenous Populations Communities*, (IWGIA & ACHPR, 2005), adopted by the African Commission on Human and People's Right at its 28th ordinary session. DOC/OS(XXXIV)/345 at 6-15; G Lynch, 'Kenya's New Indigenes: Negotiating Local Identities in a Global Context' (2011) 17 *Nations and Nationalism* 148; G Lynch, 'Negotiating Ethnicity: Identity Politics in Contemporary Kenya' (2006) 33 *Review of African Political Economy* 49; S Balaton-Chrimes, 'Indigeneity and Kenya's Nubians: Seeking Equality in Difference or Sameness?' (2013) 51 *The Journal of Modern African Studies* 331; and OZ Mitto, 'Indigenous Communities and their Rights to Ancestral Land' (2015) *Kenya Journal of Law and Justice: Justice Be Our Shield and Defender* 1.

³⁰ MO Makoloo, (n 1) above at 14-19. See also, R Verma, *We Are the Land, and the Land Is Us: The Complexities of Land Tenure and Struggles for Pastoralist Livelihoods in Kenya* (Sustainable Agricultural Rural Development (SARD) Initiative and Food and Agricultural Organization (FAO), 2007) and BO Koissaba, 'Elusive Justice: The Maasai Contestation of Land Appropriation in Kenya: A Historical and Contemporary Perspective' in MM Kithinji *et al*, (eds), *Kenya After 50: Reconfiguring Historical, Political, and Policy Milestones* (Palgrave Macmillan, 2016) at 189-219.

³¹ See, Chapter Seven below.

³² USAID, (n 23) above.

³³ *Constitution of the Republic of Kenya 2010*. Available at: www.kenyalaw.org:8181/exist/rest/db/kenyalex/Kenya/The%20Constitution%20of%20Kenya/docs/ConstitutionofKenya%202010.pdf, accessed 8 December 2016.

³⁴ *The National Land Policy*. Adopted in December 2009. See, Ministry of Lands, *Sessional Paper No 3 of 2009 on National Land Policy*. Available at:

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NLP is the overarching policy framework which sets out its objectives on land management in Kenya.³⁵ The NLP protects customary rights to land;³⁶ outlines principles of increased recognition of land rights of vulnerable groups;³⁷ establishes the National Land Commission, District Land Boards, Community Land Boards and Land Courts;³⁸ and calls for the development of a legal framework to handle land restitution and resettlement for those who have been dispossessed.³⁹ In particular, the NLP provides that '[i]t adopts a plural approach, in which different systems of tenure coexist and benefit from equal guarantees of tenure security.'⁴⁰ It also recognises that there have been historic inadequacies in terms of legal protection of customary land tenure in Kenya.⁴¹

In order to address these inadequacies, the NLP aims to make provision for community land, and presents mechanisms for developing effective new land laws for the protection of customary land tenure.⁴² In line with the above objective, the NLP emphasises that colonial and post-colonial individualisation of land tenure has undermined community land holdings whilst ignoring customary land rights of Kenyans resulting in numerous incidences of abuse of trust'.⁴³ The NLP defines 'customary land rights' as 'rights conferred by or derived from African

http://theredddesk.org/sites/default/files/ministry_of_lands_2007_national_land_policy.pdf, accessed, 8 December 2016.

³⁵ Kenyan NLP, (n 34) above at iv.

³⁶ Ibid, at 2.

³⁷ Ibid, at 40.

³⁸ Ibid, at 46-50.

³⁹ Ibid, at 41-43.

⁴⁰ Ibid, at 33.

⁴¹ See Republic of Kenya, Ministry of Lands (n 34) above at paras 64 and 65.

⁴² Ibid.

⁴³ Ibid.

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customary law whether formally recognized by legislation or not.’⁴⁴ It identifies gatherers, hunters, pastoralists and subsistence farmers⁴⁵ as people who are vulnerable groups and requiring empowerment in gaining access to and protection of their land rights.⁴⁶ The NLP therefore proposes that there should be a detailed inventory into the situation of land rights of all vulnerable groups in Kenya with the aim of dealing effectively with the concerns of such peoples.⁴⁷

Following the broad policy objectives set out in the NLP, the Kenyan Constitution provides that ‘every person has the right, either individually or in association with others, to acquire and own property - (a) of any description; and (b) in any part of Kenya.’⁴⁸ In order to remedy the afore-mentioned inadequacies in the colonial and post-colonial treatment of customary land rights, the Kenyan Constitution vests community land in communities, which it identifies on the basis of ethnicity, culture or any similar community of interest.⁴⁹ It provides further that all unregistered community lands should be held in trust by County Governments on behalf of the communities for whom such lands should be held.⁵⁰ Community land is defined by the Kenyan Constitution to include among others: ‘land lawfully transferred to a specific community by any process of law’⁵¹ as well as ‘ancestral lands and lands traditionally occupied by hunter-gatherer communities’.⁵² The Kenyan Constitution then enjoins Parliament to enact legislation to give legal

⁴⁴ *The Glossary to Republic of Kenya, Ministry of Lands* (n 34) above at 63.

⁴⁵ Kenyan NLP, (n 34) above at para 194.

⁴⁶ *Ibid*, at para 194-197.

⁴⁷ *Ibid*, at 198-199.

⁴⁸ Art 40.

⁴⁹ Art 63 (1).

⁵⁰ Art 63 (2) (d) (iii). See also, Art 63 (3) and (4).

⁵¹ Art 63 (2) (b).

⁵² Art 63 (2) (d) (ii).

effect to its provisions on community lands.⁵³ In pursuance of the afore-mentioned constitutional directive, a number of land statutes have been enacted to wit: *National Land Commission Act 2015*,⁵⁴ *Land Registration Act 2012*,⁵⁵ and *Land Act 2012*⁵⁶ while *Land (Group Representatives) Act 2010*⁵⁷ and *Land Adjudication Act 1968*⁵⁸ have been revised. Indeed, land law reforms in Kenya are still on-going at the time of writing.

5.1.3. Kenya's Current Land Legislation and Customary Land Rights

The *National Land Commission Act*⁵⁹ defines a 'community' to mean users of community land which could be identified on the basis of their ethnicity, culture and any such similar community in line with Article 63 (1) of the Kenyan Constitution, and 'which holds a set of clearly defined rights and obligations over land and land-based resources'.⁶⁰ One of the functions of the National Land Commission (the Commission) which the Act establishes includes the responsibility 'to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress'.⁶¹ In

⁵³ Art 63 (5).

⁵⁴ No 5 of 2012. (As revised in 2015). Available at: www.kenyalaw.org/lex/rest/db/kenyalaw/Kenya/Legislation/English/Acts%20and%20Regulations/N/National%20Land%20Commission%20Act%20Cap.%205D%20-%20No.%205%20of%202012/docs/NationalLandCommission5of2012.pdf, accessed 8 December 2016.

⁵⁵ No 3 of 2012. Available at: [www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Land Registration Act No 3 of 2012 .pdf](http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Land%20Registration%20Act%20No%203%20of%202012.pdf), accessed 8 December 2016.

⁵⁶ No 6 of 2012.

⁵⁷ Cap. 287, *Laws of Kenya*.

⁵⁸ *Supra*.

⁵⁹ *Supra*.

⁶⁰ Section 2 (1).

⁶¹ Section 5 (1) (f).

addition to the above, *The Trust Land Act*⁶² makes provision for the management of trust land in Kenya. 'Trust lands' refers to lands that were occupied by indigenous Kenyans during the colonial period but which have not been consolidated, adjudicated or registered in individual or group names, and customary lands that have not been taken over by the Government of Kenya.⁶³

The *Trust Land Act* grants every tribe, group, family and individuals '[a]ll the rights which they enjoy or may enjoy by virtue of existing African customary law'.⁶⁴ It also protects the rights of residents from expropriation without compensation who occupy and use land 'under African customary law'.⁶⁵ However, it has been observed that this provision is often violated as officials regularly dispose of trust lands without compensation to the customary land rights holders.⁶⁶ Likewise, the *Land (Group Representatives) Act*⁶⁷ recognises communal land tenure which such groups may have held prior to the current land regime in Kenya.⁶⁸ It also makes provision for the incorporation of representatives of groups who have been recorded as owners of land under the *Land Adjudication Act*.⁶⁹ The *Land (Group*

⁶² *Supra* (as revised in 2012). For a comprehensive analysis of pre-colonial, colonial and post-colonial land laws and policies in Kenya and their implications for customary land rights and the culture of indigenous peoples in Kenya, see AH Adam, *Recognising Sacred Natural Sites and Territories in Kenya: An Analysis of how the Kenyan Constitution, National and International Laws can Support the Recognition of Sacred Natural Sites and their Community Governance Systems* (Institute for Culture and Ecology (Kenya), African Biodiversity Network & the Gaia Foundation, 2012) at 24-54 and SK Karanja, 'Land Restitution in the Emerging Kenyan Transitional Justice Process' (2010) 28 *Nordic Journal of Human Rights* 177.

⁶³ USAID, (n 23) above at 5.

⁶⁴ Section 69.

⁶⁵ See the Long Title and Sections 7 and 8.

⁶⁶ Kenya Ministry of Lands, (n 34) above at para 65.

⁶⁷ *Supra*.

⁶⁸ In this context, the current land regime in Kenya comprises of the relevant national land provision like the 2010 Constitution of Kenya and the NLP; the new legislations on land that were enacted in 2012 including: *The Land Act*; the *Land Registration Act* and *The National Land Commission Act*; as well as the on-going legal reforms in the land sector in Kenya.

⁶⁹ See section 7 of *Land (Group Representatives) Act* 2010.

Representatives) Act defines a group as any 'tribe, clan, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner.'⁷⁰ This Act has been the basis of registration and granting of group ranches to pastoral communities in Kenya.⁷¹ However, it has been reported that the Group Representatives who are entrusted with the management of such group lands 'lack the authority of traditional leaders, and therefore with the questioning of their legitimacy comes disregard for group ranch rules.'⁷²

The Land Registration Act,⁷³ makes provisions for community lands, subject to other legislation made pursuant to Article 63 (5) of the Kenyan Constitution. It adopts the definition of 'community' within the meaning of Article 63 (1) of the Kenyan Constitution.⁷⁴ The significance of the above land law reforms in relation to customary land tenure in Kenya becomes obvious when viewed in the context of historical and contemporary legal developments in relation to land rights of Ogiek peoples as demonstrated in sub-sections 5.1.4 - 5.1.5 below.

5.1.4. The Ogiek and their Customary Land Rights in Kenya

The Ogiek are hunter-gatherers who live in the Eastern part of the Mau Escarpment in the Rift Valley Province of the Republic of Kenya.⁷⁵ They are IPs

⁷⁰ Note that the definition of a group under section 2 of the *Land (Group Representatives) Act* 2010 is similar to the definition under section 2 of the *Land Adjudication Act* 2012.

⁷¹ P Kameri-Mbote *et al*, (n 11) above at 27. See also, S Coldham, 'The Registration of Group Ranches among the Maasai of Kenya: Some Legal Problems' (1982) 14 *The Journal of Legal Pluralism and Unofficial Law* 1.

⁷² P Kameri-Mbote *et al*, (n 11) above at 29.

⁷³ *Supra* (as revised in 2012).

⁷⁴ See section 2. See also two most recent land law legislation - *Community Land Act* 2016 and *Land Laws (Amendment) Act* 2016.

⁷⁵ ACHPR and IWGIA (n 29) above at 15; NO Ohenjo, *Kenya's Castaways: The Ogiek and National Development Processes* (CEMIRE & MRG, 2003); and R Blackburn, *A Preliminary Report of Research on the Ogiek Tribe of Kenya: Discussion Paper No 89*, (Institute of Development Studies, University of Nairobi, 1970).

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who have been living in Kenya since pre-colonial times and they are estimated to be about 20,000 countrywide and about 6,000 in the East Mau Forests.⁷⁶ The entirety of the Mau Forests comprise of seven different forested areas which include: South West Mau (Tinet); East Mau; Mau Narok; Transmara; Maasai Mau; Western Mau and Southern Mau.⁷⁷ The Ogiek consider the entire Mau Forests to be their ancestral lands which covers 250,000 hectares.⁷⁸

The Ogiek have experienced exclusion from these forests and their ancestral lands in colonial and post-colonial times.⁷⁹ The contemporary challenges they are facing in relation to their land rights are mainly a result of the Kenyan Government's expropriation of their customary lands by declaring them to be properties of the Government.⁸⁰ This has occurred despite the fact that these forests are known to be their homes and means of livelihood.⁸¹ Some of these traditional forests include the Tinet Forest in Nakuru District; the Narok Forest in Nakuru District and the Mount Elgon Forests within Mount Elgon District.⁸² One of those notorious violations of their land rights relates to their ancestral land

⁷⁶ See AK Barume and IWGIA, *Land Rights of Indigenous Peoples in Africa* (IWGIA, 2010) at 91.

⁷⁷ Ibid.

⁷⁸ J Sang, 'The Ogiek in Mau Forest in Kenya' in J Nelson and L Hossack (eds), *Indigenous Peoples and Protected Areas in Africa: From Principles to Practice* (Forest Peoples Project, 2003) at 111-138; AK Barume, 'Indigenous Battling for Land Rights: The Case of the Ogiek of Kenya' in J Castellino and N Walsh (eds), *International Law and Indigenous Peoples* (Martinus Nijhoff Publishers, 2005) at 365. See, generally AK Barume and IWGIA (n 76) above at 91.

⁷⁹ See J Kimaiyo and K Nakuru, *Ogiek Land Cases and Historical Injustices* (Egerton & Ogiek Welfare Council, 2004) at Chapters 5 and 7. See also, D Vinding and IWGIA, *The Indigenous World 2001-2002* (IWGIA, 2002) at 376-377; and D Vinding and IWGIA, *The Indigenous World 2002-2003* (IWGIA, 2003) at 367-368.

⁸⁰ M Makoloo, (n 1) above at 10.

⁸¹ Ibid.

⁸² Ibid. See also, C Médard, 'Indigenous' Land Claims in Kenya: A Case-study of Chebyuk, Mount Elgon District' in WA Chris (ed), *The Struggle over Land in Africa: Conflicts, Politics & Change* (Human Sciences Research Council (HSRC) Press, 2010) at 21-33.

located in the Mau Forests area which was declared 'a protected forest area', by the Government of Kenya thereby rendering about 5,000 of them homeless.⁸³

5.1.5. The Ogiek Land Rights Cases at National Courts

The post-colonial Kenyan courts have been buffeted with a number of cases concerning the land rights of the Ogiek peoples.⁸⁴ One of such cases is the case of *Joseph Letuya and 21 others v Attorney General and 5 Others*.⁸⁵ The facts of the case are that sometime in the early 1990s, the Kenyan Government gazetted some lands belonging to the Ogiek as public lands under Kenyan State laws and made allocation of plots of land in and around the Mau Forests to some individuals who were non-members of the community.⁸⁶ Consequently, some members of the community were forcibly evicted.⁸⁷ Several members of them considered these forceful evictions as violations of their customary land rights, and they instituted this case in the High Court of Kenya.⁸⁸

While the above matter was pending, on 16 February, 2001, the Kenyan Minister for Environment declared through a Gazette notice that on the basis of the provisions of section 4 (2) of the Kenyan *Forests Act*,⁸⁹ the boundaries of the

⁸³ See ACHPR and IWGIA, (n 29) above at 26.

⁸⁴ See for example the following cases: *Joseph Letuya and 21 Ors v Attorney General and 5 Ors* (ELC Civil Suit No. 821 of 2012); *Francis Kemei and 9 Ors v Attorney General and 3 Ors* (HCCA No. 238/99 and Appeal No. 98/2000:); *Simon Kiwape and 19 Ors v Muneria Naimodu and 2 Ors* (Civil Case No. 19/97, Narok Misc Application No. 7 of 1999); *Marinwa, Sogoo and Olooligero families v Isaiah Cheluget* (Tribunal case No. 19/1998); *Republic v Minister for Environment and Natural Resources and Ministry of Land Officials* (Judicial Review HCCA No. 421 OF 2002); and *Simon Milgo v Land Dispute Tribunal*, Elburgon Division (NRC Misc., Civil Application No 1 of 2003).

⁸⁵ *Supra*.

⁸⁶ *Ibid*, at 3-4.

⁸⁷ *Ibid*, at 4.

⁸⁸ *Ibid*.

⁸⁹ This Act has now been repealed and re-enacted as the *Forest Conservation and Management Act*, 2016. Available at: <http://kenyalaw.org/ki/fileadmin/pdfdownloads/Acts/ForestConservationandManagementActNo34of2016.pdf> , accessed 12 January, 2011.

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Eastern Mau Forest had been altered.⁹⁰ This notice which was gazetted related directly to the lands that were the subject of this suit.⁹¹ In reaction to this development, by March 2001, the Ogiek Plaintiffs approached the same Court,⁹² praying for this latter Gazette notice to be quashed.⁹³ In 2014, the Environment and Land Court (ELC) of Kenya (a new Court created pursuant to the above law reforms in Kenya to which the 1997 case was transferred)⁹⁴ gave a ruling in this matter.⁹⁵ In determining whether members of the Ogiek community had any customary land rights arising from their occupation of East Mau Forests, the Court relied on the provisions of the NLP of Kenya and section 63 of the 2010 Kenyan Constitution among other legal instruments and held that their customary land rights were violated.⁹⁶ The Court therefore ruled in their favour and ordered the Government of Kenya to reverse its actions accordingly.⁹⁷

Indeed, during the pendency of the above case, the Ogieks continued to encounter challenges in relation to their customary land rights and they continued to challenge these before the domestic courts in Kenya.⁹⁸ One of such cases which was decided before the first case discussed above is the case of *Francis*

⁹⁰ See *Joseph Letuya and 21 Ors v Attorney General and 5 Ors* (supra) at 4.

⁹¹ Ibid.

⁹² Ibid, at 4.

⁹³ Ibid.

⁹⁴ Sitting in Nairobi. This Court was established pursuant to the *Environment and Land Court Act 2011* (as revised in 2015) to determine disputes relating to the environment and the use and occupation of land.

⁹⁵ *Joseph Letuya and 21 Ors v Attorney General and 5 Ors* (supra) at 7-20.

⁹⁶ Ibid, at 12-14.

⁹⁷ Ibid, at 19-20.

⁹⁸ See *Simon Kiwape and 19 Ors v Muneria Naimodu and 2 Ors* (supra); *Marinwa, Sogoo and Oloigoero Families v Isaiah Cheluget* (supra); *Republic v Minister for Environment and Natural Resources and Ministry of Land Officials* (supra) and *Simon Milgo v Land Dispute Tribunal, Elburgon Division* (supra).

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Kemei and Ors v The Attorney General and Ors.⁹⁹ This case was instituted by ten Plaintiffs on behalf of themselves and 5,000 members of the Ogiek community of Tinet Forest in south western Mau Forests.¹⁰⁰ It was the position of Ogiek peoples that the Tinet forest was part of their ancestral lands which they had occupied since time immemorial.¹⁰¹ However, as in the previous case, the lands in dispute in the present case were gazetted by the Kenyan Government as forest reserves during colonial rule, and following this there were also several attempts in the early 1990s by the post-colonial Government to evict the Ogiek peoples from the disputed lands.¹⁰²

Although the post-colonial Government succeeded in evicting some of the Ogiek, most of them returned to the forest almost immediately.¹⁰³ However, the Kenyan *Forests Act*,¹⁰⁴ prohibited cutting, grazing, removal of forest produce or disturbance of the flora in such reserves, except where the permission of the forest authorities in Kenya had been obtained.¹⁰⁵ Similarly, there was a prohibition to the effect that no person(s) should be found in a forest area between 9 p.m. and 6 a.m. and no one was permitted to erect buildings within a gazetted forest in Kenya under the *Forest Act*.¹⁰⁶ Against the above background, in 1999 the Government of Kenya issued a 14 days' ultimatum to the Ogiek peoples living in the Tinet Forest in the south western Mau Forests demanding that they should vacate the forest area.¹⁰⁷ In reaction to this order to vacate, ten members of the

⁹⁹ *Francis Kemei Ors v The Attorney General and Ors* (supra).

¹⁰⁰ *Ibid*, at 3.

¹⁰¹ *Ibid*, at 4.

¹⁰² *Ibid*.

¹⁰³ *Ibid*.

¹⁰⁴ *Supra*.

¹⁰⁵ *Francis Kemei and Ors v The Attorney General and Ors* (supra) at 5-6.

¹⁰⁶ *Ibid*, at 4.

¹⁰⁷ *Ibid*.

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Ogiek community instituted this action challenging the threat of eviction.¹⁰⁸ The Plaintiffs claimed that they were dependent for their livelihoods on living in the forest since they were food gatherers, hunters, peasant farmers, bee-keepers and that their culture was associated with the forest.¹⁰⁹ Among other reliefs, they urged the Court to declare that: their eviction from Tinet Forest by the Government was in violation of their rights to the protection of the law;¹¹⁰ their rights not to be discriminated against; their right to reside in any part of Kenya; and their right to life and that this had been contravened by the forcible eviction from the Tinet Forest.¹¹¹

In response, the Respondents contended that: the Plaintiffs were not genuine members of the Ogiek community and that it was not true that the Plaintiffs had been living in Tinet forest since time immemorial;¹¹² the Plaintiffs had entered illegally into the Tinet forest;¹¹³ the rights and freedoms provided for in the old Kenyan Constitution were subject to derogations aimed at ensuring that their enjoyment by individuals or communities do not prejudice the rights and freedoms of others;¹¹⁴ the Plaintiffs were not landless as they claimed, and that since colonial times, members of this community had been resettled along with other Ogiek;¹¹⁵ and that the eviction was not discriminatory, as all other illegal occupiers of the disputed lands were also asked to leave.¹¹⁶ Consequently, the respondents submitted that the Plaintiffs were no longer dependent on the forest resources for

¹⁰⁸ Ibid, at 3.

¹⁰⁹ Ibid, at 3-4.

¹¹⁰ Ibid.

¹¹¹ Ibid, at 3-5.

¹¹² Ibid, at 5.

¹¹³ Ibid, at 5-6.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

their survival.¹¹⁷ The Court did not accept the arguments of the Plaintiffs and instead dismissed all their claims. The Court upheld the claim of the Government to the Mau Forests as Government lands and therefore refused to recognise customary land rights of the Ogiek to the forest lands.

It is argued that the contrast between the decision of the Court in this case and the case of *Joseph Letuya and 21 Ors v Attorney General and 5 Ors*,¹¹⁸ demonstrates the importance of constitutional and legislative reforms to the protection of customary and communal land rights of IPs in post-colonial Africa. The two cases illustrate how different laws lead to different outcomes in terms of the enforceability of customary land rights in a post-colonial Kenya. This latter case was decided before the 2010 adoption of the new Constitution of Kenya, the NLP and the post-2010 enactments of new land legislations, all of which added up to give constitutional, statutory and policy recognition to customary land rights of IPs in Kenya.

It is further argued that had this case been decided under the current land rights regime in Kenya, the outcome may have been different. This argument is supported by the legal challenges encountered by the Endorois peoples of Kenya in relation to their customary and community land rights in a number of pre-2010 Kenya land rights cases.¹¹⁹ It is the argument in this thesis, that to the extent that post-colonial domestic courts continue to afford superiority to State law over

¹¹⁷ Ibid, at 6.

¹¹⁸ *Joseph Letuya and 21 others v Attorney General and 5 Others* (supra).

¹¹⁹ See *William Arap Ng'asia & 29 Ors v Baringo County Council and Koibatek County Council*. HC - Nakuru, Miscellaneous Civil Application No. 522 of 1998. For further analysis of the judicial struggles and difficulties encountered by the Endorois before the domestic Courts of Kenya, see C Morel, 'Defending Human Rights in Africa: The Case for Minority and Indigenous Rights' (2004) 1 Essex Human Rights Review 54 at 56 and L Kimathi, *Contesting Local Marginalization through International Instruments: The Endorois Community Case to The African Commission on Human and Peoples' Rights - A Case Study* (Institute for Democracy and Electoral Assistance (IBIDEA), 2012) at 12-15. However, it is also possible that the unfriendly climate for the independence of the Kenyan judiciary may also have impacted on the negative attitudes of judges to land rights of IPs in pre-2010 Kenya. See M Mutua, 'Justice under Siege: The Rule of law and Judicial Subsistence in Kenya' (2001) 23 (1) Human Rights Quarterly 96.

customary law, to that extent, any claims by IPs for the protection of their customary land rights before such national courts would succeed or fail on the basis of the terms and the extent to which State law is willing to recognise customary land rights of IPs. This argument is buttressed by the comparative examination of land rights of Abuja and Ogiek peoples in section 5.2 below.

5.2. Comparative Analyses of Land Rights of Abuja and Ogiek Peoples

Pre-colonially, in Nigeria as well as in Kenya customary land tenure was the prevailing mode of land tenure based on community and family land ownership.¹²⁰ Both Nigeria and Kenya have similar experiences of British colonial rule and the consequential introduction of English land tenure into the domestic legal systems of the two States, along with the systematic subjugation of customary land tenure to a lower status compared to State land law during colonialism.

It must be noted that the fact that Kenya was heavily settled by European settlers in colonial times could have influenced the historical hostility towards customary and community land tenure.¹²¹ This could also perhaps explain the motivation for recent customary land rights reforms in Kenya which could be driven by nationalist and decolonisation objectives towards addressing the historical injustices in relation to customary land tenure in colonial and early post-colonial times.¹²² Therefore, the Kenyan reforms could be understood in the context of

¹²⁰ For Nigeria, see PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, 2011); CK Meek, *Land Law and Custom in the Colonies* (Oxford University Press, 1946); CK Meek, *Law and Authority in a Nigerian Tribe* (Oxford University Press, 1950); BO Nwabueze, *Nigerian Land Law* (Nwamife Publishers, 1972); and TO Elias, *Nigerian Land Law and Custom* (Routledge & Kegan Paul Ltd, 1951). For Kenya, see MO Makoloo, (n 1) above; H Okoth-Ogendo, (n 10) above; and B Berman, (n 10) above.

¹²¹ YP Ghai and P McAuslan, (n 6) above at 25 and MO Makoloo, (n 1) above at 5.

¹²² For critical review of the current land tenure reforms in Kenya see P Narh *et al*, 'Land Sector Reforms in Ghana, Kenya and Vietnam: A Comparative Analysis of Their Effectiveness' (2016) 5 (2) Land 8; JW Bruce, 'The Variety of Reform: A Review of Recent Experience with Land Reform and the Reform of Land Tenure, with Particular Reference to the African Experience'

repatriation of land confiscated in colonial times. As Nigeria, did not have the experience of the level of European settlements as in colonial Kenya, and did not experience the kind of hostility towards customary land tenure experienced in colonial Kenya, there may be no such nationalist and anti-colonial motivation to embark on such land law reforms in Nigeria as has been recently undertaken in Kenya.¹²³

In Kenya, the colonial administration made efforts to secure large chunks of land through various means including signing of treaties, such as the *Maasai Agreements* in 1904 and 1911.¹²⁴ In Nigeria, a similar attitude was adopted by entering into treaties with local chiefs such as the one between King Docemo of Lagos and the British – the *Treaty of Cession*.¹²⁵ In the case of Kenya, colonial land legislation had the combined effects of making Kenyans tenants at the will of the British Crown and by implication liable to displacement at the convenience of the colonial authorities.¹²⁶ In Nigeria, the colonial authorities were very good at recognising and accommodating the pre-existing indigenous customary land tenure as illustrated by the decision of the Privy Council in the case of *Amodu Tijani v Secretary of Southern Nigeria*.¹²⁷

Also, while the British colonial administration embarked on a policy of abolishing customary land tenure and made legal arrangements to convert the communal system of customary land tenure in Kenya into individual and private ownership

(2014) 9 Occasional Paper 13; and A Manji, 'The Politics of Land Reform in Kenya 2012' (2014) 57 (1) African Review 115.

¹²³ See G Wasserman, 'Continuity and Counter-Insurgency: The Role of Land Reform in Decolonizing Kenya, 1962-70' (1973) 7 (1) Canadian Journal of African Studies 133 and JW Harbeson, 'Land Reform and Politics in Kenya, 1954-70' (1971) 9 (2) The Journal of Modern African Studies 231.

¹²⁴ MO Makoloo, (n 1) above at 5.

¹²⁵ TO Elias, (n 120) above.

¹²⁶ H Okoth-Ogendo, (n 10) above and B Berman, (n 10) above.

¹²⁷ *Amodu Tijani v Secretary of Southern Nigeria* [1921] AC 399.

based on English land tenure principles,¹²⁸ this did not happen in Nigeria during British colonial administration. Both post-colonial States of Nigeria and Kenya have upon attainment of political independence from Britain in the early 1960s retained the colonial legacy of the State managing land through legislation.¹²⁹ However, while post-colonial State law in Kenya appears to have initially embarked on a process of individualising land rights to the detriment of customary rights to land, thereby undermining the indigenous customary land rights of Kenyans,¹³⁰ in Nigeria, such wholesale attempt at individualising customary land tenure has not been done. Instead, section 36 of the *Nigerian Land Use Act 1978* (LUA) attempts to accommodate customary land tenure in the 36 States of the Nigerian federation.

A major point of divergence is that whereas Kenya now has much post-colonial legislation that accommodate customary land rights of Kenyans, Nigeria has just one statute. Indeed, while the Kenyan Constitution¹³¹ recognises customary land rights of Kenyans under its Article 63, the Nigerian Constitution¹³² has no equivalent provision. In addition, Kenya has a broad and overreaching policy framework in the form of the NLP which expressly sets out the objectives of addressing historical injustices in relation to minorities and IPs' customary land rights. Nigeria does not have any such policy. Unlike Kenya, Nigeria has not embarked on any land law and land policy reforms since the enactment through a military decree in 1978 of the LUA.

¹²⁸ L Cotula, C Toulmin and C Hesse, (n 18) above at 3.

¹²⁹ E Colson, 'The Impact of the Colonial Period on the Definition of Land Rights' in V Turner (ed), *Colonialism in Africa 1870-1960*, vol 3 (Cambridge University Press, 1971) and Cotula L and Chauveau J-P, *Changes in Customary Land Tenure Systems in Africa* (International Institute for Environment and Development (IIED), 2007).

¹³⁰ P Kameri-Mbote *et al*, (n 11) above.

¹³¹ *Supra*.

¹³² *Constitution of the Federal Republic of Nigeria*, 1999 (as amended).

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It is the argument in this thesis that the facts surrounding the land rights of Ogiek peoples are in *pari materia* with the facts surrounding the land rights of Abuja peoples. The gazetting of the ancestral lands of Ogiek peoples as Government lands was made through the instrumentality of the Kenyan *Forests Act*,¹³³ likewise the ancestral lands of Abuja peoples of Nigeria were also compulsorily acquired as lands belonging to the Federal Government of Nigeria through the instrumentality of the *Federal Capital Territory (FCT Act)*¹³⁴ and the *Constitution of the Federal Republic of Nigeria 1999* (Nigerian Constitution).¹³⁵

The contrast is that while the Constitution of Kenya now protects customary land rights of Ogiek peoples, the Nigerian Constitution remains the major legal obstacle to the protection of customary land rights of Abuja peoples. This paradox is further demonstrated by the decisions of the Nigerian CA in *Ona v Atenda*,¹³⁶ and the Kenyan ELC in *Joseph Letuya and 21 Ors v Attorney General and 5 Ors*.¹³⁷ While the Nigerian Constitution was used as a 'sword' to terminate land rights of Abuja peoples on the altar of national unity in the former case, in the latter case the Kenyan Constitution was used as a 'shield' to safeguard land rights of Ogiek peoples.

It is argued that although anti-colonial and nationalist motivations in relation to repatriation of lands acquired during colonial rule may be lacking in Nigeria, however, as the experience in Nigeria in both colonial and post-colonial times has been the accommodation of customary land tenure by the colonial and post-colonial State, Nigeria may not have serious difficulties in transplanting the recent

¹³³ Supra.

¹³⁴ *Federal Capital Territory (FCT Act)*, CAP 128 *Laws of the Federation of Nigeria 1990*.

¹³⁵ Supra.

¹³⁶ *Ona v Atenda* [2000] 5 NWLR (Pt. 656) 244.

¹³⁷ Supra.

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Kenyan land law reforms to resolve similar legal challenges, not just in relation to land rights of Abuja peoples but towards Nigerians in general.

It is argued also that the main similarity between land rights of Abuja peoples and land rights of Ogiek peoples is that they both illustrate the power of State law to extinguish customary land rights of groups of people on the one hand, and the ability of the same State law to protect customary land rights of groups of people on the other hand. It is therefore, the argument in this thesis that such powers of State law to either extinguish or protect customary land rights of groups of people raises critical, interesting, academic and research questions as to the relationship between State law and other forms of law such as customary law and international law.¹³⁸

Based on the analyses above, the case study of Abuja raises the following research questions: The first central research question is: 1. Are the Abuja peoples of Nigeria indigenous peoples (IPs) under international law and are their customary land rights protected under international law as IPs? To answer this first central research question, the following sub-research questions have been generated: 1) Who are IPs under international law? 2) Is the concept of IPs relevant in the African context? 3) Do the Abuja peoples of Nigeria meet the criteria to qualify as IPs under international law? 4) How are children defined under international child rights law and are there any insights to be gleaned from this so that IPs may be defined in a more positive context? 5) How relevant is the general body of international human rights law to the protection of land rights of IPs and how does international law protect such rights?

However, as the African region in general has adopted its own regional human rights framework as a document written by Africans for Africans it will be significant to enquire about its relevance to the protection of land rights of IPs in

¹³⁸ For critical analysis of such power of State law to terminate communal customary land rights in various African states, see LA Wily, 'The Law is to Blame': The Vulnerable Status of Common Property Rights in Sub-Saharan Africa' (2011) 42 *Development and Change* 733.

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Africa. Accordingly, the following additional sub-research question is posed: 6) Are the land rights of IPs protected under the *African Charter on Human and Peoples' Rights* (the African Charter)? These research questions are answered in Chapters Six and Seven.

In line with the above central and sub-research questions, the following second central and sub-research questions are posed: 2. What is the nature of the relationship between international and national law in post-colonial African States? 1) What are the differences in approach and how does this impact on the domestic application of international law? 2) What is the nature of the relationship between international and national law in post-colonial Nigeria? 3) What is the nature of the relationship between international and national law in post-colonial Kenya? 4) What are the differences and similarities in the approaches of Nigeria and Kenya towards international law? 5) Do either of the post-colonial African States of Nigeria and Kenya have anything to learn from each other in terms of the relationship between international and national law? These latter research questions will be answered in Chapters Eight and Nine.

Conclusion

Whilst making comparative analyses between land rights of Abuja and Ogiek peoples, it has been argued that such comparative analyses illustrates the power of State law to extinguish the rights of groups of people on the one hand, and its capacity to protect such rights on the other hand. Conscious of the fact that insights from law reforms in one jurisdiction may not be easily transplanted elsewhere, it has been submitted that the recent progressive land law reforms in Kenya should be replicated in Nigeria to resolve similar legal challenges in relation to land rights of Abuja peoples.

Indeed, it has been submitted also that such land law reforms should be made to the benefit of Nigerians in general to protect the customary land rights of all Nigerians. It must be noted that despite the above recommendations for Nigeria,

the arguments in this Chapter do not aim to situate the Kenya land law reforms as a template for all African States regarding customary land rights and their accommodation by State law, rather such reforms provide a new way of contextualising the Kenyan jurisdiction as a possible way of placing it within broader avenues that may be pursued by African States with similar legal systems and customary land rights issues.

Theoretically, Palley suggested that there are two main approaches which States use to legally articulate the position of vulnerable groups within their domestic jurisdictions to wit: integration and maintenance of difference.¹³⁹ While integration involves assimilationist and dominative approaches, maintaining difference involves the technique of pluralism.¹⁴⁰ It appears the idea behind the Kenyan land law reforms is the preservation of legal diversity in relation to land rights through using the techniques of pluralism. Whereas, the Nigerian approach is assimilationist. It has also been demonstrated that the case study of Abuja raises some academic research questions which have been enumerated at the end of section 5.2 above.

In conclusion, the main purpose of Volume 1 has been to present the reader with the legal challenges that the case study of Abuja highlights in a post-colonial Nigeria. In Chapters Two and Three, a broad historical and contextual background relating to the legal developments in colonial and post-colonial Nigeria respectively were examined. The case study has been introduced in Chapter Four and comparative analyses have been made between the case study and land rights of Ogiek peoples in the present Chapter. In the following Volume 2, the main research objective will be to examine the relevance of international

¹³⁹ C Palley, 'The Role of Law in Relation to Minority Groups' in AE Alcork, BK Taylor and JM Welton (eds), *The Future of Cultural Minorities* (Macmillan Press, 1979) 120-160.

¹⁴⁰ GR Woodman, 'Ghana: How Does State Law Accommodate Religious, Cultural, Linguistic and Ethnic Diversity?', in M-C Foblets, J-F Gaudreault-Desbiens and AD Renteln (eds) *Cultural Diversity and the Law: State Responses from Around the World*, (Bruylant, Éditions Yvon Blais, 2010) 255-280.

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law in the context of finding solutions to the legal challenges arising from the case study of Abuja, through finding answers from international law to the research questions which the case study generates.

VOLUME 2 OF 2

**Indigenous Peoples, International Law, State
Law and Land Rights of Abuja Peoples of
Nigeria**

CHAPTER SIX: INDIGENOUS PEOPLES, ABUJA

PEOPLES AND INTERNATIONAL LAW

Introduction

In the preceding Volume 1, the research objective was to illustrate the colonial origin of contemporary legal challenges that the case study presents. Accordingly, in Chapter Two the introduction of English law into the Colony of Nigeria and the concomitant relegation of customary law to colonial State law was demonstrated. Likewise, the subjugation of customary law to State law and the nature of the definition of land rights in colonial and post-colonial Nigeria was demonstrated in Chapter Three. In Chapter Four, the consequences of the relegation of customary law to an inferior status compared with State law on the definition of land rights in the case study was demonstrated. In Chapter Five, comparative analyses between Abuja and Ogiek peoples was made with a suggestion that Nigeria should replicate the law and constitutional reforms in relation to customary land tenure undertaken in post-colonial Kenya. In addition to the recommendations in Chapter Five, the main objective of Volume 2, is to find answers to the research questions emanating from the legal challenges demonstrated in Volume 1 through recourse to international law.

Against the background of the legal problems arising from the introduction of the case study of Abuja in Chapter Four, which demonstrated that the compulsory acquisition of the ancestral lands of Abuja peoples without payment of compensation or resettlement is legitimised by the domestic laws of Nigeria, this Chapter is aimed at answering the following research questions:(1) Who are indigenous peoples (IPs) under international law? This research question is significant to this thesis as the answer to it will enable this research to identify those characterised as IPs in international law. 2) Is the concept of IPs relevant to Africa? This research question is also significant as answering it will also help to determine if the concept of IPs is relevant to Africa and to Abuja peoples of Nigeria. 3) Do the Abuja peoples of Nigeria meet the criteria to qualify as IPs

under international law? 4) How are children defined under international child rights law and are there any insights to be gleaned from this so that IPs may be defined in a more positive context? The answers to the afore-mentioned research questions (sub-research questions 1 and 2) will help to answer sub-research question 3) through applying the criteria of IPs identified in answering sub-research questions 1) and 2) above. The answers to sub-research question 4) will enhance an analogical examination of international child rights law with the objective of drawing insights as to how IPs may be presented in a more positive way under international law.

At a general level, it is important to find answers to the above research questions to determine the central research objective highlighted in Chapter One. This is, whether Abuja peoples of Nigeria are IPs under international law and whether their land rights are protected under international law. To answer the above research questions, this Chapter has been sub-divided into three main sections.

Section 6.1 begins with an examination of the emergence of the United Nation (UN) human rights system and its relevance towards advancing the rights IPs. In section 6.2 the emergence of the international human rights regime specifically on the rights of IPs will be examined. This section will engage with the debates on the definition of IPs in the existing literature and whether the concept of IPs is relevant in the African context. The main objective is to answer the research questions: Who are IPs under international law? Is the concept of IPs relevant to Africa? Do the Abuja peoples of Nigeria meet the criteria to qualify as IPs under international law? In section 6.3, the main task is to answer the sub-research question 4) How are children defined under international child rights law and are there any insights to be gleaned from this so that IPs may be defined in a more positive context? In answering this question there will be analogical analyses between the definition of IPs and the definition of children under international law. The purpose is to illustrate how one branch of international human rights law has responded to the challenges of defining subjects of international law and how the other branch may respond to similar challenges.

6.1. The UN Human Rights System and IPs in Historical Perspective

Although some writers have argued that the origin of international law dates back to antiquity in the form of the Jewish, Greek and Roman City States,¹ modern international law began in Europe in the fifteenth and sixteenth centuries.² The Age of Discovery in the sixteenth and seventeenth centuries led to the development of international rules relating to the acquisition of territories by European Powers.³ The Paris Peace Conference in 1919 that led to the establishment of the League of Nations was the beginning of a movement towards a global society. Prior to this, European exploration and conquest of the Western Hemisphere raised questions about the relationship between Europeans and the IPs that they encountered.⁴ Within a naturalist framework, early European theorists like Bartolome de las Casas and Francisco de Vitoria questioned the legitimacy of Spanish conquerors and the colonialist system which granted them lands and rights to the labour of the Indians who lived in them.⁵

The above early European and naturalist jurisprudence in relation to IPs has been associated with the early development of international law which was the legacy of the humanism of European ecclesiastical jurists.⁶ This early naturalist frame was replaced by the emergence of modern States and international law in Europe

¹ See L Oppenheim, *International Law: A Treatise*, vol 1 (Longmans, Green & Co, 1905) at 44-50.

² *Ibid*, at 54. See also, RMM Wallace and O Martin-Ortega, *International Law* (6th edn, Sweet & Maxwell, 2009) at 5.

³ RMM Wallace and O Martin-Ortega, (n 2) above at 5.

⁴ SJ Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004) at 16.

⁵ See BdL Casas and A Collard, *History of the Indies* (Harper & Row, 1971); BdL Casas, *The Devastation of the Indies: A Brief Account* (John Hopskin University Press, 1974); L Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Southern Methodist University Press, 1949); A Nussbaum, *A Concise History of the Law of Nations* (Macmillan, 1954); and JB Scott and F de Vitoria, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (The Lawbook Exchange Ltd, 2000).

⁶ SJ Anaya, (n 4) above at 16.

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which prompted a revision of the framework of legal discussion in relation to IPs.⁷ Before 1945, there was hardly any development internationally in relation to human rights and human rights were rarely the subject of bilateral or multilateral treaties.⁸ For instance, the *Treaty of Westphalia* 1648 merely recognised the principle of equality of rights for Catholics and Protestant States.⁹

However, the era of modern international law began with the *Treaty of Westphalia*, thereby ushering in the era of positivism in international law.¹⁰ Although the *Final Act of the Congress of Vienna*, 1815¹¹ included provisions against the slave trade, it was not until 1890 that the European Powers agreed on specific enforcement mechanisms through the *Brussels Act* 1890 for the abolition of slavery.¹² The abolition of slavery signalled the beginning of international action on human rights by the comity of nations. However, the emergence of positivism in international law, particularly in the nineteenth century

⁷ Ibid.

⁸ E Stamatopoulou, 'Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic' (1994) 16 *Human Rights Quarterly* 58 at 61.

⁹ Ibid.

¹⁰ See C Tilly, 'Reflections on the History of European State-Making' in C Tilly (ed), *The Formation of National States in Western Europe* (Priston University Press, 1975) at 18; JL Brierly and A Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (7th edn, Oxford University Press, 2012) at 5; JR Crawford, *The Creation of States in International Law* (Oxford University Press, 2006) at 10; L Gross, 'The Peace of Westphalia, 1648-1948' (1948) *American Journal of International Law* 20; D Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21 *The International History Review* 569 at 570 and B Straumann, 'The Peace of Westphalia as a Secular Constitution' (2008) (15) 2 *Constellations* 173 at 183-184.

¹¹ Completed on 9 June, 1815. For more on the historical significance of the Final Act of the Congress of Vienna to international law and statehood, see C Dupont, 'History and Coalitions: The Vienna Congress (1814–1815)' (2003) 8 *International Negotiation* 169; R Langhorne, 'Reflections on the Significance of the Congress of Vienna' (1986) 12 *Review of International Studies* 313 at 316-317; JS Barkin and B Cronin, 'The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations' (1994) 48 *International Organizations* 107 at 11; PW Schroeder, 'The Vienna Settlement Rest on a Balance of Power?' (1992) *The American Historical Review* 683; HA Kissinger, 'The Congress of Vienna: A Reappraisal' (1956) 8 *World Politics* 264 and KS Gleditsch and MD Ward, 'A Revised List of Independent States since the Congress of Vienna' (1999) 25 *International Interactions* 393.

¹² E Stamatopoulou, (n 8) above at 61.

removed IPs from the international legal arena and focused mainly on the sovereignty of European States and their territorial integrity.¹³ Most of the significant events leading to the formation of the UN and the era of human rights, began in January 1919 after the First World War, when delegates from about thirty Allied and other associated States converged in Paris to negotiate and restore European and world peace.¹⁴ The Powers represented at the Paris Peace Conference,¹⁵ were inspired by the reality that the First World War was evidence that the international system which was comprised mainly of the Super Powers as the main actors was a failure and there was a need for change in the balance of power globally.¹⁶

The result of the Paris Peace Conference was the *Treaty of Versailles* 1919¹⁷ and the adoption of the *Covenant of the League of Nations* 1919 (League Covenant).¹⁸ It is the League Covenant that made 'the most crucial contribution that the statesmen meeting in Paris could make to building the new international order.'¹⁹ The League Covenant did not include the protection of human rights as part of its aims and objectives.²⁰ It did not also include issues about racial equality as its objectives and an attempt by some IPs to participate in the League of Nations in

¹³ BJ Richardson, S Imai and K McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) at 102.

¹⁴ See A Sharp, *The Versailles Settlement: Peacemaking after the First World War, 1919-1923* (2nd edn, Palgrave Macmillan, 2008) at 1.

¹⁵ Paris Peace Conference of 1919.

¹⁶ See R Henig, *Versailles and After 1919-1933* (2nd edn, Routledge, 1995) at 9.

¹⁷ *Ibid*, at 29.

¹⁸ See *Covenant of League of Nations* reprinted in A Sharp (n 14) above at 68-80. Which came into force on 10 January, 1920.

¹⁹ A Fleury, 'The League of Nations: Towards a New Appreciation of Its History' in E Gläser, MF Boemeke and GD Feldman (eds), *The Treaty of Versailles: A Reassessment after 75 Years* (German Historical Institute & Cambridge University Press, 1998) at 507.

²⁰ E Stamatopoulou, (n 8) above at 62.

the 1920s were unsuccessful.²¹ The insignificant place of IPs in the international arena at the time is illustrated by the *Island of Palmas Case* of 1928, where the Permanent Court of Arbitration did not consider treaties between IPs and the Dutch East India Company as binding international treaties, but it recognised that the Spanish had title over the islands which derived from discovery.²² The arbitrator merely focused on the legal consequences of European assertions of power over the lands and did not consider the rights of the IPs living on them.²³ In a similar way, Indian IPs were not deemed to have legal personality under international law in the earlier case of *Cayuga Indian Claims* of 1926.²⁴

6.1.1. The League Covenant and the Movement towards a Global Society

The adoption of the League Covenant signalled the emergence of a new direction for international law amongst the comity of States. States committed themselves to an era of collective security and international solidarity.²⁵ However, of particular relevance to Africa was the establishment of the mandate system to manage German colonies in Africa in the aftermath of the defeat of Germany in the First World War.²⁶ Therefore, the former German colonies were shared among the Allies as Mandated Territories and their inhabitants were to be 'tutored' by each European mandatory to develop towards political independence.²⁷ Mandated Territories were to be administered through the authority of the Mandate Powers

²¹ Ibid.

²² *Island of Palmas Case (United States v Netherland)* [1928] 2 Report of International Arbitral Awards (RIAA) 829.

²³ Ibid.

²⁴ *Cayuga Indian Claims (Great Britain) v United States* [1926] 6 RIAA 173, 176.

²⁵ Art 10 of the Covenant.

²⁶ Art 22 (1).

²⁷ See Art 22 (2) and (3). See, TO Elias and R Akinjide, *Africa and the Development of International Law* (Martinus Nijhoff Publishers, 1988) at 22. Other colonies like Togoland went to the French and the British while Tanganyika went to the British; Rwanda and Burundi went to Belgium, while South West Africa was mandated to the Union of South Africa.

subject to the monitoring of the Permanent Commission.²⁸ The implications of these developments were that although African States had lost their sovereignty to European powers and consequently their capacity to enter into external relations, nonetheless Africans continued to have an effect on the development of international law as their territories became the subject of an increasing need to end colonialism.²⁹

At a more general level, the League Covenant represented an attempt at a process aimed at achieving international cooperation on a global scale.³⁰ However, as Alan Sharp records there were disagreements among the Great Powers and the US pulled out which left only Britain and France as the main players.³¹ Despite this failure, the League of Nations provided the foundations upon which a new world order based on international cooperation would emerge in the aftermath of the Second World War in the form of the UN. Flury argues that at the League of Nations, States still believed in the overall supremacy and sovereignty of States without regard for a globalised society where States were to be held accountable under international or regional law.³² This sovereigntist approach to international law and cooperation changed with the emergence of human rights as cardinal principles and objectives of the UN Charter.³³

²⁸ Art 22 (8) and (9).

²⁹ A Fleury, (n 19) above at 517.

³⁰ Ibid.

³¹ A Sharp, (n 14) above at 65.

³² A Fleury, (n 19) above at 516. For further analyses of League of Nations and its contributions to the development of international law, see IJ Lederer, *The Versailles Settlement: Was it Foredoomed to Failure?* (Heath, 1960) and M Housden, *The League of Nations and the Organization of Peace* (Routledge, 2014).

³³ *The Charter of the United Nations*, signed on 26 June 1945, in San Francisco, US after the United Nations Conference on International Organisation, came into force on 24 October 1945. See Art 1.

6.2. The Emergence of IPs in International Law

This section aims to answer the research question: Who are IPs under international law? This research question is significant to this thesis as the answer to it will enable this research to determine if the international human rights regime on IPs is applicable in the context of the case study of Abuja. Hurst Hannum points out that until the adoption of the *International Labour Organisation (ILO) Convention No 107 (ILO 107)* in 1957,³⁴ IPs' rights were not recognised under international law except for the treaties that were entered between Indian nations and colonial Powers in early American history.³⁵

However, the literature on the rights of IPs under international law is dominated by debates about definition.³⁶ As Ken Coates notes, the question is, is it the smallness of a population that should be the main criteria for defining IPs, or could it be some other criterion, like ancestral connection to land, the length of time in a territory, or commitment to pre-industrial and pre-colonial culture?³⁷ 'Or is it perhaps the product of more recent historical processes? Is being indigenous simply to have been the victim of colonization? To complicate matters further there are difficulties identifying the unique identities of specific cultural groups.'³⁸

The controversy surrounding the definition of IPs is exemplified by the opposing views of two anthropologists - Adam Kuper on the one hand and Alan Barnard on

³⁴ *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, adopted in Geneva, at the 40th International Labour Congress (ILC) session on 26 June 1957, entered into force 2 June 1959.

³⁵ H Hannum, 'New Developments in Indigenous Rights' (1987) 28 *Vermont Journal of International Law* 649.

³⁶ See for example, K Lehmann, 'To Define or Not to Define-The Definitional Debate Revisited' (2006) 31 *American Indian Law Review* 509; HN Weaver, 'Indigenous Identity: What Is It and Who Really Has It?' (2001) 25 *The American Indian Quarterly* 240 and J Corntassel, 'Who is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity' (2003) 9 *Nationalism and Ethnic Politics* 75.

³⁷ K Coates, *A Global History of Indigenous Peoples: Struggle and Survival* (Springer, 2004) at 1.

³⁸ *Ibid.*

the other hand. In a widely cited paper,³⁹ Kuper launches a strong argument against the concept of 'indigenous peoples', where he argues that the concept of 'indigenous peoples' is merely a 'euphemism for what used to be termed "primitive"'.⁴⁰ He maintains further that it is not possible to attach any cultural distinctiveness to IPs as farmers, hunters or nomadic herders given the various historical interactions with so-called 'indigenous peoples' in several encounters between them and other groups.⁴¹ Indeed, Kuper ridicules the idea of defining IPs on grounds of 'descent' from pre-invasion peoples.⁴² In his view if a group of people are afforded certain rights on grounds of 'descent' this would result in a 'drift to racism'.⁴³ He therefore concludes that the idea behind IPs and their rights '...rely on obsolete anthropological notions and on a romantic and false ethnographic vision. Fostering essentialist ideologies of culture and identity, they may have dangerous political consequences.'⁴⁴

By contrast, Barnard argues that the notion of 'indigenous peoples' is very important in the context of explaining the relationship between dominant groups or institutions and non-dominant ones.⁴⁵ To buttress his views Barnard gives the example of the Botswana Government that once threatened to change the constitution of the country should some IPs living there succeed in claiming land rights against the Government in the courts.⁴⁶ His argument is that such exercise

³⁹ A Kuper, 'The Return of the Native' (June 2003) 44 *Current Anthropology* at 389-402.

⁴⁰ *Ibid*, at 389.

⁴¹ *Ibid*, at 390.

⁴² *Ibid*.

⁴³ *Ibid*, at 392.

⁴⁴ *Ibid*, at 395. For other commentaries for and against Kuper's views, see M Guenther *et, al.*, 'Discussion: The Concept of Indigeneity' (2006) 14 *Social Anthropology* 17 and J Kenrick and J Lewis, 'Indigenous Peoples' Rights and the Politics of the Term "Indigenous"' (2004) 20 *Anthropology Today* 4.

⁴⁵ A Barnard, 'Kalahari Revisionism, Vienna and the "indigenous peoples" Debate' (2006) 14 *Social Anthropology* 1 at 2.

⁴⁶ *Ibid*.

of State power by using its ability to make or change laws to the detriment of the rights of IPs illustrates the political and legal relevance of the concept of IPs, as this empowers them against the interests of the State.⁴⁷ In response to Kuper's critique of the concept of IPs Barnard submits that to reject 'indigenous people' as an anthropological concept is not the same thing as rejecting it as a legal concept, or rejecting it as a useful tool for political persuasion.⁴⁸ Likewise, Jonathan Friedman argues that '[c]ontrary to Kuper, indigeneity does not refer to a particular kind of society or even life style, but to a political identity that is, as we have argued here, a product of the structure of the state itself.'⁴⁹

Although Barnard agrees with Kuper that it is difficult to define IPs and some of the definitions proffered are untidy however, he (Barnard) suggests that despite the problems with defining the concept of IPs, in the context of the relationship between peoples and the modern State it is a useful concept in relation to non-dominant groups who self-identify and are identified by others as such.⁵⁰ Consequently, Barnard opts for a polythetic definition which was first adumbrated by Sidesel Saugestad.⁵¹ This definition identifies IPs according to four criteria which include: first-come, self-identification, non-dominance and cultural difference.⁵² Barnard submits that this definition sums up the international consensus amongst anthropologists, lawyers and politicians in the context of the relationship between peoples and the State.⁵³

⁴⁷ Ibid.

⁴⁸ Ibid, at 7.

⁴⁹ J Friedman, 'Indigeneity: Anthropological Notes on a Historical Variable' in M Henry (ed), *Indigenous Peoples Self-Determination, Knowledge, Indigeneity* (Eburon Delft, 2008) at 43-44.

⁵⁰ Ibid.

⁵¹ S Saugestad, *The Inconvenient Indigenous: Remote Area Development in Botswana, Donor Assistance and the First People of the Kalahari* (Nordic Africa Institute, 2001).

⁵² Ibid, at 43.

⁵³ A Barnard, (n 45) above at 7.

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It is no wonder then that the concept of IPs is even more problematic in the context of Africa and even a sympathiser of the concept like Barnard admits that there are problems in applying this concept to Africa.⁵⁴ Saugestad recognises that there is an African context to the term,⁵⁵ and explains the process leading up to the production of the Martinez Report⁵⁶ where the African conception of IPs was brought to focus but was rejected. However, this rejection does not seem to imply that the concept of IPs is not relevant to Africa.

Despite the seeming lack of consensus on the meaning of IPs, academics have continued to proffer various definitions. For example, James Anaya appears to consider the definition of IPs in relation to people who inhabited a place prior to invasion by colonisers.⁵⁷ Anaya contends that within international law and international institutions the terms 'indigenous', 'native' or 'aboriginal' 'has long been used to refer to a particular subset of humanity that represents a certain common set of experiences rooted in historical subjugation by colonialism, or something like colonialism.'⁵⁸ He then goes further to proffer his definition by arguing that:

Today, the term indigenous, refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally

⁵⁴ Ibid, at 8. For another author who makes a brilliant case about the need to support the concept of indigenous peoples for its political advantages to certain groups, see RB Lee, 'Twenty-first Century Indigenism' (2006) 6 *Anthropological Theory* 455.

⁵⁵ See S Saugestad, 'Beyond the "Columbus Context": New Challenges as the Indigenous Discourse is Applied to Africa' in H Minde (ed), *Indigenous Peoples Self-determination, Knowledge, Indigeneity* (Eburon Delft, 2008) 157-173 at 158. Also, note how Saugestad expresses his understanding of the meaning of indigenous people in Africa at 165-166.

⁵⁶ MJ Cobo, *Study of the Problem of Discrimination Against Indigenous Populations* (United Nations, 1987).

⁵⁷ SJ Anaya, (n 4) above at 3-4.

⁵⁸ Ibid, at 5.

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distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest.⁵⁹

Although Anaya begins his analysis of the definition of IPs by placing a lot of emphasis on a history of 'colonialism or something like colonialism'⁶⁰ in a somewhat contradictory note he argues that presently IPs are identified as well as identifying themselves in accordance with identities that 'predate historical encroachments by other groups and the ensuing histories that have wrought, and continue to bring, oppression against their cultural survival and self-determination as distinct peoples.'⁶¹ Anaya appears to introduce the criteria of self-identification in connection with 'identities that predate encroachment', 'oppression against their cultural survival', and 'distinct peoples'.⁶²

Such West-centric descriptions of IPs also place a lot of emphasis on distinctiveness of culture as a key criterion for identifying them. In this respect Julian Burger contends that the idea of belonging to a distinct culture is a central aspect of defining IPs.⁶³ In an attempt to be heterogeneous in defining IPs Anaya acknowledges that 'many of the minority or non-dominant tribal peoples of Africa and Asia are generally regarded, and regard themselves, as indigenous ... because their ancestral roots are embedded in the lands in which they live, or would like to live'.⁶⁴ However, he is silent on whether such IPs of Africa are 'indigenous peoples' for the purposes of international law and the rights that are protected and guaranteed therein.

⁵⁹ Ibid, at 3.

⁶⁰ Ibid, at 5.

⁶¹ Ibid.

⁶² See SJ Anaya, 'Indigenous Rights Norms in Contemporary International Law' (1991) 8 (1) *Arizona Journal of International & Comparative Law* 1 at 4, where Anaya maintains that cultural distinctiveness and colonialism are key features of IPs.

⁶³ J Burger, *Report from the Frontier: The State of the World's Indigenous Peoples* (Cultural Survival Inc, 1987) at 12.

⁶⁴ SJ Anaya, (n 4) above at 3.

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Taiiake Alfred and Jeff Corntassel argue that the literature on IPs has been dominated by 'identity constructions that reflect the colonized political and legal contexts in which indigenous peoples are forced to live and operate.'⁶⁵ They note further that colonialism should not be allowed to be the only narrative of IPs as this limits their freedom and imposes an outcome that further feeds into the power dynamics that disempowers them.⁶⁶ Indeed, it appears that a lot of the literature on IPs tend to present them in the context of victimisation, as Coates argues IPs are defined in the context of powerlessness and exploitation by other dominant groups.⁶⁷

The most widely cited definition is the one provided by Jose Martinez Cobo.⁶⁸ Cobo's study identifies certain key elements in defining and identifying IPs such as: the significance of traditional and ancestral lands; linkage of IPs to original or prior inhabitants of a territory; and distinctiveness of culture. However, as Coates argues, defining IPs in terms of victimisation is not only dis-empowering but also fails to acknowledge the fact that some IPs have in the past also 'exploited, defeated, ruled over, and dislocated other indigenous societies.'⁶⁹

Even international organisations in the business of promoting the rights of IPs also seem to define them in terms of victimhood and distinctiveness of culture. For example, Survival International describes them as 'a group which has had ultimate control of their lands taken by later arrivals; they are subject to the

⁶⁵ T Alfred and J Corntassel, 'Being Indigenous: Resurgences against Contemporary Colonialism' (2005) 40 *Government and Opposition* 597 at 605. See also, JN Brown and PM Sant, *Indigeneity: Construction and Re/Presentation* (Nova Science Publishers, 1999) and RH Barnes, A Gray and B Kingsbury, *Indigenous Peoples of Asia*, vol 48 (Association for Asian Studies Inc, 1995).

⁶⁶ *Ibid*, at 601.

⁶⁷ K Coates, (n 37) above at 5.

⁶⁸ MJ Cobo, (n 56) above at paras 379-382.

⁶⁹ K Coates, (n 37) above at 9. See also, H Minde, 'The Destination and the Journey: Indigenous Peoples and the United Nations from the 1960s through 1985' in H Minde (ed), *Indigenous Peoples: Self-determination, Knowledge, Indigeneity* (Delft Eburon, 2008) 49-86 at 56-57.

domination of others.⁷⁰ Similarly, according to the International Work Group for Indigenous Affairs (IWGIA) IPs 'face the same experience of discrimination and marginalization as other ethnic minorities'.⁷¹ It is the argument herein that this idea of defining IPs in such negative terms contradictorily feeds into the narratives that have accounted for the historical injustices encountered by IPs as well as their contemporary challenges globally. However, before examining the implications of this idea of defining IPs in such negative terms in further detail, it is important at this juncture to critically examine the approaches to the definition or descriptions of IPs by international organisations as well as under relevant international human rights instruments.

6.2.1. The UN, International Labour Organisation (ILO) and Definition of IPs

The ILO *Indigenous and Tribal Populations Convention, 1957* (ILO 107)⁷² appears to be the first international instrument to define IPs⁷³ as it described them similarly to the latter *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169), 1987⁷⁴ which identifies them as:

...peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.⁷⁵

⁷⁰ See <www.survivalinternational.org/info/terminology>. Accessed 17 March 2016.

⁷¹ See <www.iwgia.org/culture-and-identity/identification-of-indigenous-peoples>. Accessed 17 March 2016.

⁷² *Supra*.

⁷³ Under its Art 1 (b).

⁷⁴ ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* adopted in Geneva, at the 76th International Labour Congress (ILC) session on 27 June 1989, entered into force on 05 September 1991.

⁷⁵ See Art 1 (b).

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It provides further that '[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.'⁷⁶ It has been suggested that the definition of IPs in the latter ILO Convention differs from the former in emphasising 'self-identification' by IPs as a criteria for identifying them.⁷⁷ Indeed, ILO 169 remains the only existing and binding international instrument that contains criteria for describing IPs. Although it is claimed that the UN has no definition for IPs, however, a reading of paragraph 6 of the preamble to the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP)⁷⁸ suggests that IPs are those who 'have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources'. So, even the UN appears to describe and identify IPs in the context of victimhood.

By contrast to the above preambular description, Article 9 of UNDRIP provides that '[i]ndigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.' Similarly, Article 33 (1) of UNDRIP provides that '[i]ndigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.' It is argued that the combined effects of Articles 9 and 33 of UNDRIP are that the identification or definition of IPs is to be determined by IPs themselves in accordance with 'their own customs and traditions'. So, in as much as the UN is concerned, when the determination of who are IPs is at issue, self-identification as such appears to be

⁷⁶ See Art 1 (2).

⁷⁷ RT Ako and O Oluduro, 'Identifying Beneficiaries of the UN-Indigenous Peoples' Partnership (UNIPP): The Case for the Indigenes of Nigeria's Delta Region' (2014) 22 *African Journal of International & Comparative Law* 369.

⁷⁸ *UN Declaration on the Rights of Indigenous Peoples*. A/RES/61/295, adopted by the UN General Assembly on Thursday, 13 September 2007 by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>, accessed 17 March 2016.

the key criterion. It is obvious therefore that the concept of IPs has transcended the discipline of anthropology as 'the term has come to occupy wide currency in general as well as in the other social sciences literature.'⁷⁹ Indeed, IPs are today recognised as distinct subjects of international law with rights as such.⁸⁰ However, as noted above there are practical problems with the application of the West-centric definition or description of IPs in the context of the protection of their rights in Africa.

6.2.2. Definition of IPs in the African Context

The objective of this section is to answer the research question: Is the concept of IPs relevant to Africa? This research question is significant to this thesis as answering it will also help to determine if the concept of IPs is relevant to Africa and to the Abuja peoples of Nigeria. The relevance or otherwise of the concept of IPs in the African context has been the subject of academic debates by scholars like James Woodburn who critically examines the political status of hunter-gatherers in present day Africa by demonstrating that through the combined effects of their lack of political status and low numerical strengths these peoples have very negligible political power and influence in countries where they live.⁸¹ He argues that '[i]n most, but not all, Sub-Saharan African countries, hunter-gatherers are politically, to all intents and purposes, invisible, they lack voting power, lobbying capacity and any significant form of representation even at local

⁷⁹ V Xaxa, 'Tribes as Indigenous People of India' (1999) *Economic and Political Weekly* 3589 at 3590. For further discussions on the definition of indigenous peoples, see M Pelican, 'Complexities of Indigeneity and Autochthony: An African Example' (2009) 36 *American Ethnologist* 52; JN Brown and PM Sant, *Indigeneity: Construction and Re/Presentation* (Nova Science Publishers, 1999); RH Barnes, A Gray and B Kingsbury, *Indigenous Peoples of Asia*, vol 48 (Association for Asian Studies Inc, 1995); L Hughes, *The No-nonsense Guide to Indigenous Peoples* (New Internationalist Verso, 2003), at 11-16; and R Stavenhagen, *The Emergence of Indigenous Peoples* (Springer Science & Business Media, 2012) at 46, 47, 48 and 81-83.

⁸⁰ RA Williams, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' (1990) *Duke Law Journal* 660.

⁸¹ J Woodburn, 'The Political Status of Hunter-Gatherers in Present-Day and Future Africa' in A Barnard and J Kenrick (eds), *Africa's Indigenous Peoples: 'First Peoples' or 'Marginalized Minorities'?* (Centre of African Studies, University of Edinburgh, 2001) 1-14 at 1.

level.⁸² He shows how there is a general recognition that these hunter-gatherers are the 'first inhabitants of the countries in which they live'.⁸³

Woodburn maintains that '[b]y far the most important problem facing hunter-gatherers and former hunter-gathers in Africa today is the theft of their land and the loss of their livelihood.'⁸⁴ However, Woodburn concludes that because there is a general feeling in Africa that all Africans are IPs since almost all of them experienced colonialism, 'more is likely to be gained by stressing that they are First Peoples' and not IPs.⁸⁵

Likewise, in an essay examining the status of the San⁸⁶ in southern Africa, James Suzman examines the issue of identifying the San as IPs by arguing that given the problematic context of the term 'indigenous' in Africa it is counter-productive to articulate the rights of the San through the indigenous rights framework.⁸⁷ Whilst he does not deny that the San of southern Africa can be legitimately categorised as IPs, Suzman concludes that it is better to regard them as a 'marginalized minority rather than indigenous peoples' as they stand to gain more in terms of the legal protection of their rights through reference to their marginalised status.⁸⁸ It is argued herein that notwithstanding the merits in Suzman's arguments above, the concept of IPs is relevant to the promotion and protection of the rights of certain minority groups in Africa as demonstrated by the

⁸² Ibid.

⁸³ Ibid, at 2.

⁸⁴ Ibid, at 8.

⁸⁵ Ibid, at 12.

⁸⁶ The Sans are a population of marginalised and minority people who live in Botswana, Namibia, South Africa, Zimbabwe, Angola and Zambia, see J Suzman, *Things from the Bush: A Contemporary History of the Omaheke Bushmen* (Schlettwein Publishing, 2000).

⁸⁷ J Suzman, 'Indigenous Wrongs and Human Rights: National Policy, International Resolutions and the Status of the San of Southern Africa' in A Barnard and J Kenrick (eds), *Africa's Indigenous Peoples: 'First Peoples' or 'Marginalized Minorities'* (Centre of African Studies, University of Edinburgh, 2001) 273-297 at 274-275.

⁸⁸ Ibid.

jurisprudence of African Commission on Human and Peoples Rights (African Commission) and African Court on Human Peoples Rights (African Court) in subsections 6.2.3–6.2.4 below.

Although Saugestad admits that ‘Africa and much of Asia represent special conceptual challenges’⁸⁹ in terms of defining IPs, she argues that to link the concept of IPs to only European colonial expansion ‘leaves us without a suitable concept for analysing the same type of internal relationships that have persisted after the liberation from colonial dominance.’⁹⁰ Saugestad maintains that in Africa there are many groups of people who have been socially marginalised, economically exploited and socially excluded by other dominant ethnic groups from the national political systems and economic structures post-colonially.⁹¹ She therefore submits that the concept of IPs is necessary to describe the relationship between some populations and dominant sections within post-colonial African States.⁹² This submission is validated by the African Commission as demonstrated in sub-section 6.2.3 below.

6.2.3. The African Commission and the Definition of IPs

In a Report,⁹³ the African Commission through its Working Group on Indigenous Populations/Communities found that ‘[t]he African peoples who are facing particular human rights violations, and who are applying the term “indigenous” in their efforts to address their situation, cut across various economic systems and embrace hunter-gatherers, and pastoralists as well as some small-scale

⁸⁹ S Saugestad, ‘Contested Images: ‘First Peoples’ or ‘Marginalized Minorities’ in Africa?’ in A Barnard and J Kenrick (eds), *Africa’s Indigenous Peoples: ‘First Peoples’ or ‘Marginalized Minorities* (Centre of African Studies, University of Edinburgh, 2001) 299-322 at 303.

⁹⁰ *Ibid.*, at 304

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ African Commission on Human and Peoples’ Rights (ACHPR) and International Work Group on Indigenous Affairs (IWGIA), *Report of the African Commission’s Working Group on Indigenous Populations/Communities*, (ACHPR and IWGIA, 2005).

farmers.⁹⁴ It provides a list of specific groups of peoples which it describes as IPs by using the examples of hunter-gatherers,⁹⁵ pastoralists,⁹⁶ across the African continent including the Ogoni people of South-East Nigeria which it describes as 'mostly farmers and fishermen.'⁹⁷ The Report notes that the examples given are neither exhaustive nor comprehensive enough to cover all those that may qualify to be described as IPs in Africa.⁹⁸ In an attempt to address the challenges surrounding the usage of the term IPs in the African context, the African Commission concludes that '[i]t is by no means an attempt to question the identity of other groups or to deny Africans the right to identify as indigenous to Africa or to their country.'⁹⁹ Instead the African Commission is of the view that the concept of IPs is:

... today a term and a global movement fighting for rights and justice for those particular groups who have been left in the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life are subject of discrimination and contempt and whose very existence is under the threat of extinction.¹⁰⁰

Like the UN, the African Commission is also of the opinion that a strict definition of IPs is 'neither necessary nor desirable.'¹⁰¹ However it has identified the characteristics of IPs in Africa. The following characteristics are enumerated as the key attributes of IPs in Africa: (1) their cultures and way of living are different from other dominant groups in the society; (2) their cultures are under threat of

⁹⁴ Ibid, at 5.

⁹⁵ Ibid, at 6.

⁹⁶ Ibid, at 8-10

⁹⁷ Ibid, at 18. For an analysis of whether the people of the Niger-Delta, Nigeria meet the criteria to be recognised as IPs, see RT Ako and O Oluduro, (n 77) above at 380-383.

⁹⁸ ACPHR and IWGIA (n 93) above at 10.

⁹⁹ Ibid.

¹⁰⁰ Ibid, at 58.

¹⁰¹ Ibid, at 59.

extinction; (3) their survival is dependent on access to and control of their traditional lands; (4) they suffer from discrimination from the State and other dominant ethnic groups as they are regarded as underdeveloped; (5) they live in isolated areas of society as a result of marginalisation politically and socially. According to the African Commission, as a result of the above characteristics, IPs in Africa are vulnerable to the violations of their human rights,¹⁰² and are unable to participate in determining their own future and development.¹⁰³ It is also worth noting that the African Commission expressly distinguishes between IPs and 'minorities', as it maintains that 'the concept of indigenous peoples in its modern forms more adequately encapsulates the real situation of groups and communities concerned.'¹⁰⁴ But it acknowledges that there are obvious overlaps between the concept of IPs and minorities under international law.¹⁰⁵ Indeed, Abuja peoples of Nigeria are certainly minorities and as argued in sub-section 6.2.5 below they are also IPs, this illustrates that the concepts of minorities and IPs in international law can overlap in relation to certain groups of people.

6.2.4. The Meaning of 'Peoples' under the African Charter – Does this include IPs?

Under the *African Charter on Human and Peoples' Rights* (African Charter)¹⁰⁶ the word 'peoples' is used in its title, preamble¹⁰⁷ and substantive provisions¹⁰⁸

¹⁰² Ibid, at 60.

¹⁰³ Ibid. For further analysis of the African Commission's views on the definition and description of indigenous peoples, see ACHPR and IWGIA, *Indigenous Peoples of Africa: The Forgotten Peoples? The African Commission's Work on Indigenous Peoples in Africa*, (ACHPR and IWGIA, 2006) at 8-14 and KN Bojosi and GM Wachira, 'Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 382 at 391-400.

¹⁰⁴ ACHPR and IWGIA (n 93) above at 64.

¹⁰⁵ Ibid.

¹⁰⁶ *African Charter on Human and Peoples Right*, adopted in Nairobi, Kenya on 27 June 1981, entered into force 21 October 1986.

¹⁰⁷ See paras 1, 3, 4, 5, 6, 9, 10 and 11 of the preamble to the African Charter.

¹⁰⁸ See Arts 19-24 of the African Charter.

without defining it anywhere in its text.¹⁰⁹ The African Commission which is established by the African Charter,¹¹⁰ has the mandate of interpreting the provisions of the African Charter,¹¹¹ but it is yet to define the word 'peoples' as used in the African Charter.¹¹² In the case of *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria (Ogoni case)*,¹¹³ the African Commission held that the rights of the Ogoni people of Nigeria (a minority ethnic group) were protected and enforceable against the Government of Nigeria under the African Charter without determining if they were IPs within the meaning of the African Charter.¹¹⁴

In the more recent case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya (Endorois case)*,¹¹⁵ the African Commission had to determine whether usage of the word 'peoples' under the African Charter was inclusive of IPs. Although the African Commission admitted that there was no universally acceptable definition of IPs,¹¹⁶ it nevertheless relied on the provisions of UNDRIP, ILO 169, and the decisions of

¹⁰⁹ For a more detailed analysis of usage of the word 'peoples' in the African Charter, see R Murray, *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing, 2000).

¹¹⁰ Art 30 of the African Charter.

¹¹¹ Art 45 (3) of the African Charter.

¹¹² R Murray, *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing, 2000) at 103-104 and PN Barney, 'The Challenge of Culture for Human Rights in Africa' in M Evans and R Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press, 2008) at 233-234.

¹¹³ *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*. Communication 155/96.

¹¹⁴ *Ibid*, at paras 62, 66 and 69. See also, D Shelton, 'Decision Regarding Communication 155/96 (Social and Economic Rights Action Centre/Centre for Economic and Social Rights v. Nigeria). Case No ACHPR/COMM/A044/1' (2002) *American Journal of International Law* 937.

¹¹⁵ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. Communication 276/03.

¹¹⁶ *Ibid*, at para 147.

the Inter-American Court of Human Rights (IACHR) to find that the word ‘peoples’ in the African Charter was applicable to IPs in Africa.¹¹⁷

The African Commission in the *Endorois* case relied on three criteria (distinctiveness of culture and the culture being under threat of extinction; survival dependent on access to and control of traditional lands; and self-identification) to rule that the Endorois of Kenya were IPs within the meaning of the term under international law as well as under the African Charter.¹¹⁸ An important point worth pointing out is that the African Commission’s characterisation of IPs also portrays them as victims thus carrying on with the conventional conceptions of IPs through the lens of victimhood. It is argued that this approach is counter-productive since the main objective of international and regional attempts to promote and protect the rights of IPs are aimed towards empowering them. Defining and describing them as mere victims contributes to disempowering them by identifying them with factors that are responsible for their vulnerability in the first place.¹¹⁹

On 26 May 2017, the African Court on Human and Peoples Rights (African Court) gave judgment in the case of *African Commission on Human and Peoples’ Rights v The Republic of Kenya (Ogiek case)*.¹²⁰ Before then, no international court had ever given a judgement on the merits on any matter in relation to the rights of indigenous peoples (IPs) in the African context. Therefore, this judgement is

¹¹⁷ Ibid, at paras 142-162.

¹¹⁸ Ibid.

¹¹⁹ For critical analysis on the definition of IPs see generally, R Maaka and A Fleras, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (Otago University Press, 2005); and R Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, 2003).

¹²⁰ *African Commission on Human and Peoples’ Rights v The Republic of Kenya*. Application No 006/2012. This case emanated from the African Commission but was referred to the African Court. See <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples’%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf>, accessed 31 May 2017.

certainly a pivotal movement in the development of the African human rights system in general but particularly for IPs and minorities in the African continent.

The African Court noted that IPs are not defined under the African Charter and there is no universally agreed definition of the concept.¹²¹ It then referred to the report of the African Commission's Working Group on IPs and identified the following characteristics of IPs in Africa: self-identification; attachment to traditional lands which are very important to their survival; a state of marginalisation and subjugation and whose ways of life are distinct from dominant segments of society.¹²² Relying on Articles 60 and 61 of the African Charter, the Court referred to the description of IPs under the Article 1 of ILO 169¹²³ and the Report of the UN Rapporteur on Minorities,¹²⁴ and concluded that the Ogiek meet the criteria to be considered IPs and so held.¹²⁵ It must be emphasised that this is the first legally binding judicial decision by an international court on the rights of IPs in the African continent. In this context, the decision of the African Court finally lays to rest the debates about whether the concept of IPs is relevant in the African context.

However, in the context of this thesis and for the purposes of protecting their land rights, IPs are hereby defined to mean any group of non-dominant peoples who have ancestral roots to the lands where they live as against other dominant groups or institutions that threaten the enjoyment of their rights as a group, particularly, where the livelihood and continuous existence of such groups as a community of farmers, hunters, fishermen and where their continuous survival as a people is dependent on their occupation, control and use of the lands upon

¹²¹ Ibid, at para 105.

¹²² Ibid, at paras 105 and 107.

¹²³ Ibid, at footnote 13.

¹²⁴ Ibid, paras 106-107

¹²⁵ Ibid, at para 110-112.

which they live and have lived prior to the emergence of modern statehood, whether through colonialism or by the efforts of State-makers indigenous to such modern States.¹²⁶

6.2.5. The Abuja Peoples of Nigeria – Are they IPs?

This section aims to answer the research question: Do Abuja peoples of Nigeria meet the criteria to qualify as IPs under international law? This research question is very significant to this thesis. The answer to this research question is related to the central research objective in this thesis, which is to determine whether Abuja peoples of Nigeria are IPs under international law. There are two main points to consider in the determination of whether Abuja peoples are IPs. Firstly, since there are no universally acceptable criteria with which to determine if a group of people can be regarded as IPs, preference will be accorded to the characteristics of IPs given by the African Commission's Report,¹²⁷ which claims to have taken the peculiarities of African societies into account¹²⁸ in addition to the recent decision of the African Court in the *Ogiek* case.

The second point is that Abuja peoples are eight different ethnic groups, a situation replicated in the Niger Delta region of Nigeria where the Ogoni peoples are found. However, in the *Ogoni* case,¹²⁹ decided by the African Commission, it was only the Ogoni people of the Niger Delta that brought a claim and the other different ethnic groups in the region did not bring a claim. So, the issue of whether a combined collective of different ethnic groups can come within the meaning of

¹²⁶ This model of definition is apparent from a critical reading of the following literature: W Adebani, 'Terror, Territoriality and the Struggle for Indigeneity and Citizenship in Northern Nigeria' (2009) 13 *Citizenship Studies* 349; A Sayne, *Rethinking Nigeria's Indigene-Settler Conflicts*, (US Institute of Peace, 2012); AO Adesoji and A Alao, 'Indigeneship and Citizenship in Nigeria: Myth and Reality' (2009) 2 *Journal of Pan African Studies* 151; ACHPR and IWGIA (n 93) above and V Xaxa, 'Tribes as Indigenous People of India' (1999) *Economic and Political Weekly* 3589.

¹²⁷ ACHPR and IWGIA (n 93) above at 60.

¹²⁸ *Ibid.*

¹²⁹ *Supra.*

'peoples' under the African Charter was not addressed. Similarly, in the *Endorois* case,¹³⁰ it was again only one ethnic group (the Endorois) from Kenya that brought a claim before the African Commission. Even the *Ogiek* case,¹³¹ recently decided by the African Court relates to just one ethnic group (the Ogieks) from Kenya.¹³² In a way, this appears to follow the general trend of cases which relate to single groups of ethnic peoples coming before the international human rights treaty Monitoring Bodies, even though there is yet no case emanating from Africa that has come up before the Monitoring Bodies as demonstrated later in Chapter Seven below.

As at the time of writing there is no known case either before the African Commission or the African Court relating to the rights of IPs, in which a collective of ethnic groups has brought a claim. In addition, there is a gap in the existing body of literature on IPs on whether people belonging to different ethnic groups can qualify as IPs in Africa.¹³³ Therefore, it is important for this thesis to assess if a collective of different ethnic and linguistic people such as the Abuja peoples of Nigeria can meet the characteristics of IPs as adumbrated by the African Commission.

As noted above, the African Commission enumerates the following criteria as the characteristics of IPs in Africa: (1) distinctiveness of culture and such culture should be under threat of extinction; (2) survival dependent on access to and control of traditional lands; (3) suffering from discrimination from the State and

¹³⁰ Supra.

¹³¹ *African Commission on Human and Peoples' Rights v The Republic of Kenya*. Application 006/2012.

¹³² Supra.

¹³³ For a survey of some of the recent literature on the definition of IPs, see S Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (Federation Press, 1998); R Stavenhagen, *The Emergence of Indigenous Peoples* (Springer Science & Business Media, 2012); and A Gupta, *Human Rights of Indigenous People*, vol 1 (Gyan Publishing House, 2005). On the issue of definition of IPs in the specific context of Africa, see AK Barume, *Land Rights of Indigenous Peoples in Africa* (IWGIA, 2010).

other dominant ethnic groups; and (4) living in isolated areas of society as a result of marginalisation politically.¹³⁴ The first element that a group must hold to qualify to be considered as IPs is that such group should have a distinct culture that differs from those of dominant groups of society and such culture should be under threat of extinction.¹³⁵ The culture of each of the Abuja peoples of Nigeria differs from people from other parts of Nigeria in the sense that each of the different groups speak distinctly different languages from each other *inter se* as well as from other dominant ethnic groups in Nigeria.¹³⁶ However, a significant part of their culture in relation to farming, fishing and hunting have similarities and differences among them *inter se* and with other dominant ethnic populations in Nigeria.¹³⁷

It has been rightly argued that there is danger in attaching too much significance to the element of distinctiveness of culture as most ethnic communities in Africa have similar cultures and traditions.¹³⁸ Therefore, it is argued that there is far more importance in considering whether and to what extent the culture and way of life of the various ethnic communities in Abuja are threatened by the national laws which have terminated their customary land rights. There are two main ways in which the culture of Abuja peoples is threatened. The first is in connection to land. It was demonstrated in Chapter Four (section 4.1) that they have historically been

¹³⁴ ACHPR and IWGIA, (n 93) above at 60.

¹³⁵ Ibid.

¹³⁶ See Abuja Council of Arts and Culture, *A Socio-Cultural Study of the Peoples of Abuja* Vol 1 (Research & Documentation Unit, Abuja Council for Arts and Culture, 1995) at Chapters 1-5; A Hassan and S Na'ibi, *The Gwari Tribe in Abuja Emirate* (Nigeria Magazine Special Publications, Federal Government Print Department, 1961) at 7-13. See also, S Na'ibi and A Hassan, *The Gwari, Gade and Koro Tribes* (Ibadan University Press, 1969) and R Blench, 'Atlas of Nigerian Languages, vol III (revised and amended edition of Crozier & Blench, 1992).

¹³⁷ See S Na'ibi and A Hassan, (n 136) above; S Na'ibi (n 136) above; and Abuja Council of Arts and Culture, (n 136) above.

¹³⁸ RT Ako and O Oluduro, (n 77) above at 380. See also, GR Woodman, 'Ghana: How Does State Law Accommodate Religious, Cultural, Linguistic and Ethnic Diversity?', in M-C Foblets, J-F Gaudreault-Desbiens and AD Renteln (eds) *Cultural Diversity and the Law: State Responses from Around the World* (Bruylant, Éditions Yvon Blais, 2010) 255-280 at 257.

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and currently are farmers, hunters and fishermen. Like IPs all over the world, land is intrinsically connected to Abuja peoples' cultural survival as farmers, hunters and fishermen.¹³⁹ For similar reasons, they also satisfy the second criterion which requires that their survival should be dependent on access to and control of traditional lands.¹⁴⁰ The second point as to how their culture is under threat, relates to their languages. Some researchers have concluded that the languages of the various ethnic groups indigenous to Abuja are currently under threat of extinction.¹⁴¹

The third criterion requires that they suffer from discrimination from the State and other dominant ethnic groups. While this requirement appears to suggest that such groups are minorities rather than IPs, it is argued that this requirement combines with the other characteristics identified by the African Commission to create the distinction between IPs and minorities. In Chapter Four, it was demonstrated that since the late eighteenth century and early nineteenth century the peoples of Abuja were engulfed by the Islamic jihad of the dominant Hausa and Fulani ethnic groups led by Uthman Dan Fodio, bringing them under the political hegemony of the now defunct Zaria Emirate.¹⁴² State-based

¹³⁹ W Adebani, 'Abuja' in S Bekker and G Therborn (eds), *Capital Cities in Africa: Power and Powerlessness* (HSRC Press and CODESRIA, 2012).

¹⁴⁰ ACHPR and IWGIA, (n 93) above at 60.

¹⁴¹ R Blench, 'The Status of the Languages of Central Nigeria' in M Brenzinger (ed), *Endangered Languages in Africa* (Rüdiger Köppe, 1998) 187-206; R Blench, 'Endangered Languages in West Africa' in M Brenzinger (ed), *Language Diversity Endangered* (Mouton de Gruyter, 2007) 140-162; and O Yusuf, 'Disappearing Languages of the Middle Belt: Steps to Safeguard' in L Ihezue and OE Osuji (eds), *Proceedings of the National Workshop on best Practices to Safeguard Endangered Nigerian Languages* (UNESCO, 2007) 67-81.

¹⁴² See G Thomas-Emeagwali, 'Notes on the History of Abuja, Central Nigeria' *African Study Monographs* 9, No 4 (1989) 191-196; OSMM Temple and CL Temple, *Notes on the Tribes, Provinces, Emirates and States of the Northern Provinces of Nigeria* (Cass, 1965); HD Gunn and F Conant, *Peoples of the Middle Niger Region: Northern Nigeria*, vol 1 (International African Institute, 1960); CK Meek, *The Northern Tribes of Nigeria: An Ethnographical Account of the Northern Provinces of Nigeria together with a Report on the 1921 Decennial Census*, vol 1 (Cambridge University Press, 1925); CK Meek, *The Northern Tribes of Nigeria: An Ethnographical Account of the Northern Provinces of Nigeria together with a Report on the 1921 Decennial Census*, vol 2 (Cambridge University Press, 1925) and DC Tambo, 'The Sokoto

discrimination can be said to have begun in 1976 when the then military junta promulgated a military Decree¹⁴³ designating their ancestral lands as lands belonging exclusively to the Federal Government of Nigeria without first resettling them or paying compensation to all the IPs living there.

Evidence that no adequate compensation has been paid nor have all the peoples been resettled is illustrated by two Bills currently before the Nigerian Senate.¹⁴⁴ Such discrimination from the State becomes even more apparent when one considers that Section 36 of the Nigerian *Land Use Act* (LUA) 1978,¹⁴⁵ accommodates the customary land rights of other Nigerians indigenous to the other 36 States that make up the Nigerian Federation, but its application in Abuja is made impossible by its Section 49, Section 1 (3) of the *Federal Capital Territory* (FCT Act),¹⁴⁶ and Section 297 (2) of the *Constitution of the Federal Republic of Nigeria* (Nigerian Constitution),¹⁴⁷ to the effect that the entire lands in the FCT are owned exclusively by the Federal Government of Nigeria. This issue will be addressed later in Chapter Seven below in the context of the specific provisions of international human rights treaties in more detail.

Caliphate Slave Trade in the Nineteenth Century' (1976) 9 *The International Journal of African Historical Studies* 187.

¹⁴³ *Decree No 6 1976*, now known as the *Federal Capital Territory Act*, CAP L F4, *Laws of the Federation of Nigeria*, 2004. Available at: <http://lawnigeria.com/LawsOfTheFederation/FEDERAL-CAPITAL-TERRITORY-ACT.html>, accessed 23 October 2016.

¹⁴⁴ See *The FCT Resettlement, Integration and Development Commission And For Related Matters Bill 2016* (HB 513) sponsored by Hon. Zaphania Jisalo, available at: www.nassnig.org/document/download/8074, accessed 23 October 2016. See also, *Lead Debate on A Bill for an Act to Amend the Federal Capital Territory Act Cap f6 Laws of the Federation of Nigeria 2004 And Other Matters Connected Therewith* (SB 115), sponsored by Senator David Umaru (APC) (Niger East Senatorial District).

¹⁴⁵ *Land Use Act* (LUA) 1978. Available at: <http://lawnigeria.com/LawsOfTheFederation/LAND-USE-ACT.html>, accessed 23 October 2016

¹⁴⁶ *Supra*.

¹⁴⁷ *Constitution of the Federal Republic of Nigeria 1999* (as amended). Available at: www.lawnigeria.com/CONSTITUTIONHUB/Constitution.html, accessed 23 October 2016

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The final criterion requires that such groups should be living in isolated areas of society as a result of marginalisation.¹⁴⁸ While a few of the Abuja peoples now live close to the city of the FCT as a result of the increasing development and expansion of the Capital City, the majority of them still live in villages and rural areas located in the six Local Government Councils of the FCT with no accessible roads, hospitals and other social amenities.¹⁴⁹ In any case, it appears the criteria identified by the African Commission are not conjunctive, implying that a group is not required to meet all the criteria to be considered IPs.¹⁵⁰ Indeed, in the *Endorois* case,¹⁵¹ the African Commission relied only on three criteria (distinctiveness of culture and the cultures being under threat of extinction; survival dependent on access to and control of traditional lands; and self-identification) to rule that the Endorois of Kenya were IPs.

In the *Ogiek* case, the African Court relied on four criteria (priority of occupation in time in relation to territory, cultural distinctiveness, self-identification and experience of victimisation, subjugation).¹⁵² Therefore, based on the authority of the *Ogiek* case, Abuja peoples satisfy enough of the characteristics identified by the African Court as elements for identifying IPs in Africa. Even if Abuja peoples are subjected to the further key test of self-identification under UNDRIP¹⁵³ and the requirement under ILO 169 that their 'social, economic, cultural and political institutions'¹⁵⁴ should distinguish them from other dominant sections of the

¹⁴⁸ ACHPR and IWGIA, (n 93) above at 60.

¹⁴⁹ S Gusah, 'Community Land Trusts: A Model for Integrating Abuja's Urban Villages within the City Master Plan' in LE Herzer (ed), *Changing Cities: Climate, Youth, and Land Markets in Urban Areas* (Wilson Centre for Comparative Urban Study Project, 2011) at 141-159. See also, Map showing the Six Local Government Areas in Abuja at Appendix 2 below.

¹⁵⁰ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. Supra.

¹⁵¹ Supra at paras 142-162.

¹⁵² *Ogiek* case (supra) at paras 107-112

¹⁵³ Art 33 (1) of UNDRIP.

¹⁵⁴ Art 1 (1) (b) of ILO 169.

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society, the conclusion is not different. The various ethnic groups in Abuja, self-identify as distinct ethnic groups and as IPs, including their identification by others as such.¹⁵⁵ They are also peoples who descended from those who 'inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries'.¹⁵⁶

It was also demonstrated in Chapter Four above that the peoples of Abuja inhabited the territory now designated as the Federal Capital Territory (FCT) of Nigeria, prior to the commencement of British colonial rule in Nigeria and they were forcefully brought into Nigeria through the amalgamation of the Northern and Southern Protectorates of Nigeria in 1914 by the British colonial administration.¹⁵⁷ The logical conclusion from the above analyses is that each of the various indigenous ethnic groups of Abuja of themselves and all of them together as a collective of different ethnic communities satisfy the requirement to be regarded as IPs. Consequently, it is argued that any such collective of different ethnic groups in Africa that satisfy the characteristics of IPs identified by the African Commission, UNDRIP and ILO 169, are entitled to the rights attached to such groups in international law.¹⁵⁸

¹⁵⁵ See S Gusah, (n 149) above at 141-159. See also, SU Ago *et al*, *Federal Capital Territory Abuja, Nigeria: Report of Ministerial Committee for the Appraisal of Physical Planning and Development Issues in the Federal Capital Territory Abuja Vol. 1* (FCDA, 1999).

¹⁵⁶ Art 1 (b) and Art 1 (2).

¹⁵⁷ See O Ikimi, 'Nigerian Reaction to The Imposition of British Colonial Rule, 1885-1918 in S Förster, WJ Mommsen and RE Robinson, *Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition* (Oxford University Press, 1988) 454-467 and JE Flint, 'Nigeria: The Colonial Experience from 1880 to 1914' in LH Gann and P Duignan (eds), *Colonialism in Africa, 1870-1960: The History and Politics of Colonialism 1870-1960*, vol 1 (Cambridge University Press, 1969) at 234-235.

¹⁵⁸ RT Ako and O Oluduro, (n 77) above at 383.

6.3. Definition of IPs: Lessons from the UN Convention on the Rights of the Child

It is the argument advanced in this thesis that the existing academic, international and regional attempts at defining, describing and empowering IPs need to adopt the current approach used by contemporary international law towards promoting and protecting the rights of children. Traditionally, children were conceived and characterised as citizens in waiting.¹⁵⁹ The idea of conceiving children as citizens in waiting represented a future-oriented approach towards defining children as potential citizens of the future.¹⁶⁰ Children were not viewed as individuals fully ready to engage, live and participate in an adult dominated world.¹⁶¹ They were also portrayed as innocent and frail, thereby removing children from any discussion about work, politics and sexuality.¹⁶² Rather they were presented as underdeveloped or uncompleted human beings or 'human becomings'.¹⁶³ The idea that children were citizens in development and in need of protection has been rightly subjected to academic criticism for allowing children to be presented as objects of intervention rather than as legal subjects with rights as such.¹⁶⁴ This attitude towards children promoted and enhanced the justification for a lack of

¹⁵⁹ See R Lister, 'Why Citizenship: Where, When and How Children?' (2007) 8 *Theoretical Inquiries in Law* 693. For an example of literature that justified this approach, see TH Marshall, *Citizenship and Social Class* (Cambridge, 1950).

¹⁶⁰ R Lister, (n 159) above at 696.

¹⁶¹ *Ibid.*

¹⁶² P Aries, *Centuries of Childhood; a Social History of Family Life. Translated from the French by Robert Baldick* (Knopf, 1962) and KLF Calvert, *Children in the House: The Material Culture of Early Childhood 1600-1900* (Northeastern University Press, 1992).

¹⁶³ C Jenks and J Fionda, 'Sociological Perspectives and Media Representations of Childhood' in J Fionda (ed), *Legal Concepts of Childhood* (Hart Publishing, 2001) 19-43 at 23-33.

¹⁶⁴ See for example, MD Freeman, 'Taking Children's Rights More Seriously' (1992) 6 *International Journal of Law, Policy and the Family* 52 at 54.

formal recognition of children as citizens and consequently their exclusion from acquiring citizenship rights.¹⁶⁵

For example, the 1924 League of Nations *Declaration on the Rights of the Child*,¹⁶⁶ made merely passing provisions about the future citizenship responsibilities of children by providing that '[t]he child must be brought up in consciousness that its best qualities are to be used in the service of its fellow men.'¹⁶⁷ Indeed, children were referred to as 'it' in the entire document thereby objectifying children and denying them the right to be assigned a gender.¹⁶⁸

Although the 1959 *UN Declaration on the Right of the Child*,¹⁶⁹ went beyond the afore-mentioned Declaration by making provisions for a broader range of rights for children,¹⁷⁰ there was no recognition of the right of children as autonomous people like adults and their participatory rights in decision matters that affected them were not protected.¹⁷¹ It has been rightly argued that the strategy of presenting children as 'future beings' 'conceals a more fundamental set of closed-

¹⁶⁵ See O O'Neill, 'Children's Rights and Children's Lives' (1992) 6 *International Journal of Law & the Family* 24.

¹⁶⁶ 1924 League of Nations *Declaration on the Rights of the Child*, adopted 26 September 1924 in Geneva, Switzerland. Available at: www.un-documents.net/gdrc1924.htm, accessed 26 November 2016.

¹⁶⁷ *Ibid*, at last paragraph.

¹⁶⁸ C Goddard and B Saunders, 'Journalists as Agents and Language as an Instrument of Social Control: A Child Protection Case Study' (2001) 26 *Children Australia* 26.

¹⁶⁹ 1959 *UN Declaration on the Right of the Child*, proclaimed by UNGA Resolution 1386(XIV) of 20 November 1959. This formed the adoption of the latter *Convention of the Rights of the Child*, 1989, adopted by the UNGA 30 years later on 20 November 1989, entered into force on 2 September 1990.

¹⁷⁰ See for example, Principles 1-10.

¹⁷¹ MD Freeman, *The Moral Status of Children: Essays on the Rights of the Child* (Martinus Nijhoff Publishers, 1997) at 50.

mind attitudes that acts as a barrier to young people who want to get involved in civic life and contribute to policy-making'.¹⁷²

In contradistinction to the above previous approaches of defining and presenting children as 'future adults' which created a binary situation in terms of citizenship rights between children and adults, the 1989 *UN Convention on the Rights of the Child*, (UNCRC),¹⁷³ promotes the idea of children as full citizens in their own right and as independent bearers of such rights as well as empowering them with the capacity of being legal subjects in their own right including decision-making powers.¹⁷⁴ The UNCRC promotes the view that children are no longer merely 'pre-citizens' or 'potential adults' or 'becomings'.¹⁷⁵ Instead, children are now presented and characterised as full human beings who are invested with important social and citizenship rights.

For example, Article 1 of the UNCRC defines a child as 'every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.' It also provides that 'States Parties shall assure **to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.**'¹⁷⁶ In addition, the UNCRC requires that in all judicial and administrative proceedings affecting any child, 'the child shall in particular be provided the opportunity to be

¹⁷² P Haid, EC Marques and J Brown, *Re-focusing the Lens: Assessing the Challenge of Youth Involvement in Public Policy* (The Ontario Secondary School Students' Association & The Institute on Governance, 1999) at 56.

¹⁷³ *Supra*.

¹⁷⁴ D Stasiulis, 'The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement' (2002) 6 *Citizenship Studies* 507.

¹⁷⁵ A James, 'To be (come) or not to be (come): Understanding Children's Citizenship' (2011) 633 *The Annals of the American Academy of Political and Social Science* 167.

¹⁷⁶ Art 12 (1). The emphasis is added.

heard in any judicial and administrative proceedings affecting the child ...'¹⁷⁷ Indeed, the UNCRC makes provision for civil and political rights enjoyable by adults and makes them enjoyable by children. Such rights include: the right to freedom of expression;¹⁷⁸ the right to freedom of thought, conscience and religion;¹⁷⁹ and of the rights to freedom of peaceful assembly.¹⁸⁰

It is herein argued that there are significant lessons from the above analyses for the international and regional regimes on the rights of IPs. IPs are easily presented as victims. Like the previous approach towards children's citizenship rights *vis-à-vis* adults' citizenship rights, which created a binary situation, the way IPs are presented in international law appears to replicate this binary between 'victimised IPs' citizenship rights on the one hand, and the citizenship rights of 'other non-victimised' citizens on the other hand. This conventional approach of defining IPs as victims of colonialism or domination by others must now give way for a more empowering and positive definition. Already, like children IPs have emerged as distinct legal subjects under international law but the way they are defined and presented ought to deviate from further propagating the narratives of victimisation that have historically disempowered them.

Although there is power in victimhood in terms of its potency in eliciting remedial actions for victims of harm and injustice,¹⁸¹ it is the argument in this thesis that

¹⁷⁷ Art 12 (2). See L Lundy, 'Voice' is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *British Educational Research Journal* 927; L Lundy, L McEvoy and B Byrne, 'Working with Young Children as Co-researchers: An Approach informed by the United Nations Convention on the Rights of the Child' (2011) 22 *Early Education & Development* 714; and L Lundy, 'United Nations Convention on the Rights of the Child and Child Well-Being', in A Ben-Arieh *et al*, (eds), *Handbook of Child Well-Being* (Springer, 2014) 2439-2462.

¹⁷⁸ Art 13.

¹⁷⁹ Art 14.

¹⁸⁰ Art 15.

¹⁸¹ For critical discussions on the potency of victimhood, see M Lazar, (ed) *Feminist Critical Discourse Analysis: Gender, Power and Ideology in Discourse* (Springer, 2005); N Renwick and C Qing, 'China's Political Discourse Towards the 21st Century: Victimhood, Identity, and Political

the narrative of victimhood in the context of IPs has achieved its purpose and have now outlived its usefulness. The narrative of victimhood has been useful in adopting the UNDRIP. It has also been helpful in the creation of the United Nations Permanent Forum on Indigenous Issues (UNPFII). Indeed, there has been a lot of positive legal developments in relation to the jurisprudence of the Inter-American Court of Human Rights on the rights of IPs in the Americas.¹⁸² In the context of Africa, the African Court's decisions in the *Ogiek* case¹⁸³ demonstrates that IPs rights are germane human rights issues in the context of the African Charter and the African continent.

In view of the above, it is argued that the narrative of victimhood is no longer useful in describing and defining IPs as it has now outlived its usefulness. In a futuristic sense, it is counter-productive to continue identifying IPs with narratives that have been responsible for their historical subjugation and oppression in various parts of the world. Identifying them as such comes with risk that IPs' identities would be perennially linked and associated only with the negative experiences that they have encountered in the past. Thereby stigmatising and tagging IPs with identity constructions that obfuscates the many positive and more empowering narratives associated with IPs in the past and in the present.¹⁸⁴

An example of the danger with presenting IPs in negative terms is illustrated by the justification for colonialism. In this context, it should be understood that at the onset of colonialism and in the context of the relationship between Europeans and Africans at the time, all Africans were for all intent and purposes IPs. The

Power' (1999) 17 (4) *East Asia* 111; and J Ochs, 'The Politics of Victimhood and its Internal Exegetes: Terror Victims in Israel' (2006) 17 (4) *History and Anthropology* 355.

¹⁸² See SJ Anaya and WA Robert 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System' (2001) 14 *Harvard Human Rights Journal* 33.

¹⁸³ *Supra*.

¹⁸⁴ T Alfred and J Cornassel, (n 65) above at 605.

Berlin Conference of 1884-1885 and the resultant partitioning of Africa was facilitated by a very negative narrative and description of Africans as uncivilised, barbaric, eccentric, without States and needing protection from slavery as opposed to the civilised, rational and diametrically opposite West.¹⁸⁵ For instance, the main purpose of the Berlin Conference of 1884-1885 was highlighted by the opening statements of the President to the Conference – Prince Bismarck of Prussia who remarked that:

In convoking the Conference, the Imperial Government was guided by the conviction that all the Governments invited share the wish to **bring the natives of Africa within the pale of civilization** by opening up the interior of that continent to commerce ... by **encouraging missions and enterprises calculated to spread useful knowledge, and by preparing the way for the suppression of slavery...**¹⁸⁶

This negative conception of Africans and Africa as helpless and in need of help and protection justified the civilising mission and the complete subjugation of Africans through colonialism from the nineteenth century to the twentieth century. Presenting IPs in such similarly negative context comes with the risks that in some States dominant groups and institution could capitalise on such narratives as justificatory grounds to marginalise and discriminate against IPs.

It is argued that one possible solution to this problem of presenting IPs in negative terms of victimisation is for the UN to adopt a new Convention on the Rights of IPs. As demonstrated later in Chapter Seven below (sub-section 7.2.3.3 (a)), the four States which voted against UNDRIP have adopted positive reactions to it. This illustrates that there is now near universal acceptance of its provision by States all over the world. Accordingly, this thesis invites the UN to commence

¹⁸⁵ See discussion of Edward Said's *Orientalism* at Chapter Four (4.1.1) above.

¹⁸⁶ See Protocol No1 – Meeting of 16 November, 1884 reprinted in RJ Gavin and J Betley, *The Scramble for Africa: Documents on the Berlin West African Conference and Related Subjects, 1884/1885* (Ibadan University Press, 1973) at 129. The emphasis is added.

actions towards following the tradition it adopted in respect of the 1989 UNCRC. It is argued that such a process will present the opportunity for the international community to re-articulate the rights of IPs and present IPs in a more positive way as was done in the case of the definition of a child and children's rights under the current UNCRC. As at the time of writing there are no such attempts, rather the UNPFII is more interested in adopting an optional protocol to monitor State compliance with the provisions of UNDRIP.¹⁸⁷

6.3.1. International Law, IPs and Children through the Lens of Paternalism

Perhaps a more common denominator between children and IPs is the idea of paternalism or protectionism in international law. 'A state, organization, or even an individual is said to be acting paternalistically with respect to another state, organization, or individual when it is acting as a father acts with respect to his child or his children.'¹⁸⁸ In this context, international law seems to determine and regulate the relationship between States and subjects as well as bearers of rights under international law such as children and IPs. Indeed, it has been argued that paternalism includes 'the claim or attempt to supply the needs or to regulate the life of a nation or community in the same way as a father does those of his children.'¹⁸⁹

A practical illustration of paternalism in international law in relation to IPs is the provision of Article 38 of UNDRIP which demands that States should adopt legislative and policy measures within their domestic jurisdictions to give effects

¹⁸⁷ See United Nations Permanent Forum on Indigenous Issues (UNPFII), *Study on an Optional Protocol to the United Nations Declaration on the Rights of Indigenous Peoples Focussing on Voluntary Mechanism*, adopted at the UNPFII thirteenth session in New York on 12-23 May 2014, E/C.19/2014/7, 4 March 2014. See also, UNPFII, *Expert Group Meeting: Dialogue on an Optional Protocol to the United Nations Declaration on the Rights of Indigenous Peoples*, UNPFII/2015/EGM. 27-29 January 2015.

¹⁸⁸ N Fotion, 'Paternalism' (1979) 89 (2) *Ethics* 191 at 191.

¹⁸⁹ *Oxford English Dictionary* as quoted in E Sankowski, 'Paternalism and Social Policy' (1985) 22 (1) *American Philosophical Quarterly* 1 at 1.

to the provision of UNDRIP. Likewise, Article 2 of the UNCRC imposes obligations upon States to take measures to ensure that the rights of children guaranteed thereunder are protected without distinction of any kind. It could also be argued that the requirement and reliance of the State as the institution through which these rights are to be protected and respected demonstrates that international law regards the State as an institution with 'paternalistic' relationships with subjects of international law such as IPs and children.

It should be noted that paternalism as a theoretical concept has various meanings, categorisations and is controversial.¹⁹⁰ As Garren argues:

A review of the contemporary literature, therefore, reveals a clamorous cacophony in which there are as many competing conceptions of paternalism as there are authors...Indeed, the terminological inexactitude surrounding the concept and the attendant lack of consensus it has occasioned, has led one author to surmise that, 'the word is sometimes more trouble than it is worth and that we would be better off philosophically doing without "paternalism" in discussing some genuine problems now often formulated by using the word.'¹⁹¹

With the above controversy surrounding the concept of paternalism in mind, in this thesis and in relation to international law's paternalistic attitude towards IPs and children, paternalism is understood in the context of Boom's and Ogus' sense of 'strong paternalism'¹⁹² wherein international law seeks 'not merely to inform or

¹⁹⁰ See WH van Boom and A Ogus, 'Introducing, Defining and Balancing "Autonomy v. Paternalism"' (2010) 3 *Erasmus Law Review* 1 at 1-2.

¹⁹¹ DJ Garren, 'Paternalism, Part 1' (2006) 47 (4) *Philosophical Books* 334 at 340. For more critical discussion on the concept of paternalism, see D Luban, 'Paternalism and the Legal Profession' (1981) *Wisconsin Law Review* 454; AT Kronman, 'Paternalism and the Law of Contract' (1983) 92 (5) *The Yale Law Journal* 763; HM Malm, 'Bad Samaritan Law and Legal Paternalism' (1995) 106 (1) *Ethics* 4; and P Burrows, 'Analyzing Legal Paternalism' (1995) 15 *Review of Law and Economic* 489.

¹⁹² WH van Boom and A Ogus, (n 211) above at 2.

even to persuade but to ensure that ... behaviour that leads to adverse consequences is altered or stopped if necessary.'¹⁹³

The purpose of the above analogy between the paternalistic approach of international law towards IPs' and children's rights is not intended as a critique but as a way of demonstrating how international law approaches issues to do with the protection of such groups. It is the argument in this thesis that such paternalistic approaches to the protection of IPs and children is morally justified in view of their vulnerability in relation to dominant groups and institutions within the State. Indeed, it has been rightly contended that 'while there is little or no agreement among contemporary authors as to paternalism's intention or extension ... there is widespread agreement that paternalism however defined ... does give rise to a question of moral justification.'¹⁹⁴

However, it has been argued that paternism tends to deprive the individual of his or her rights.¹⁹⁵ It has also been demonstrated that attempts to reject paternalism entirely is fruitless and will probably not eliminate paternalism in the society.¹⁹⁶ It has been further argued that paternism raises critical issues regarding the power and ability of the State to interfere with individual rights and autonomy.¹⁹⁷ Charbonnier opines that paternalism seems to be an obstacle to emancipation.¹⁹⁸ Indeed, it is also contentious whether expression and demonstration of acts of gratitude on the part of vulnerable groups such as the mentally ill and and young

¹⁹³ Ibid.

¹⁹⁴ DJ Garren, (n 191) above at 341.

¹⁹⁵ M Smiley, 'Paternalism and Democracy' (1989) 23 (4) The Journal of Value Inquiry 299-318.

¹⁹⁶ E Tonkens and JW Duyvendak, 'Paternalism—caught between Rejection and Acceptance: Taking Care and Taking Control in Community Work' (2003) (38) (1) Community Development Journal 6.

¹⁹⁷ G Dworkin, 'Paternalism' (1972) 56 (1) the Monist 64.

¹⁹⁸ S Charbonnier, 'How Can One Recognize Emancipation? Familiarity versus Paternalism' (2013) 2 Tracés 83.

people who may be protected by paternalistic attempts by the State or international law does in fact justify paternalism.¹⁹⁹ Whatever side of the debate is taken as to the relevance or otherwise of paternalism in international law in relation to vulnerable groups such as IPs and children, it appears such paternalistic approaches will remain for the foreseeable future. In the following Chapter Seven, the manner in which international law protects land rights of IPs will be critically examined.

Conclusion

In Chapter Four, it was demonstrated that the compulsory acquisition of the ancestral lands of Abuja peoples, without payment of compensation or resettlement by the Nigerian Government is legitimised by the domestic laws of Nigeria. The main objective of this Chapter has been to determine whether the Abuja peoples meet the criteria to qualify as IPs under international law. Accordingly, and on the basis of the characteristics of IPs in Africa enumerated by the African Commission and the African Court, a group ought to fulfil the following criteria to be considered as IPs: (1) distinctiveness of culture and such cultures should be under threat of extinction; (2) survival dependent on access to and control of traditional lands; (3) suffering from discrimination from the State and other dominant ethnic groups; and (4) living in isolated areas of society as a result of marginalisation politically.²⁰⁰

It has been demonstrated that Abuja peoples satisfy a substantial number of the characteristics of IPs identified by the African Commission and African Court. In addition, it has also been demonstrated that even if the criteria of distinctiveness of culture under ILO 169 and self-identification under UNDRIP are applied to Abuja peoples of Nigeria, similar conclusions are reached. In line with this conclusion, the argument has been advanced that whenever any collective of

¹⁹⁹ T Kasachkoff, 'Paternalism: Does Gratitude Make it Okay?' (1994) 20 (1) *Social Theory and Practice* 1.

²⁰⁰ ACHPR and IWGIA, (n 93) above at 60.

different ethnic peoples claims any rights as IPs in Africa, they should be recognised as such once they satisfy the criteria identified by the African Commission and the African Court.

In section 6.3 above, the argument was developed that the international human rights regime on IPs and their rights can draw insights from the departure from the previous international human rights regime on the rights of children from the era where children were presented as future beings, thereby creating a binary situation where adults and children lived in a divided human rights world, to the contemporary situation where children are presented as human beings and independent bearers of human rights as such. The argument has therefore been advanced that it is time to depart from the conventional approach of presenting IPs in negative terms.

Therefore, there is a need for a new direction in line with contemporary approaches to the definition of children and their rights under the current UNCRC to reconceptualise IPs in a more positive and less negative way. Having demonstrated that the Abuja peoples of Nigeria satisfy the characteristics of IPs identified by the African Commission, the African Court as well as under ILO 169 and UNDRIP, the next significant issue which this thesis must critically examine is whether there is any protection for the customary land rights of Abuja peoples under international human rights law. This will be the main research objective in the following Chapter Seven.

CHAPTER SEVEN: LAND RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW AND ABUJA PEOPLES OF NIGERIA

Introduction

Following on from the research findings in the preceding Chapter Six that Abuja peoples of Nigeria are indigenous peoples (IPs) under international law, the main research objective in this Chapter is to consider whether there is protection for land rights of Abuja peoples under international law. In line with this research objective, this Chapter aims to answer the research questions: how relevant is the general body of international human rights law to the protection of land rights of IPs and how does international law protect such rights? This research question leads to an examination of the international human rights regime to determine whether Nigeria is bound by its international human rights obligations in relation to land rights of Abuja peoples. The answer to this research question helps to critically examine specific international instruments on land rights of IPs and their applicability or otherwise to Nigeria and the case study of Abuja.

The second research question to be answered in this Chapter is: are the land rights of IPs protected under the *African Charter on Human and Peoples' Rights* (the African Charter)? This research question invites a critical appraisal of the African Charter and the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) as well as the jurisprudence of the African Court on Human and Peoples' Rights (African Court). The answer to this second research question will help to illustrate the significance of the African Charter and its applicability to the case study of Abuja.

To answer the afore-mentioned research questions, this Chapter has been subdivided into four main sections. Section 7.1 focusses on the general body of international human rights law and the relevance to the protection of land rights of IPs. The jurisprudence of the United Nations' (UN) human rights treaty-based

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Monitoring Bodies on land rights of IPs will also be examined. The main purpose is to answer the research questions: how relevant is the general body of international human rights law to the protection of land rights of IPs and how does international law protect such rights? In Section 7.2, there will be critical analyses of three special international instruments on the rights of IPs and their relevance to the protection of land rights of IPs. The objective here is also to answer the research question: how relevant is the general body of international human rights law to the protection of land rights of IPs and how do international law promote and protect such rights?

Section 7.3 is aimed at examining the provisions of the African Charter and its significance to the protection of land rights of IPs in Africa. The goal here is to answer the research question: are the land rights of IPs protected under the African Charter? The analyses made in the process of answering the research questions enumerated above will then be used as a spring board to demonstrate the significance of a viable interaction between international and national laws in Nigeria. This will also be the foundation upon which later comparative analyses of the relationship between international and national law in the post-colonial African States of Nigeria and Kenya will be made in Chapter Nine. In section 7.4, the relevance of the concept of self-determination to protecting land rights of IPs and Abuja peoples will be examined.

7.1. Land Rights of IPs under International Law

One major area of consensus in defining or describing IPs is that virtually all attempts at doing so identify them with land or territories.¹ Land rights of IPs have

¹ See K Lehmann, 'To Define or not to Define-The Definitional Debate Revisited' (2006) 31 *American Indian Law Review* 509; HN Weaver, 'Indigenous Identity: What Is It and Who Really Has It?' (2001) 25 *The American Indian Quarterly* 240; J Cornassel, 'Who is Indigenous? "Peoplehood" and Ethnonationalist Approaches to Rearticulating Indigenous Identity' (2003) 9 *Nationalism and Ethnic Politics* 75; S Saugestad, 'Beyond the "Columbus Context": New Challenges as the Indigenous Discourse is Applied to Africa' in H Minde (ed), *Indigenous Peoples Self-determination, Knowledge and Indigeneity* (Eburon, 2008); SJ Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004) at 3-8; MJ Cobo, *Study of the Problem of Discrimination Against Indigenous Populations* (United Nations, 1987) at 379-382;

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dominated existing literature on the rights of IPs because of their historical connections with such lands and the connection of land rights to other rights guaranteed under international human rights law². As Sue Farran argues in the context of IPs in Pacific island countries '[I]and is more than its physical substance or exploitable potential.'³ Indeed, this is the situation in Africa where people's identities are linked to land.⁴ However, the protection of land rights of IPs can conflict with the interests of the State in a post-colonial Africa.

As demonstrated in Chapters Three,⁵ Four⁶ and Five,⁷ this sort of conflict was a feature of colonial Nigeria where the colonial authorities were entering into treaties with local chiefs most of whom had no *locus* to transfer land rights without the consent of members of the community.⁸ Likewise, as demonstrated in

and RT Ako and O Oluduro, 'Identifying Beneficiaries of the UN-Indigenous Peoples' Partnership (UNIPP): The Case for the Indigenes of Nigeria's Delta Region' (2014) 22 *African Journal of International & Comparative Law* 369. See also, Art 1 (b) of ILO 169 and para 6 preamble to UNDRIP.

² G Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 *European Journal of International Law* 165, at 166.

³ S Farran, 'Land as a Fundamental Right: A Cautionary Tale,' (2009) 40 *Victoria University of Wellington Law Review* 387, at 388-389. See also, S Farran, 'Navigating between Traditional Land Tenure and Introduced Land Laws in Pacific Island States' (2011) 43 *The Journal of Legal Pluralism and Unofficial Law* 65; and S Farran, 'Fragmenting Land and the Laws that Govern It' (2008) 40 *The Journal of Legal Pluralism and Unofficial Law* 93.

⁴ See W Adebani, 'Terror, Territoriality and the Struggle for Indigeneity and Citizenship in Northern Nigeria' (2009) 13 *Citizenship Studies* 349; A Sayne, *Rethinking Nigeria's Indigene-Settler Conflicts*, (US Institute of Peace, 2012); AO Adesoji and A Alao, 'Indigeneship and Citizenship in Nigeria: Myth and Reality' (2009) 2 *Journal of Pan African Studies* 151; African Commission on Human and Peoples Rights (ACHPR) and International Work Group on Indigenous Affairs (IWGIA) *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (ACHPR and IWGIA, 2005); and I Nwachukwu, 'The Challenges of Local Citizenship for Human Rights in Nigeria,' (2005) 13 *African Journal of International & Comparative Law* 235.

⁵ See section 3.2.

⁶ See sections 4.1 and 4.2.

⁷ See sections 5.1 and 5.2.

⁸ CK Meek, *Land Law and Custom in the Colonies* (Oxford University Press, 1946); A Oyeboode, 'Treaties and the Colonial Enterprise: The Case of Nigeria' (1990) 2 *African Journal of*

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Chapters Four⁹ and Five,¹⁰ this conflict persists in a post-colonial Nigeria.¹¹ State interests may negate the rights of IPs, especially where the powers of the State to manage and control land are legitimised by national law. In this context, IPs may be particularly vulnerable because of their lack of political power and disadvantaged position in States as minority groups.¹² Hence, the significance of international law.

7.1.1. The United Nations General Assembly (UNGA) Declarations and Land Rights of IPs

In furtherance of achieving its human rights objectives the UNGA has contributed to the development of international human rights law through adopting many resolutions aimed at promoting human rights and the rights of IPs. Most famously, in 1948 the UNGA proclaimed the *Universal Declaration of Human Rights* (UDHR)¹³ as a common standard for protecting human rights all over the world.¹⁴

International & Comparative Law 17; and OSMM Temple and CL Temple, *Notes on the Tribes, Provinces, Emirates and States of the Northern Provinces of Nigeria* (2 edn, CMS Bookshop, 1922).

⁹ See section 4.2.

¹⁰ See section 5.2.

¹¹ PE Oshio, 'The Indigenous Land Tenure and Nationalization of Land in Nigeria' (1990) 10 *Boston College Third World Law Journal* 43; VC Uchendu, 'State, Land, and Society in Nigeria: A Critical Assessment of Land Use Decree (1978)' (1979) 6 *Journal of African Studies* 62; GR Woodman, 'European Influence on Land Law and Land Use in Colonial Ghana and Nigeria' in JD Moor and D Rothermund (eds), *Our Laws, Their Lands: Land Laws and Land Use in Modern Colonial Societies* (Lit Verlag, 1994) 5-24; and MG Yakubu, *Land Law in Nigeria* (Macmillan Publishers, 1985).

¹² AK Abebe, 'Limitations to the Rights of Indigenous Peoples in Africa: A Model for Balancing National Interest in Development with the Rights of Indigenous Peoples' (2012) 20 *African Journal of International & Comparative Law* 407.

¹³ UNGA Resolution 217A. available at: www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf. Accessed 14 December 2015.

¹⁴ For a comprehensive analysis of the status and impact of the UDHR on national and international human rights law, see H Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 *Georgia Journal of International & Comparative Law* 287.

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In addition, the UN now has various Charter-based international human rights instruments¹⁵ on the one hand, and treaty-based human rights instruments on the other hand, with their corresponding Monitoring Bodies.¹⁶ In the remaining sections of this Chapter, some of these human rights instruments are examined in more detail in the context of land rights of IPs.¹⁷

While it is trite that States are bound by their treaty obligations – in the context of this thesis the UN Charter-based instruments and treaty-based instruments when they have signed and ratified them - UNGA resolutions are not legally binding.¹⁸ Nevertheless, UNGA resolutions, particularly those on human rights, may lay down tenets of law when adopted by a majority of States or unanimously they can represent the *opinio juris* of many individual States as well as the *opinio juris communis* (the common opinion of States) as to the law which when combined with State practice, have the capacity to metamorphose into binding customary rules of international law.¹⁹ While some scholars maintain that UNGA resolutions have the attribute of international legislation others have refused to accept that view.²⁰ Those that deny the legal binding nature of UNGA resolutions maintain

¹⁵ See LB Sohn, 'The Human Rights Law of the Charter,' (1977) 12 Texas International Law Journal 129.

¹⁶ See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>, accessed 14 December 2015. See, also, www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx, accessed 14 December 2015.

¹⁷ See J Donnelly, 'International Human Rights: A Regime Analysis' (1986) 40 International Organization 599 and T Maluwa, *International Law in Post-Colonial Africa* (Martinus Nijhoff Publishers, 1999) at 124-141.

¹⁸ J Donnelly, (n 17) above.

¹⁹ N Singh, 'The United Nations and the Development of International Law' in A Roberts and B Kingsbury (eds), *United Nations, Divided World: The UN's Role in International Relations* (2 edn, Oxford University Press, 1993) at 396.

²⁰ J Castaneda, *Legal Effects of United Nations Resolutions* (Columbia University Press, 1969) at 14.

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that they are at best 'normative' – a way of denying that they are law.²¹ One such instrument that has unarguably attained the status of customary international law is the UDHR²² and its relevance to the land rights of IPs is examined in sub-section 7.1.2 below.

7.1.2. The *Universal Declaration of Human Rights (UDHR) 1948* and the Land Rights of IPs

The UDHR, 1948²³ makes provisions for certain human rights that operate to the benefit of protecting land rights of IPs as individuals and in association with other members of an indigenous community. For example, Article 2 of the UDHR provides that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Article 7 also provides that '[a]ll are equal before the law and **are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration ...**'²⁴ It is herein argued that the combined effects of Articles 2 and 7 above are that when State laws restrict or extinguish any rights of an individual or group of individuals on the basis of any of the grounds stipulated in Article 2, such State laws must be deemed to be in violation of the UDHR.

²¹ There are more analyses on this issue later in sub-section 7.2.3.3 below.

²² H Hannum, (n 14) above at 287; S Cavandoli and M Odello, *Emerging Areas of Human Rights in the 21st Century: The Role of the Universal Declaration of Human Rights* (Routledge, 2011); and MA Glendon, 'Knowing the Universal Declaration of Human Rights' (1997) 73 *Notre Dame Law Review* 1153.

²³ The *Universal Declaration of Human Rights (UDHR) 1948*, the Declaration was proclaimed by the UN General Assembly in Paris on 10 December 1948 as UNGA Resolution 217(III) A, as a global bench-mark of achievements for all peoples and all nations. Available at: www.un.org/en/universal-declaration-human-rights/index.html, accessed 26 September 2016.

²⁴ The emphasis is added.

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As demonstrated in Chapters Three²⁵ and Four,²⁶ the provisions of Section 36 of the *Nigerian Land Use Act (LUA)*, 1978²⁷ which recognises the customary land rights of Nigerians is not applicable in Abuja.²⁸ Without resettlement or the payment of adequate compensation to the IPs of Abuja,²⁹ the non-applicability of Section 36 of LUA in Abuja is a *de jure* contravention of Articles 2 and 7 of the UDHR (right to freedom from discrimination). It is also argued that, in so far as the IPs of Abuja are excluded from benefiting from the provisions of section 36 of LUA, when in fact and in law this benefit inures in favour of other citizens of Nigeria who are indigenous to the 36 States of the Nigerian Federation, this amounts to discrimination against all the various ethnic communities indigenous to Abuja.

Of direct relevance to land rights of IPs is Article 17 of UDHR which provides that '[e]veryone has the right to own property alone as well as in association with others.'³⁰ And that '[n]o one shall be arbitrarily deprived of his property.'³¹ It is argued that the provision of Article 17 of the UDHR is applicable to the case study of Abuja peoples individually and collectively as members of their communities.

²⁵ See sub-section 3.2.3.

²⁶ See section 4.2.

²⁷ *Nigerian Land Use Act (LUA)*, 1978 CAP 202 *Laws of the Federation of Nigeria*, 1990.

²⁸ By section 49 (1) of LUA. See also, section 1 (3) of the Federal Capital Territory (FCT Act). See also, section 297 (2) of the *Constitution of the Federal Republic of Nigeria*, 1999.

²⁹ Evidence that no adequate compensation has been paid nor have all the people been resettled is supported by two Bills currently before the Nigerian federal parliament. See, *The FCT Resettlement, Integration and Development Commission And for Related Matters Bill* 2016 (HB 513) sponsored by Hon. Zaphania Jisalo, available at: www.nassnig.org/document/download/8074, accessed 23 October 2016. See also, *Lead Debate on A Bill for an Act to Amend the Federal Capital Territory Act Cap f6 Laws of the Federation of Nigeria 2004 And Other Matters Connected Therewith* (SB 115), sponsored by Senator David Umaru (APC) (Niger East Senatorial District).

³⁰ Art 17 (1).

³¹ Art 17 (2).

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Therefore, Sections 1 (3) of the FCT Act,³² and 297 (2) of the Nigerian Constitution 1999,³³ which provide that the ownership of all the lands in Abuja the FCT shall be exclusively that of the Federal Government are a *de jure* violation of Article 17 of the UDHR, to the extent that there has been no resettlement or adequate compensation paid to the IPs of Abuja.

Rightly described as an instrument with the capacity to set standards for the entire global community of States,³⁴ as well as the foundation of the post-Second World War codification of human rights nationally and internationally,³⁵ the UDHR is founded upon a general sense of fairness in society.³⁶ It also challenges traditional notions of sovereignty in so far as it seeks to preserve the interests and rights of the individual or community of individuals against the interests of the State, which may sometimes be tempted to trample upon such rights, by positioning such individual or community interests within the purview of the international arena.³⁷ The legal significance of the UDHR is such that writers have concluded that its contents have attained the status of customary international law and consequently binding upon all States.³⁸

³² Supra (n 28) above.

³³ Supra (n 28) above.

³⁴ H Lauterpacht, 'The Universal Declaration of Human Rights,' (1948) 25 British Year Book of International Law 354 at 354.

³⁵ H Hannum, (n 14) above at 296-340 and J von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the turn to Rights in International Law' (2008) 19 European Journal of International Law 903 at 904.

³⁶ H Landorf, 'The Universal Declaration of Human Rights' (2012) 76 (5) Social Education 247 at 248.

³⁷ JP Humphrey, 'The Universal Declaration of Human Rights' (1949) 4 International Journal 351 at 359.

³⁸ H Hannum, (n 22) above at 289; RB Lillich, 'The Growing Importance of Customary International Human Rights Law,' (1995) 25 Georgia Journal of International & Comparative Law 1; B Simma and P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles,' (1988) 12 The Australian Year Book of International Law 82 at 90-100; JP Humphrey, 'The International Bill of Rights: Scope and Implementation,' (1975) 17 William & Mary Law Review 527; H Waldock, 'Human Rights in Contemporary International Law and the

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Indeed, as Hurst Hannum argues 'there can be no question that, under whatever list of criteria one adopts, the Universal Declaration constitutes at least significant evidence of customary international law.'³⁹ An international consortium of Non-Governmental Organisations (NGOs) has also concluded that the 1948 UDHR has attained the status of customary international law.⁴⁰ Likewise, the International Law Institute and the International Law Association have concluded that the UNDHR constitutes customary international law and some legal scholars have argued that its provisions have attained the status of *ius cogens* (preemptory norms) of international law.⁴¹ Others argue that it is an over-statement to view the UNDHR as customary international law.⁴² Indeed, one writer describes it as a

Significance of the European Convention' (1965) 11 *International & Comparative Law Quarterly Supplementary Publication* 1; LB Sohn, 'The Human Rights Law of the Charter' (1977) 12 *Texas International Law Journal* 129; A Philip, 'The Universal Declaration at 35: Western and Passé or Alive and Universal' (1982) 31 *International Court of Justice Review* 69; AH Robertson and JG Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (Manchester University Press, 1996); and L Henkin, *The Age of Rights* (Columbia University Press, 1990). For a general appraisal of the provisions of the UDHR, see MA Glendon, 'Knowing the Universal Declaration of Human Rights' (1997) 73 *Notre Dame Law Review* 1153.

³⁹ H Hannum, (n 14) above at 322.

⁴⁰ See *Montreal Statement of the [Nongovernmental] Assembly for Human Rights* (1968) reprinted in (1968) 9 *Journal of International Community of Jurists Review* at 94 and *L'Annuaire de L'institut De Droit International: Resolutions 1957-1991* at 206 and Resolution adopted by the International Law Association, in International Law Association (ILA), *Report of the Sixty-Sixth Conference* (ILA, 1995) respectively.

⁴¹ Justice J Lallah, in Bhagwati JP *et al*, (eds), *Judicial Colloquium on The Domestic Application of International Human Rights Norms Bangalore, India 24-26 February 1988* (Commonwealth Secretariat, 1988) at 33; J Humphrey, *No Distant Millennium: The International Law of Human Rights* (United Nations Educational and Scientific and Cultural Organization (UNESCO), 1989); B Ramcharan, 'The Legal Status of the International Bill of Human Rights,' (1986) 55 *Nordic Journal of International Law* 366; and MS McDougal, HD Lasswell and LC Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press, 1980).

⁴² See MT Kamminga, *Inter-State Accountability for Violations of Human Rights* (University of Pennsylvania Press, 1992); KJ Partsch, 'The Contribution of Universal International Instruments on Human Rights' in AL De Mestral (ed), *The Limitation of Human Rights in Comparative Constitutional Law* (Les Editions Yvon Blais, 1986); and EIA Daes, *Freedom of the Individual under Law: An Analysis of Article 29 of the Universal Declaration of Human Rights* (United Nations, 1990).

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document filled with Western ideologies and as an instrument of imperialism which has no relevance in Africa.⁴³

The International Court of Justice (ICJ) has expressed its views on the legal character of the UDHR in at least one case. Firstly, the idea that international human rights obligations may be binding upon States as customary international law has been confirmed by the ICJ.⁴⁴ Although the UDHR was cited before the ICJ in the *South West Africa* cases,⁴⁵ the case was dismissed because of the Applicant's lack of *locus standi*.⁴⁶ However, in another case the ICJ per the then Vice President Ammoun J. stated that it was taking:

... judicial notice of the Universal Declaration of Human Rights Although the affirmations of the Declaration are not binding qua international convention ... **they can bind States on the basis of custom within the meaning of paragraph I(b) of [Article 38 of the Statute of the Court] ... because they constituted a codification of customary law... or because they have acquired the force of custom through a general practice accepted as law.**⁴⁷

Although it remains unclear whether all the provisions of the UDHR have attained the status of customary international law, research has demonstrated that the provisions of Articles 1, 2, 6, and 7 of the UDHR, which provides for the right to equal treatment and non-discrimination in relation to the enjoyment of human rights 'without distinction of any kind', have been widely accepted by most States

⁴³ IG Shivji, *The Concept of Human Rights in Africa* (African Books Collective, 1989).

⁴⁴ See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, [1951] ICJ 15. *Advisory Opinion* of 28 May 1951 at 23. See also, *Barcelona Traction, Light & Power Co Ltd* [1970] ICJ 3 at 32 (Second Phase). Judgment of 5 February 1970.

⁴⁵ *South West Africa*, [1966] ICJ 6 (Second Phase). Judgment of 18 July 1966.

⁴⁶ *Ibid.*

⁴⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), [1971] ICJ 16 at 57. *Advisory Opinion* of 21 June 1971). The emphasis is added.

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if not all.⁴⁸ As Hannum submits, '[o]ne specific kind of discrimination, that based on race, is held by all commentators to be prohibited under customary international law, at least when it is pervasive.'⁴⁹

Nigeria was the first African State to implement many provisions of the UDHR in its Constitution soon after independence in 1960,⁵⁰ this demonstrates that Nigeria has accepted the UDHR as binding upon it. Indeed, Chapter IV of the Nigerian Constitution, 1999⁵¹ applies most of the rights proclaimed under the UDHR.⁵² In the Nigerian High Court case of *Nolokwu v Commissioner of Police*,⁵³ the Court stated that 'in as much as and for as long as the Federal Government of Nigeria remains ... [committed to] the Universal Declaration of Human Rights, for so long would Nigerian courts protect and vindicate fundamental human rights entrenched in the Declaration.'⁵⁴

⁴⁸ H Hannum, (n 14) above at 342.

⁴⁹ Ibid at 343. See also, J Dugard, 'The Application of Customary International Law Affecting Human Rights by National Tribunals' (1982) Proceedings of American Society of International Law 245. However, the attitude in Britain towards the UDHR has been to cite it and reject it as a source of law. See the following cases: *Alexander v Wallington, General Comments*, [1993] STC 588; *R v London Borough of Barnet ex parte Islam and Quraishi*, [1989] QB 2181; *R v Immigration Appeal Tribunal ex parte Minta*, [1990] QB 1248; *R v Secretary of State for the Home Department ex parte Ruddock*, [1987] All ER 518; and *Wheeler v Leicester City Council*, [1985] 1 AC 1054.

⁵⁰ See C Heyns, 'African Human Rights Law and the European Convention' (1995) 11 South African Journal on Human Rights 252 at 257 and ME Adjami, 'African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence' (2002) 24 Michigan Journal of International Law 103 at 116.

⁵¹ See particularly, sections 33-46 of the *Constitution of the Federal Republic of Nigeria 1999*.

⁵² See sections 17-30 of the *Constitution of Nigeria, 1960*; sections 18-33 of *Constitution of Nigeria, 1963*; and Sections 30-42 of *Constitution of Nigeria 1979*. Available at: www.lawnigeria.com/CONSTITUTIONHUB/1960-1999ConstitutionofNigeria.html, accessed 23 October 2016.

⁵³ *Nolokwu v Commissioner of Police* reported in Fawehinmi G, (ed) *Law of Habeas Corpus* [1986] 96.

⁵⁴ Ibid.

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Indeed, section 44 (1) of the Nigerian Constitution provides that:

No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things -

(a) requires the prompt payment of compensation therefore and

(b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

In *National Universities Commission v Oluwo*,⁵⁵ the Nigerian Court of Appeal held that the Nigerian Government cannot legally compulsorily acquire a person's property without payment of compensation as this will constitute a violation of the above provision of the Constitution.⁵⁶ Therefore, in relation to the land rights of Abuja peoples, in so far as compensation has not been paid by the Nigerian Government for the compulsory acquisition of their ancestral lands there is a conflict between section 44 on the one hand and section 297(2) of the Nigerian Constitution on the other. In addition, section 1(3) of the FCT Act is a violation of section 44 of the Nigerian Constitution above.

In addition to the UDHR there are other UNGA resolutions that complement its provisions that are relevant in the context of the land rights of IPs as demonstrated in sub-section 7.1.3 below.

⁵⁵ *National Universities Commission v Oluwo* [2001] 3 NWLR (Pt. 542) 438.

⁵⁶ *Ibid*, at 490. See also the following cases: *Ogunleye v Oni* [1990] 2 NWLR (Pt 135) 745; *Goldman Nigeria Ltd v Ibafo Co Ltd* [1994] LPELR-14116; *Kukoyi v Aina* [1999] 10 NWLR (Pt. 624) 633; and *ELF Petroleum Nigeria Ltd v Umah* [2007] 1 NWLR (Pt. 1014) 44.

7.1.3. The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (Minority Rights Declaration) 1992

The Minorities Right Declaration⁵⁷ aims to promote the human rights principles under the UDHR among other international human rights instruments.⁵⁸ It provides that persons who belong to national or ethnic, religious and linguistic minorities 'have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.'⁵⁹ It also provides that '[p]ersons belonging to minorities may exercise their rights ... individually as well as in community with other members of their group, without any discrimination.'⁶⁰ Article 3 (1) provides that persons belonging to minorities may exercise their rights under the Minority Rights Declaration both individually and in association with others and no disadvantage should occur as a result of membership of a minority group.⁶¹ States are consequently mandated to take measures towards ensuring that minorities exercise all their rights without discrimination and in full equality of the law.⁶²

Based on the latest census figures by the Nigerian National Population Commission,⁶³ despite its status as the administrative capital of Nigeria with

⁵⁷ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, UNGA Res 47/135, UN GAOR, 3rd Comm forty seventh session and ninety second plenary meeting, Annex, Agenda Item 97(b), UNGA Resolution /47/135 3 February 1993. Available at: www.un.org/documents/ga/res/47/a47r135.htm, accessed 26 September 2016.

⁵⁸ Para 3 of the preamble to the Minorities Rights Declaration.

⁵⁹ Art 2 (1).

⁶⁰ Art 3 (1).

⁶¹ Art 3 (2).

⁶² Art 4 (1). See also, Arts 6 (1) and 8 (1) of the *UN Declaration on the Right to Development*, adopted 4 December 1986 at 97th plenary meeting through UNGA Resolution 41/128.

⁶³ See www.population.gov.ng/index.php/state-population, accessed 23 October 2016.

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people from all over the country currently settled there, as well as being home to about eight different indigenous ethnic groups,⁶⁴ Abuja is a less populated territory in comparison with the 36 States of Nigeria. This indicates that the IPs of Abuja are certainly minorities in Nigeria and the provisions of the Minorities Rights Declaration are relevant to them. The discriminatory nature of the non-recognition of the customary land rights of Abuja peoples has already been demonstrated in Chapter Six⁶⁵ and sub-section 7.1.2 above. It is argued that this also constitutes violations of Articles 2 (1) and 3 (1) and (2) of the Minorities Rights Declaration.

Under Article 4 (2) of the Minority Rights Declaration, States are mandated 'to create favourable conditions to enable persons belonging to ethnic minorities to express their characteristics and to develop their culture, language, religion, traditions and customs...' Article 5 (1) imposes an obligation on States to adopt State policies and programmes 'with due regard for the legitimate interests of persons belonging to minorities.' Since as demonstrated in Chapter Four above,⁶⁶ Abuja peoples are mainly farmers, hunters and fishermen, the *de jure* denial of their customary land rights therefore contravenes Articles 4 (2) and 5 (1) as this is a threat to the exercise of their cultural right to farm, fish, hunt and live on their ancestral lands.

The Minority Rights Declaration re-enforces the debates about the balance of individual rights with the collective rights of groups such as IPs and other minorities.⁶⁷ It draws upon already existing international human right law to create

⁶⁴ See A Hassan and S Na'ibi, *The Gwari Tribe in Abuja Emirate* (Nigeria Magazine Special Publications, Federal Government Print Department, 1961) at 7-13. Also, see, S Na'ibi and A Hassan, *The Gwari, Gade and Koro Tribes* (Ibadan University Press, 1969) and R Blench, *Atlas of Nigerian Languages*, vol 3 (Crozier & Blench, 1992).

⁶⁵ See sub-section 6.2.5.

⁶⁶ See section 4.1.

⁶⁷ NS Rodley, 'Conceptual Problems in the Protection of Minorities: International Legal Developments' (1995) 17 Human Rights Quarterly 48; P Thornberry, *The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations: An Occasional Paper from Minority Rights Group*

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collective rights for minorities.⁶⁸ The above provisions of the UDHR and the Minority Rights Declarations have been given stronger legal weight in the context of existing international human rights treaties and their respective Monitoring Bodies in relation to land rights of IPs as demonstrated in sub-sections 7.1.4–7.1.6 below.

7.1.4. The *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* 1965 and the Committee on the Elimination of All Forms of Racial Discrimination (CERD)

Article 1(1) of ICERD⁶⁹ defines ‘racial discrimination’ as any distinction which, excludes, restricts or offers preferential treatment based on the following grounds: ‘race, colour, descent, or national or ethnic origin’ which prevents the enjoyment and exercise of human rights ‘on an equal footing’ in ‘the political, economic, social, cultural or any other field of public life.’ ICERD imposes a duty upon States to take measures to ensure the equal protection and enjoyment of human rights of racial groups or individuals belonging to them just as other members of society.⁷⁰ Article 2 (c) of the ICERD places an obligation upon States to eliminate all forms of racial discrimination within their domestic jurisdictions and for them to take affirmative action in this respect.

Article 5 also enjoins States ‘...to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race,

(Minority Rights Group (MRG), 1993); and BM Van Den and W Van Genugten, 'International Legal Protection of Migrant Workers, National Minorities and Indigenous Peoples—Comparing Underlying Concepts' (2002) 9 *International Journal on Minority and Group Rights* 195.

⁶⁸ Y Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 *International and Comparative Law Quarterly* 102; N Lerner, 'The 1992 UN Declaration on Minorities' (1993) *Israel Yearbook on Human Rights* 55; and L Green, 'Internal Minorities and Their Rights' in J Baker (ed), *Group Rights* (University of Toronto Press, 1994) at 101-117.

⁶⁹ *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* 1965, adopted and opened for signature and ratification by UNGA Resolution 2106 (XX) of 21 December 1965, entered into force on 4 January 1969, in accordance with its Art 19.

⁷⁰ Art 2 (2).

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colour, or national or ethnic origin, to equality before the law...’ in the enjoyment of the ‘right to own property alone as well as in association with others’⁷¹ including ‘economic, social and cultural rights’.⁷² In order to monitor States’ compliance with the provisions of ICERD, the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD) was established.⁷³ Indeed, CERD has reminded States that the provisions of ICERD are of an immediate effect.⁷⁴ Nigeria is a Party to ICERD and is consequently bound by its provisions. CERD has interpreted the ICERD in favour of protecting land rights of IPs and remains of the opinion that it is relevant to the protection of the rights of IPs in general as contained in its 1997 *General Recommendation No 23* on IPs.⁷⁵

CERD has through its monitoring processes and interpretation of human rights standards across the world, contributed to the protection of the rights of IPs.⁷⁶ It promotes the collective rights of IPs and it has emphasised that ‘a “hands-off”, or “neutral” or “laissez-faire” policy is not enough’.⁷⁷ Xanthaki notes that CERD’s recommendations and official comments have enabled several States to review and amend their laws and policies which impact negatively on the rights of IPs.⁷⁸ CERD has also utilised its ‘Urgent Action Procedure’ to put pressure on States to

⁷¹ Art 5 (d) (v).

⁷² Art 5 (e).

⁷³ Art 8.

⁷⁴ See Committee on the Elimination of Racial Discrimination (CERD), *Diop v France* CERD/C/39/D/2/1989. Communication No 2/1989 10 May 1991.

⁷⁵ CERD, Report of the Committee on the Elimination of Racial Discrimination, adopted at the UNGA fifty second session, Annex V, UN Doc A/52/18 (SUPP) (26 September 1997) (*General Recommendation No 23: Indigenous Peoples*).

⁷⁶ A Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 Melbourne Journal of International Law 27 at 28.

⁷⁷ See P Thornberry, 'Confronting Racial Discrimination: A CERD Perspective' (2005) 5 Human Rights Law Review 239 at 260.

⁷⁸ A Xanthaki, (n 76) above at 28.

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change and amend discriminatory laws and policies. New Zealand was the subject of an 'early warning procedure' in 2004 for its *Foreshore and Seabed Act* (2004) because the law discriminated against the Māori in that State.⁷⁹ Likewise, in March 2006, CERD issued a similar decision demanding that the United States (US) must stop any further violation of the land rights of Western Shoshone.⁸⁰ There has been no case emanating from victims in Africa concerning land rights of IPs as at the time of writing. However, CERD has continued to explain the relevance of ICERD to the land rights of IPs in Africa as contained in its Concluding Observations on the Periodic Reports submitted to it by States.

For example, in its 2011 Concluding Observation on Kenya,⁸¹ CERD expressed serious concern that the Kenyan Government was yet to act on the decisions of the African Commission on the forced evictions of the Endorois and Ogiek from their ancestral lands without any adequate redress in contravention of Article 5 of ICERD which guarantees the right of every one to equal protection of the law without distinction as to ethnic origin including the right to own property in community or association with others under Article 5 (v) of ICERD.⁸² Therefore, it was recommended that the State Party (Kenya) should respond to the decision of the African Commission by providing redress to the IPs concerned.⁸³ This demonstrates that ICERD's provisions are applicable to concerns about land rights of IPs in Africa. This argument is also buttressed by the Concluding Observations of CERD about IPs and minorities in Nigeria.

⁷⁹ Ibid.

⁸⁰ CERD, *Early Warning and Urgent Action Procedure, Decision 1 (68): United States of America*, UN Doc CERD/C/USA/DEC/1. 11 April 2006.

⁸¹ CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination – Kenya*, 14 September 2011. CERD/C/KEN/CO/1-4.

⁸² Ibid, at para 17.

⁸³ Ibid. See also, paras 18, 19 and 20 where CERD took note of the historical and current injustices in relation to the land rights of IPs in Kenya. See recent decision of the African Court on Human and Peoples' Rights discussed in sub-section 7.3.1 below.

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In the afore-mentioned Concluding Observation on Nigeria,⁸⁴ CERD expressed concerns that Nigeria had not provided it with specific information regarding the list of minorities and precise figures in relation to the ethnic composition of Nigeria to enable it assess how ICERD is applied there in practice. It then demanded that Nigeria provides it with such information to determine and identify the groups that fall within the definition of ‘racial discrimination’ in accordance with Article 1 of ICERD.⁸⁵ CERD also expressed serious concerns about the absence of a definition of ‘racial discrimination’ in accordance with Article 1 of ICERD within Nigeria’s domestic laws.⁸⁶ It was also noted that the main principles under ICERD had not been incorporated into the domestic laws of Nigeria so that they could be invoked before the national Courts of Nigeria in accordance with Article 2 of ICERD by victims.⁸⁷ CERD was deeply concerned that the provisions of the Nigerian LUA, 1978 were in contravention of the provisions of ICERD.⁸⁸

Consequently, it drew the attention of Nigeria to its *General Recommendation 23* on the rights of IPs and recommended that the Nigerian LUA be repealed and new legislation should be adopted which takes account of the principles set forth in ICERD which govern the exploitation of land – such principles include fair and equitable exploitation of natural resources, obligations towards local communities as well as ‘effective and meaningful consultation.’⁸⁹ It was further noted that the mere absence of complaints before it from Nigeria by victims of racial discrimination could be an indication of the absence of appropriate legislative

⁸⁴ CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination – Nigeria*, 27 March 2007. CERD/C/NGA/CO/18.

⁸⁵ Ibid, at para 10.

⁸⁶ Ibid, at para 11.

⁸⁷ Ibid, at para 13

⁸⁸ Ibid, at para 19.

⁸⁹ Ibid.

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measures.⁹⁰ It therefore requested specific information from Nigeria in the next Periodic Report regarding specific legislation put in place by the Government making information available to Nigerians about the availability of all legal and policy measures on racial discrimination.⁹¹ Indeed, Nigeria was also invited to ratify the *International Labour Organization Indigenous and Tribal Peoples Convention*, 1989 (ILO 169).⁹² There is as yet no evidence that Nigeria has complied with the recommendations made by CERD as there are no documents on the UN website or in Nigeria showing this at the time of writing.

It is significant at this point to consider the relevance and applicability of ICERD and the jurisprudence on ICERD to the case study of Abuja. It has already been demonstrated in Chapter Six above⁹³ that Abuja people are minorities and IPs, it is argued here that the non-recognition of the customary land rights of Abuja peoples by the Nigerian Constitution, 1999⁹⁴ and the FCT Act, 1976⁹⁵ is a violation of Articles 1, 2, 5 and 6 of ICERD, as Article 1 of ICERD defines racial discrimination in a very wide sense that encompasses ethnic minorities. It is further argued that such definition is applicable and relevant to Abuja peoples who are minority ethnic groups and IPs in Nigeria. The various ethnic communities comprising the IPs of Abuja come within this wide definition and

⁹⁰ Ibid.

⁹¹ Ibid, at para 23.

⁹² Ibid, at para 26. See also, para 27 where it was recommended that Nigeria makes the declaration provided for under Art 14 (1) of ICERD to enable individuals and groups file communications before it. Nigeria was also requested to submit information to CERD regarding its compliance with the above recommendation at the its next Periodic Report by 4 January 2008 (see para 31).

⁹³ See sub-section 6.2.5.

⁹⁴ Supra.

⁹⁵ Supra at footnote 28.

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hence the applicability of the ICERD not just to them, but also to other ethnic groups in Africa in circumstances where discrimination arises.

7.1.5. The *International Covenant on Civil and Political Rights (ICCPR)* 1966 and the Human Rights Committee (HRC)

Under the ICCPR⁹⁶ the word 'peoples' is used without any definition.⁹⁷ For example, the ICCPR provides that all 'peoples' have the right to dispose of their wealth and natural resources and that in 'no case may a people be deprived of its own means of subsistence.'⁹⁸ In addition, Article 26 of the ICCPR provides that '... all persons are entitled to equal protection under the law and prohibits discrimination on grounds of race, colour, sex, language, national or social origin, property, birth or other status.' It is also significant to note that the ICCPR specifically imposes an obligation on States requiring them to adopt legislation which give effect to its provisions.⁹⁹ Perhaps the most important provision that has direct relevance to land rights of IPs is the protection accorded to 'linguistic minorities' and 'persons belonging to such minorities' of 'the right, **in community with the other members of their group, to enjoy their own culture**'.¹⁰⁰

The UN Human Rights Committee (HRC) which is established by the ICCPR¹⁰¹ with the objective of monitoring State compliance with their human rights obligation under it, has interpreted Article 27 of the ICCPR in a manner that

⁹⁶ *International Covenant on Civil and Political Rights* 1966, adopted and opened for signature, ratification and accession by UNGA Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with its Art 49.

⁹⁷ Art 1 (1) and (2). See W Van Genugten and C Perez-Bustillo, 'The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional, and National Dimensions' (2004) 11 *International Journal on Minority and Group Rights* 379 at 390.

⁹⁸ Art 1 (2).

⁹⁹ Art 2 (1) and (2).

¹⁰⁰ Art 27. The emphasis is added.

¹⁰¹ Art 28. For a critique of the composition of the HRC, see C Mallory, 'Membership and the UN Human Rights Council', (2013) 2 (1) *Canadian Journal of Human Rights*, 1-38.

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favours the protection of IPs' land rights in a very strong way,¹⁰² as evidenced by its decision in the case of *Aerela and Nakkalajarvi v Finland*.¹⁰³ Indeed, in its *General Comment on Article 27*,¹⁰⁴ the HRC states that '... culture manifests itself in many forms, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.'¹⁰⁵

Although Article 27 of the ICCPR above does not create collective rights *stricto sensu*, its provision for the rights of individual members of minority groups to enjoy their culture is complemented by the possibility that such rights are exercisable 'in community with the other members of their group'.¹⁰⁶ In the case of *Lubicon Lake Band v Canada*,¹⁰⁷ a case which was related to land rights claims of IPs, the HRC stated that it had no problems with 'a group of individuals, who claim to be

¹⁰² United Nations Human Rights Committee (HRC), *Aerela and Nakkalajarvi v Finland*, Communication No 779/1997, UN Doc CCPR/73/D/779/1997, 24 October 2001. In this case the authors alleged a violation of Article 27 of the ICCPR because of logging and road construction activities in the Kariselk area in Finland, thereby disrupting their herding culture. The authors argued that these logging activities on their herding lands amounted to a denial of their right to enjoy their culture, in community with other Sami peoples, for which the survival of their reindeer herding was essential. Although, the HRC could not conclude its decision in this case due lack of sufficient information before it, however, it maintained that: 'the claim of a violation of article 27 in that logging was permitted in the Kariselk area, the Committee **notes that it is undisputed that the authors are members of a minority culture and that reindeer husbandry is an essential element of their culture. The Committee's approach in the past has been to inquire whether interference by the State party in that husbandry is so substantial that it has failed to properly protect the authors' right to enjoy their culture.**' The emphasis is added. For a commentary on this, see BM Van Den and W Van Genugten, 'International Legal Protection of Migrant Workers, National Minorities and Indigenous Peoples-Comparing Underlying Concepts' (2002) 9 International Journal on Minority and Group Rights 195 at 195-233.

¹⁰³ *Supra*.

¹⁰⁴ HRC, *General Comment No 3: Article 27*. CCPR/C/21/Rev.1/Add.5, 26 April 1994.

¹⁰⁵ *Ibid*, at para 7.

¹⁰⁶ *Ibid*.

¹⁰⁷ HRC, *Lubicon Lake Band v Canada*, Case 167/1984. UN Doc. A/45/40, Vol II

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similarly affected, collectively to submit a communication¹⁰⁸ to it. Also, in *Sandra Lovelace v Canada*,¹⁰⁹ the HRC stated that:

Article 27 of the ICCPR establishes that states cannot deny minority groups the right to enjoy culture. The Committee determined that people who are born and raised on a reserve, have maintained ties and want to further maintain ties to that community, are considered part of that minority group within the meaning of Article 27.¹¹⁰

It should be noted that the ICCPR allows derogations from the rights guaranteed therein by State Parties only in circumstances that endanger the existence of a State subject to the proviso that such derogations are not in conflict with a State's 'obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'¹¹¹

There is as yet no case arising because of complaints by victim(s) or by any person(s) on their behalf emanating from Africa to the HRC. However, in a Concluding Observation,¹¹² the HRC welcomed the adoption of a new Kenya Constitution in 2010.¹¹³ But the HRC raised concerns in relation to the lack of clarity regarding Section 2 (6) of the Kenyan Constitution, 2010 which makes provision to the effect that all international treaties ratified by Kenya shall become part of the laws of Kenya under the Constitution.¹¹⁴ In particular, the HRC was concerned that there was nothing clear in the jurisprudence of the courts in Kenya

¹⁰⁸ This position of the HRC has been restated among other things in the case of *Apirana Mahuika et al, v New Zealand*, Case 547/1993, view of October 2000.

¹⁰⁹ See HRC, *Sandra Lovelace v Canada*, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977.

¹¹⁰ Ibid.

¹¹¹ Art 4. See also, HRC, *General Comment No. 18: Non-discrimination*, thirty seventh- session (1989).

¹¹² HRC, *Concluding Observations, adopted by the Human Rights Committee at its one hundred and fifth session, 9-27 July 2012 Kenya*, 31 August 2012. CCPR/C/KEN/CO/3.

¹¹³ Ibid, at para 3 (a).

¹¹⁴ Ibid, at para 5.

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on the status of the ICCPR in the domestic legal order, so it recommended that Kenya should take measures to ensure that the ICCPR was part of the domestic laws of Kenya.¹¹⁵

In recalling its previous Concluding Observation,¹¹⁶ the HRC regretted the continued evictions of people from their lands in Kenya without their free, prior and informed consent and reiterated that Kenya must adopt appropriate laws, policies and practices to ensure that people were evicted from their lands only when the people concerned had been consulted and resettled.¹¹⁷ The HRC also expressed deep concerns over the land rights of Ogiek and Endorois communities given their continuous evictions when they were dependent on the occupation of such lands for their economic survival and cultural practices.¹¹⁸ It noted also that Kenya had not complied with the decision of the African Commission in relation to the land rights of the Endorois in accordance with Articles 12, 17, 26 and 27 of ICCPR.¹¹⁹ It was then recommended that Kenya should take account of and respect the land rights of IPs to their ancestral lands and that projects must only be started on such lands when their free, prior and informed consent had been obtained.¹²⁰

In the case of Nigeria, the latest HRC Concluding Observation as at the time of writing is the one made in 1996.¹²¹ In it, the HRC recommended that there should be a review of the entire legal framework aimed at protecting human rights in

¹¹⁵ Ibid.

¹¹⁶ HRC, *Concluding Observation on Kenya*, CCPR/CO/83/KEN, at para 22.

¹¹⁷ Ibid. See also HRC, *Concluding Observations* (n 112) above at para 5.

¹¹⁸ HRC, *Concluding Observations* (n 112) above at para 24.

¹¹⁹ Ibid.

¹²⁰ Ibid. See also recent decision of the African Courts discussed in sub-section 7.3.1 below.

¹²¹ HRC, *Concluding Observation of the Human Rights Committee – Nigeria*, 24 July 1996. CCPR/C/79/Add. 65.

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Nigeria in conformity with the provision and principles set-forth in the ICCPR.¹²² The HRC also recommended that Nigeria should protect the rights of persons belonging to ethnic minorities and ensure that the particular provision of Article 27 of the ICCPR are fully protected.¹²³ Therefore, to the extent that the provision of Section 297 (2) of the Nigerian Constitution,¹²⁴ and Section 1 (3) of the FCT Act,¹²⁵ provides that the entire land in Abuja, the FCT of Nigeria, belongs 'exclusively' to the Federal Government of Nigeria when compensation or resettlement of all the IPs has not been made, these constitute a violation of the rights of the IPs of Abuja to practice their culture both individually and in association with others as farmers, hunters and fishermen. This situation clearly constitutes a *de jure* and *de facto* violation of Article 27 of the ICCPR.¹²⁶ Evidence of non-payment of compensation or resettlement has already been adduced in relation to the discussion regarding the UDHR and its relevance to land rights of the IPs of Abuja in sub-section 7.1.2 above.

¹²² Ibid, at para 28.

¹²³ Ibid, at para 37. See also, HRC, *Report of the Special Rapporteur on Minority Issues, Rita Izsák Mission to Nigeria* (17-28 February 2014). A/HRC/28/64/Add.2.

¹²⁴ Supra (n 28).

¹²⁵ Supra (n 28).

¹²⁶ HRC, *Aerela and Nakkalajarvi v Finland* (supra); HRC, *Lubicon Lake Band v Canada* (supra); HRC, *Sandra Lovelace v Canada* (supra) and HRC, *Ángela Poma Poma v Peru*, CCPR/C/95/D/1457/2006 at para 7.7. See also, HRC, *General Comment on Article 27* (supra).

7.1.6. The *International Covenant on Economic, Social and Cultural Rights (ICESCR)* 1966 and the Committee on Economic, Social and Cultural Rights (CESCR)

Like the ICCPR, under the ICESCR¹²⁷ the expression 'peoples' is used in its substantive provisions¹²⁸ without defining it. The ICESCR guarantees that all 'peoples' have the right to 'freely pursue their economic, social and cultural development,'¹²⁹ as well as the right to cultural freedoms.¹³⁰ It also guarantees that '[i]n no case may a people be deprived of its own means of subsistence.'¹³¹ The Committee on Economic Social and Cultural Rights (CESCR) has emphasised that cultural rights are intrinsically linked to other human rights just as they are universal, indivisible and interconnected.¹³² This is particularly important for IPs whom the CESCR recognises as having the right to the full enjoyment of the rights under the UN Charter, UDHR and UNDRIP both collectively and individually.¹³³ The CESCR has acknowledged the expansive nature of cultural rights by explaining that culture is multifaceted and a manifestation of human existence.¹³⁴

¹²⁷ *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by UNGA Resolution 2200A (XXI) of 16 December 1966, entered into Force 3 January 1976, in accordance with its Art 27.

¹²⁸ See for example Art 1 (1) and (2).

¹²⁹ Art 1 (1).

¹³⁰ Art 15 (1) (a).

¹³¹ Art 1 (2).

¹³² CESCR, *General Comment No. 21: Right of everyone to take part in cultural life (Art 15 para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009. E/C.12/GC/21, at para 1.

¹³³ *Ibid*, at para 7.

¹³⁴ *Ibid*, at paras 10, 11 and 12.

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Indeed, under Article 15 (1) ICESCR, culture includes methods of production of food.¹³⁵ It has also emphasised that any limitation on cultural rights must be through the adoption of the least restrictive measures by taking into consideration various types of restrictions.¹³⁶ The situation in the case study of Abuja is predicated on the need for an administrative capital for the State, which is a legitimate issue. However, it is argued that the usurpation of the entire lands in the FCT, including several villages and farm lands exclusively by the Federal Government is not the least restrictive measure. Rather it is the most restrictive measure which terminates the customary land rights of Abuja peoples in contravention of Articles 1 (2) and 15 (1) of ICESCR. The least restrictive measure would require that the Government retains and limits its 'exclusive' ownership to the territories in the Capital City (see Appendix 6) while the customary land rights of Abuja peoples to the villages and farm lands in the Six Local Government Areas are accommodated and protected by the Nigerian Constitution and the FCT Act.

The CESCR identifies minorities and IPs as requiring special protection of their cultural rights.¹³⁷ As for IPs, the CESCR notes that their cultural rights are linked to the land, territories and resources which they have traditionally owned, occupied or otherwise acquired or used.¹³⁸ It therefore enjoins States to respect, protect and guarantee that the relationship which IPs have with their ancestral lands and nature are protected from degradation as these are important to their subsistence and preservation of their cultural identity.¹³⁹ It is acknowledged that IPs have the right to act collectively to ensure the protection of their right to

¹³⁵ Ibid, at para 13.

¹³⁶ Ibid, at para 19.

¹³⁷ Ibid, at paras 32, 33 and 36.

¹³⁸ Ibid, at para 36.

¹³⁹ Ibid.

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maintain, control and develop their cultural heritage in line with Article 15 (1) (a) of the ICESCR.¹⁴⁰

The obligation imposed upon States with respect to cultural rights is tripartite and they include: the obligation to respect; the obligation to protect; and the obligation to fulfil.¹⁴¹ There is also provision for the right to the enjoyment of the rights guaranteed under the ICESCR without any discrimination based on 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'¹⁴² In this regard, the CESCR defines discrimination to mean any distinction, exclusion, or restriction which 'has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.'¹⁴³

The CESCR has also emphasised that eliminating discrimination requires that a State's constitution, laws, and policies do not discriminate on the basis of any of the grounds mentioned under Article 2 – formal discrimination.¹⁴⁴ The CESCR explains that eliminating discrimination in practice demands that sufficient attention should be given to groups of individuals who have historically and persistently suffered as a result of prejudice, and urges States to take measures

¹⁴⁰ Ibid.

¹⁴¹ Ibid, at para 48. According to the CESCR, 'The obligation to respect requires States parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life. The obligation to protect requires States parties to take steps to prevent third parties from interfering in the right to take part in cultural life. Lastly, the obligation to fulfil requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in article 15, para 1 (a), of the Covenant.' See, CESCR, *General Comment No 13* (1990), paras 46 and 47; No. 14 (2000), para 33, No. 17 (2005), para 28 and No. 18 (2005), para 22. See also, the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* at para 6.

¹⁴² Art 2 (2).

¹⁴³ CESCR, *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009. E/C.12/GC/20, at para 7.

¹⁴⁴ Ibid, at para 8.

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to eliminate conditions that enhance formal, substantive and *de facto* discrimination.¹⁴⁵ Membership of any group based on any of the grounds mentioned under Article 2 upon which an individual or group claims to have been discriminated against is by self-identification.¹⁴⁶ The CESCR has defined 'race and colour to include ethnic origin of an individual or group.'¹⁴⁷ Therefore, Article 2 of ICESCR has direct relevance to all the various ethnic groups in Abuja in relation to the discriminatory termination of their customary land rights, when such customary land rights exist to the benefit of Nigerians of other ethnic groups indigenous to the other 36 States of Nigeria.¹⁴⁸

It should be noted that although the ICESCR allows derogations from the rights guaranteed under it, such derogations are limited '**only to such limitations as are determined by law and only in so far as this may be compatible with the nature of these rights** and solely for the purpose of promoting the general welfare in a democratic society.'¹⁴⁹ In line with this, the CESCR has emphasised 'that there exist minimum requirements, 'core obligations', for all the rights enshrined in the Covenant, that all States parties have to comply with independently of their available resources.'¹⁵⁰

¹⁴⁵ Ibid.

¹⁴⁶ Ibid, at para 16.

¹⁴⁷ Ibid, at para 19.

¹⁴⁸ See Section 36 of the LUA 1978 (supra).

¹⁴⁹ Art 4. The emphasis is added.

¹⁵⁰ CESCR, *General Comment No 3: The Nature of States Parties Obligations*, UN Doc. E/1991/23, 14 December 1990 at para 10. See also, CESCR, *General Comment No14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, twenty second session, agenda item 3, UN Doc E/C.12/2000/4 11 August 2000 at paras 43 and 47.

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In referring to Article 27 of the *Vienna Convention on the Law of Treaties* of 1969,¹⁵¹ which provides that a State cannot rely on a provision of its domestic law as a justification to violate its treaty obligations, the CESCR has maintained that States should modify their national laws to conform with the provision of the ICESCR.¹⁵² It is argued therefore that the legitimisation of the termination of the land rights of Abuja peoples through the Nigerian Constitution and the FCT Act cannot justify the violation of Nigeria's treaty obligations under the ICESCR.

Such domestic laws would have to be amended or repealed if Nigeria refuses or is unable to compensate or resettle the peoples of Abuja. Otherwise, Nigeria remains in violation of the ICESCR to which it is a Party. However, as Kenya has recently embarked on constitutional and law reforms in relation to customary land rights of Kenyans as demonstrated in Chapter Five,¹⁵³ it is important to investigate the reaction of the CESCR to such law reforms in the context of Kenyan State obligations under the ICESCR. The purpose is to demonstrate that the CESCR interprets customary land rights issues in Africa as coming within the purview of the ICESCR.

In a Concluding Observation on Kenya,¹⁵⁴ the CESCR welcomed the incorporation of the rights under the ICESCR into the Constitution of Kenya 2010 and in the rulings of High Courts in that country as demonstrated in Chapter

¹⁵¹ *Vienna Convention on the Law of Treaties* 1969, concluded at Vienna on 23 May 1969, entered into force 27 January 1980.

¹⁵² CESCR, *Draft General Comment No 9: The Domestic Application of the Covenant*, E/C.12/1998/24, 3 December 1998 at para 3. See also, CESCR, *General Comment 12: The right to adequate food (art. 11)* E/C.12/1999/5, 12 May 1999, at para 29.

¹⁵³ See section 5.1.

¹⁵⁴ CESCR, *Concluding Observations on the Combined Second to fifth Periodic Reports of Kenya*, 6 April 2016. E/C.12/KEN/CO/2-5.

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Five¹⁵⁵ and as will be further illustrated in Chapter Nine.¹⁵⁶ However, it was concerned that Kenya was still delaying the implementation of the decision of the African Commission in the case relating to the land rights of Endorois discussed later in section 7.3 below, despite accepting that decision.¹⁵⁷ It consequently recommended that the Kenyan Government should take immediate actions towards implementing the decision of African Commission as well as ratifying ILO 169.¹⁵⁸

The CESCR expressed concerns about the absence of comprehensive legislation on anti-discrimination in accordance with Article 2 of the ICESCR. It therefore recommended that Kenya should adopt comprehensive legislation on anti-discrimination prohibiting both direct and indirect discrimination.¹⁵⁹ It also expressed concerns about the continuous threat of eviction of IPs such as pastoralist communities in Kenya without their prior and informed consent as well as adequate compensation.¹⁶⁰ It then recommended that Kenya should adopt legislation granting security of tenure to various IPs communities in Kenya.¹⁶¹

The CESCR's emphasis on legislative reforms in Kenya demonstrates that it relies on States to give legal effect to the rights protected under the ICESCR through their domestic laws. It is argued that this should be the position in relation to land rights of the IPs of Abuja as well. As at the time of writing, the latest

¹⁵⁵ See sub-section 5.1.5.

¹⁵⁶ See sub-section 9.2.1.

¹⁵⁷ CESCR, (n 154) above at para 3.

¹⁵⁸ *Ibid*, at paras 15 and 16.

¹⁵⁹ *Ibid*, at paras 19 and 20.

¹⁶⁰ *Ibid*, at para 47.

¹⁶¹ *Ibid*, at para 48.

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Concluding Observation on Nigeria is the one made in 1998,¹⁶² which merely noted that the absence of rule of law in Nigeria was negatively impacting on the enjoyment of economic, social and cultural rights.¹⁶³ However, in an earlier document,¹⁶⁴ the CESCR observed that about one million people had been affected by forced evictions in Nigeria.¹⁶⁵ It also raised concerns about land and resource rights of the oil-producing areas of Nigeria whose lands were being polluted by the exploitation of oil, and emphasised the need to protect the rights of Ogoni people.¹⁶⁶

7.1.7. Legal Effects of General Comments, Recommendations and Concluding Observations

One point worth examining is the legal nature of general comments, concluding observation, communications and recommendations of the human rights treaty Monitoring Bodies discussed in sub-sections 7.1.4-7.1.6 above. General Comments and Concluding Observations have become a growing part of international human rights law. Indeed, most human rights issues are examined and elucidated through these instruments.¹⁶⁷ Through them, useful and authoritative statements in relation to the content and practical implementation of international human rights instruments are made.¹⁶⁸ However, despite their long

¹⁶² CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights - Nigeria*, E/C.12/1/Add.23. 16 June 1998.

¹⁶³ *Ibid*, at para 3.

¹⁶⁴ CESCR, *Consideration of Reports: Initial Report of Nigeria*, E/C.12/1998/SR.8, 4 May 1998.

¹⁶⁵ *Ibid*, at para 7.

¹⁶⁶ *Ibid*, at paras 13 and 16.

¹⁶⁷ C Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment* (New York University School of Law, 2008).

¹⁶⁸ DL Donoho, 'Democratic Legitimacy in Human Rights: The Future of International Decision-Making' (2003) 21 *Wisconsin International Law Journal* 1 at 31.

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and widespread usage by human rights treaty Monitoring Bodies, their legal weight and implications in international law remains rather unclear.¹⁶⁹

Indeed, it has been claimed that the exact sources of international human rights law in general is far from being certain in terms of their legal significance in international law.¹⁷⁰ It has been argued that the jurisprudence of the UN human rights treaty Monitoring Bodies as well as those of the African Commission in the form of General Comments and Concluding Observations such as those examined in this Chapter, 'do not fit easily within the traditional accounts of international law.'¹⁷¹ Therefore, although they seem to have some significance in terms of explaining the human rights provision of human rights treaties they remain non-binding.¹⁷²

A general analysis of the role and significance of General Comments and Concluding Observations by all human rights treaty Monitoring Bodies is beyond the scope of this thesis.¹⁷³ Therefore, preference is herein accorded to the relevant Bodies discussed in this Chapter. In the context of the HRC and the ICCPR, the HRC responds to human rights issues in relation to the provision of the ICCPR through its General Comments by summarising and promoting the objectives of human rights that should be implemented by State Parties to the ICCPR.¹⁷⁴ As demonstrated in sub-section 7.1.5 above, it does this through

¹⁶⁹ C Blake, (n 167) above at 2.

¹⁷⁰ See P Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78 *The American Journal of International Law* 607; B Simma and P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 *Australian Year Book of International Law* 82; and U Baxi, 'Too Many, or Too Few, Human Rights' (2001) 1 *Human Rights Law Review* 1.

¹⁷¹ C Blake, (n 167) above at abstract.

¹⁷² *Ibid*, at 3.

¹⁷³ For such comprehensive analyses, see LR Helfer and AM Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *The Yale Law Journal* 273.

¹⁷⁴ *Ibid*, at 273.

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informing States about its regrets on violation or non-implementation of the provisions of the ICCPR and pointing out areas where States may improve their implementation of the obligations thereunder.¹⁷⁵ It also demands that States report their responses to its recommendations in their periodic reporting.¹⁷⁶ Through the mechanism of its General Comments, the HRC shed light on the rights protected under the ICCPR by examining specific articles.¹⁷⁷ In making its findings, the HRC examines the views of experts who are its members, the reports by States and cases decided on the basis of the *Optional Protocol to the International Covenant on Civil and Political Rights*.¹⁷⁸ However, the HRC's General Comments have been criticised as 'not scholarly'¹⁷⁹ and unhelpful to the understanding of the substantive rights guaranteed under the ICCPR.¹⁸⁰ The above arguments in relations to the HRC and its General Comments applies *mutatis mutandis* to the CERD and ICERD as well as ICESCR and CESCR respectively in relation to their General Comments.

O'Flaherty argues that concluding observations are a very important activity of human rights Bodies as they represent the most 'authoritative overview of the state of human rights in a country and for the delivery of forms of advice which

¹⁷⁵ Ibid, at 340.

¹⁷⁶ See for example, HRC, *General Comment No 23* (n 104) above at para 9.

¹⁷⁷ See HRC, *General Comment No 35 - Article 9: Liberty and security of person*, CCPR/C/GC/35 (advanced unedited version); HRC, *Draft general comment No. 34 (Upon completion of the first reading by the Human Rights Committee): Article 19*, CCPR/C/GC/34/CRP, 22 October 2010; and HRC, *General Comment No 12: Article 1 (The right to self-determination of peoples)*, HRI/GEN/1/Rev.9/(Vol.1), 13 March 1984, among others.

¹⁷⁸ *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted by UNGA resolution 2200A (XXI) on 16 December 1966, entered into force 23 March 1976.

¹⁷⁹ D McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford University Press, 1991) at 95.

¹⁸⁰ LR Helfer and A-M Slaughter, (n 173) above at 341.

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can stimulate systematic improvements.¹⁸¹ As human rights treaty Monitoring Bodies do not have judicial powers, they cannot adjudicate on the compliance or otherwise of State parties with the provision of human rights treaties.¹⁸² Therefore, their concluding observations are not legally binding on the States upon which they are made at each point in time.¹⁸³ However, some States such as Norway have developed the habit of using them as guidance in the implementation of their obligations under international human rights treaties¹⁸⁴ and it has also been suggested that some domestic courts rely on them in resolving human rights issues at national levels.¹⁸⁵

By contrast, the Supreme Court of the Republic of Ireland held in the case of *Kavanagh v Governor of Mount Joy Prison*,¹⁸⁶ that communications and concluding observations of the HRC did not have binding legal effect in the country. Nevertheless, concluding observations do have interpretative legal effects before international courts.¹⁸⁷ For example, in an Advisory Opinion, the ICJ in *Legal Consequences of the Construction of a Wall in the Occupied*

¹⁸¹ M O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 Human Rights Law Review 27 at 27.

¹⁸² Ibid, at 32-33.

¹⁸³ Ibid.

¹⁸⁴ See International Law Association (ILA), *Final Report on the Impact of Findings of the United Nations Treaty Bodies* (ILA, 2004), available at: www.ila-hq.org/download.cfm/docId/3B0BF58A-C096-4113-830E8E1B5BC6DEC5, accessed 8 February 2017. See also, H Keller and L Grover, 'General Comments of the Human Rights Committee and their Legitimacy' in H Keller and G Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 116-194.

¹⁸⁵ A Nollkaemper and R van Alebeek, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in H Keller and G Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 356-413.

¹⁸⁶ *Kavanagh v Governor of Mount Joy Prison* [2002] IESC 11.

¹⁸⁷ M O'Flaherty, (n 181) above at 35. See also, K Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law 905.

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Palestinian Territory,¹⁸⁸ relied on the HRC's concluding observation on Israel from 1998 to 2003 as aid to the interpretation of the obligation of the State of Israel in the context of the ICCPR and held that the provisions of the ICCPR were applicable to Israel's activities outside its territorial jurisdiction. Similar argument applies to general recommendations of the human rights treaty Monitoring Bodies.¹⁸⁹

However, a distinction between Concluding Observations and General Comments or Recommendations on the one hand and Concluding Observations on the other is that while the former are made in relation to all State Parties to the relevant instruments, concluding observations relate to the specific individual State upon which such observations are made.¹⁹⁰ Section 7.1 has so far focussed on the relevance of general international human rights instruments to the protection of land rights of IPs. In section 7.2 below the relevance of three specific instruments on the rights of IPs under international law are examined.

7.2. Specific Instruments on the Land Rights of IPs

Despite the significance of some of the general international human rights instruments and the jurisprudence of the HRC, CERD and CESCR towards

¹⁸⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports 184.

¹⁸⁹ J Mertus, *The United Nations and Human Rights: A Guide for a New Era* (2 edn, Psychology Press, 2005) at 77. See also, J Morijn, 'Reforming United Nations Human Rights Treaty Monitoring Reform' (2011) 58 *Netherlands International Law Review* 295; PS Rao, 'Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation' (2003) 25 *Michigan Journal of International Law* 929; O Schachter, 'United Nations Law' (1994) 88 *The American Journal of International Law* 1; and M Bowman, 'Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions? Legal Mechanisms for Treaty Reform' (2007) 7 *Human Rights Law Review* 225.

¹⁹⁰ AC Byrnes, 'The Other Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women' (1989) 14 *Yale Journal of International Law* 1 at 42-43 and HJ Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee' in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) at 22.

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protecting IPs' land rights¹⁹¹ as elaborated in section 7.1 above, they remain insufficient in the context of addressing historical injustices in relation to IP's land rights.¹⁹² Therefore, their impact can only be minimal in addressing the wide range of claims in relation to IPs' land rights. Against this background, it is important to critically examine the provisions of the only existing and binding international treaties on IPs' rights as well as the only UN backed legally non-binding instrument on the specific rights of IPs as enunciated in sub-sections 7.2.1-7.2.3 below.

7.2.1. ILO Convention No 107 1957 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO 107)

The only existing and legally binding international instruments on the rights of IPs are the ILO 107¹⁹³ and ILO *Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries* 1989 (ILO 169).¹⁹⁴ ILO 107 makes specific provisions for land rights of IPs including: the right to ownership of land both individually and collectively which IPs have occupied traditionally;¹⁹⁵ the right to

¹⁹¹ For comprehensive analyses of the contribution of human rights instruments to the protection and promotion of IPs right in general, see P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002) and P Thornberry, *International Law and the Rights of Minorities* (Oxford University Press, 1991).

¹⁹² SJ Anaya, (n 1) above at 290.

¹⁹³ ILO *Convention No 107 of 1957 Concerning the Protection of the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, adopted in Geneva, at the 40th ILC session held on 26 June 1957, entered into force on 02 June 1959. Available at www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107, accessed 30 September 2016.

¹⁹⁴ ILO *Convention No 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries*, adopted in Geneva, at the 76th ILC session held on 27 June 1989, entered into force on 05 September 1991. Available at www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_IBID,P12100_LA_NG_CODE:312314,en:NO, accessed 30 September 2016.

¹⁹⁵ Art 11.

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free consent before their removal from such lands;¹⁹⁶ the right to transmission of ownership in accordance with their customs;¹⁹⁷ and the right to equal treatment with other communities in relation to the availability of land for their subsistence.¹⁹⁸ When ILO 169 was adopted in 1989, ILO 107 was declared closed for ratification, however, it remains applicable and valid for the 17 States that ratified it but who are not currently Parties to the latter ILO 169.¹⁹⁹ In addition to the limited number of ratifications which limit its scope of application, it has also been criticised for its assimilationist approach towards IPs' rights thereby diminishing its ability to effectively accommodate the rights of IPs.²⁰⁰ For example under Articles 2, 4 and 5 ILO 107 makes provisions for the 'integration' of IPs and their culture into the States where they exist. Nigeria is not a Party to it and so its provisions are not binding on Nigeria.

7.2.2. International Labour Organization (ILO) *Indigenous and Tribal Peoples Convention No 169* 1989 (ILO 169)

ILO 169²⁰¹ has been ratified by only 22 States, of these only one African State (Central African Republic) has ratified it,²⁰² implying that many IPs in Africa may

¹⁹⁶ Art 12.

¹⁹⁷ Art 13.

¹⁹⁸ Art 14.

¹⁹⁹ The list of those countries is available at: www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_IBID:3122_52. Accessed 30 September 2016. Of these only six are African States to wit: Angola, Egypt, Ghana, Guinea-Bissau, Malawi and Tunisia.

²⁰⁰ M Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International & Comparative Law Quarterly* 957 at 958 and SJ Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2004) at 54-56. For more positive views on the approach of ILO 107 to IPs' rights, see A Xanthaki, *Indigenous Rights and United Nations Standards: Self-determination, Culture and Land* (Cambridge University Press, 2007) at 49-67.

²⁰¹ *Supra*.

²⁰² The list is available at: www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_IBID:3123_14, accessed 30 September 2016.

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be unable to rely on it to legally enforce their rights. Nigeria has neither signed nor ratified it. Therefore, the analyses herein remain largely academic. However, it has been stated that the legal contribution of ILO 169 to the rights of IPs transcends the number of ratifications as the ILO itself has described it as ‘... the foremost international legal instrument which deals specifically with the rights of indigenous and tribal peoples, and **whose influence extends beyond the number of actual ratifications.**’²⁰³

Indeed, it has been described as ‘a central feature of international law’s contemporary treatment of indigenous people’s demands’.²⁰⁴ Perhaps, this is the reason it continues to provide significant legal foundations and grounds for IPs’ claims in several States as it has been used to make successful legal claims for IPs before national legal systems. An example of this is illustrated by the Australian case of *Police v Abdulla*,²⁰⁵ where Perry J referred to ILO 169, which had not been ratified by Australia as ‘an indication of the direction in which the international law is proceeding’ in relation to the rights of IPs.²⁰⁶

7.2.3. UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

Like contemporary international child rights law where children have emerged as subjects of international law with rights as such under the *UN Convention on the Rights of the Child* 1989 (UNCRC)²⁰⁷ as demonstrated in the preceding Chapter

²⁰³ ILO, *ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169): A Manual* (Dumas-Titoulet Imprimeurs, 2003) at i. The emphasis is added.

²⁰⁴ SJ Anaya, (n 1) above at 58.

²⁰⁵ *Police v Abdulla* [1999] 74 SASR 337.

²⁰⁶ *Ibid*, at para 37.

²⁰⁷ *UN Convention on the Rights of the Child*, 1989 adopted and opened for signature, ratification and accession by UNGA Resolution 44/25 of 20 November 1989, entered into force 2 September 1990, in accordance with its Art 49.

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Six,²⁰⁸ it has been rightly argued that the adoption of UNDRIP²⁰⁹ by the UN General Assembly signifies and crystallises the transformation of IPs from victims into actors of international law,²¹⁰ thereby demonstrating a triumph over the era when there was opposition to the recognition of *sui generis* rights for IPs.²¹¹

Consequently, the UN human rights system has become increasingly active in the protection of IPs' rights.²¹² Nigeria gave explanations for its abstention from voting during the adoption of UNDRIP by first welcoming it, while stating that its provisions were in line with the provisions of the Nigerian Constitution.²¹³ However, it maintained that 'a number of concerns that were critical to Nigeria's interests, had not been satisfactorily addressed, including the issue of self-determination and the control of lands, territories and resources'.²¹⁴ It argued that Nigeria's '... national institutions and laws all ensured national integration'²¹⁵ and promised to promote and protect the rights of IPs as well as '... the rights of all Nigerians with its more than 300 ethnic groups speaking more than 300

²⁰⁸ See section 6.3.

²⁰⁹ UNGA Resolution 61/295, adopted on 13 September 2007, adopted by a vote of 143 in favour to four against. (Australia, Canada, New Zealand and United States), with 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

²¹⁰ J Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Transnational Publishers, 2006) and M Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International & Comparative Law Quarterly* 957.

²¹¹ I Brownlie and FM Brookfield, *Treaties and Indigenous Peoples* (Oxford University Press, 1992).

²¹² E Stamatopoulou, 'Indigenous peoples and the United Nations: Human Rights as a Developing Dynamic' (1994) 16 *Human Rights Quarterly* 58.

²¹³ See UNGA/1090612, 13 September 2007.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

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languages'.²¹⁶ In the above ambiguous manner, Nigeria claims to have welcomed the adoption of UNDRIP even though it abstained from voting.²¹⁷

The UNDRIP makes provisions for a wide range of rights for IPs as collectives²¹⁸ and as individuals.²¹⁹ It also addresses certain specific concerns in relation to IPs' life, the integrity of their identity and culture.²²⁰ UNDRIP protects IPs against genocide, and makes provisions against the militarisation of their lands as well as the use of IPs' children as soldiers.²²¹ UNDRIP has also been projected to be the legal basis for the recognition of IPs cultural and land rights under international law.²²²

7.2.3.1. Individual and Collective Rights under UNDRIP

Xanthaki maintains that one of the main significant aspects of UNDRIP is that it puts an end to the debates about whether or not there is any recognition or non-recognition of the 'collective rights for sub-national groups in current international law.'²²³ Xanthaki notes also that Article 27 of the ICCPR 'did not go as far as expressly recognising the collective rights of these minorities.'²²⁴ Indeed, although ILO 169 recognises some collective rights of IPs, the special collective dimension

²¹⁶ Ibid. See, WV Genugten, 'The African Move Towards the Adoption of the 2007 Declaration on the Rights of Indigenous Peoples: The Substantive Arguments Behind the Procedures' (2010) 104 *The American Journal of International Law* 29 at 29-65.

²¹⁷ WV Genugten, (n 216) above.

²¹⁸ See Arts 1 and 10-43

²¹⁹ See Arts 2, 6, 7, 8, 9 and 44.

²²⁰ See Arts 11-20.

²²¹ Art 30

²²² B KI-moon, 'Protect, Promote, Endangered Languages, Secretary-General Urges in message for International Day of World's Indigenous People' (2008) SC/SM/11715, HR/4957, OBV/711, available at: <www.un.org/News/Press/docs/2008/sgsm11715.doc.htm>, accessed 25 October 2016.

²²³ A Xanthaki, (n 76) above at 30-31.

²²⁴ Ibid.

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of IPs rights articulated under UNDRIP were the more controversial issues during the debates leading up to its adoption at the UN.²²⁵ The recognition of collective rights of IPs under UNDRIP demonstrates that current international law recognises collective rights as applicable to sub-State groups. As demonstrated in section 7.1 above, some international human rights instruments before UNDRIP had already recognised collective rights for certain groups.²²⁶ However, it is UNDRIP that crystallises the notion that collective rights are central to the claims of IPs, their cultures and land rights.²²⁷ In this respect, UNDRIP is unique since it appears to be the only international human rights instrument to be substantially focussed on the collective rights of IPs.²²⁸

Whereas UNDRIP frequently makes references to the collective rights of IPs, the other main UN human rights instruments which protect the rights of minorities, examined in section 7.1 above, merely make simplistic references to rights of 'persons belonging to national or ethnic, religious and linguistic minorities.'²²⁹ UNDRIP uniquely creates a balance between individual rights and collective rights through the adoption of a conciliatory approach which could enable indigenous persons/individuals to have rights as well as responsibilities within the broader context of collective rights.²³⁰ For instance, UNDRIP provides that '...

²²⁵ Ibid.

²²⁶ See below for analyses of the collective rights focus of the African Charter.

²²⁷ M Barelli, (n 200) above at 963.

²²⁸ Ibid.

²²⁹ Para 4 of the preamble to the Minorities Rights Declaration. See also, Art 2 (1) of the Minorities Rights Declaration.

²³⁰ M Barelli, (n 200) above at 963. For a more detailed analysis of the significance of collective rights to IPs and the relationship with individual rights, see A Buchanan, 'Role of Collective Rights in the Theory of Indigenous Peoples' Rights' (1993) 3 *Transnational Law & Contemporary Problems* 89; CL Holder and J Cortassel, 'Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights' (2002) 24 *Human Rights Quarterly* 126; RN Clinton, 'The Rights of Indigenous Peoples as Collective Group Rights,' (1990) 32 *Arizona Law Review* 739; D Sanders, 'Collective Rights' (1991) 13 *Human Rights Quarterly* 368; M Hartney, 'Some Confusions Concerning Collective Rights' (1991) 4 *The Canadian Journal of Law and Jurisprudence* 293; and P Jones, 'Human Rights, Group Rights, and Peoples' Rights' (1999) 21

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indigenous peoples have the right to determine the responsibilities of individuals to their communities.²³¹ In addition to the above, UNDRIP recognises and affirms that 'indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as people.'²³² Following the above recognition and affirmation, substantive provisions of UNDRIP actually strengthen the simultaneous co-existence of collective and individual rights of IPs.²³³

For example, Article 1 stipulates that '[i]ndigenous peoples have the right to the full enjoyment, **as a collective or as individuals**, of all human rights and fundamental freedoms ...'²³⁴ This is sufficient evidence within the text of UNDRIP itself to submit that one of its main aims is to solidify a viable interaction between the collective and individual rights of IPs. It has been rightly argued that the focus of UNDRIP on collective rights does not undermine the individual rights provided under international human rights law, but rather, it strengthens and enriches the international jurisprudence on human rights.²³⁵ This Chapter will now focus on the land rights provisions under UNDRIP.

Human Rights Quarterly 80. For critical views on collective rights, see M Freeman, 'Are There Collective Human Rights?' (1995) 43 *Political Studies* 25 and Y Tamir, 'Against Collective Rights' in H Lukas, SLP Meyer and WP Thomas (eds), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press, 2003).

²³¹ Art 35.

²³² Para 22 preamble.

²³³ See Arts 1, 2, 6, 7, 8, 9, 14, 17, 24, 33, 35, 40 and 44 of UNDRIP.

²³⁴ The emphasis is added.

²³⁵ M Barelli, (n 200) above at 963-964.

7.2.3.2. Land Rights of IPs under UNDRIP

UNDRIP recognises IPs' 'right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'.²³⁶ It has been earlier demonstrated in sub-sections 7.2.1 and 7.2.2 above that until UNDRIP was adopted, IPs' land rights were advocated in the international arena through references to ILO 169, as well as through the UN human rights treaties Monitoring Bodies and through State practice. Therefore, the provision of strong land rights for IPs in UNDRIP is a positive development for the international jurisprudence on IPs' rights in particular and international law in general.²³⁷

Accordingly, UNDRIP makes provision for various categories of land rights for IPs, including rights to traditional practices and natural resources, as well as rights to the development and management of their lands.²³⁸ UNDRIP provides under Article 25 that IPs have the right to their spiritual relationships with the traditional lands which belong to them and which they have occupied and used through their traditions and customs. Article 26 makes provision for the right to be entitled to the lands, territories and resources which belong to them in accordance with their traditions and customs. States are obligated to give legal recognition to such ownership.

Article 28 provides that where they have been dispossessed of such lands they are entitled to redress for the lands, territories and resources confiscated, taken, occupied, used or damaged without their free, prior and informed consent.²³⁹ Such redress must take the form of restitution or, where that is not possible, compensation in the form of equivalent lands, monetary redress, or other forms

²³⁶ Art 26 (1).

²³⁷ A Xanthaki, (n 76) above at 31.

²³⁸ See Art 23.

²³⁹ Art 28 (1).

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of appropriate redress, unless otherwise agreed by the IPs in question.²⁴⁰ This is also another area where UNDRIP strengthens the development of international law by making references to reparations and redress for historical injustices.²⁴¹

Their rights to ownership, possession, development and control over their lands which they presently possess and their rights to lands from which they have been dispossessed without their free, prior and informed consent, are recognised.²⁴² For example, a broad approach which may include ownership or possession is adopted in relation to lands which they have 'traditionally' held.²⁴³ On the one hand UNDRIP recognises IPs' rights to usage and on the other hand it also recognises the traditional ways of acquiring ownership of land by IPs and it encourages legal recognition of such traditional ways of acquiring ownership over lands by States.²⁴⁴

In addition to the above, provisions are made for the right to development and control over developmental projects on IPs' lands as well as the right to be consulted and compensated before such projects are implemented.²⁴⁵ UNDRIP also recognises the rights of IPs to natural resources on their lands. It therefore provides for their rights to 'own, use, develop and control' the natural resources of the lands they possess.²⁴⁶ It has been argued that this is 'a ground breaking provision for international law, as ownership and use of natural resources has always been the monopoly of the state.'²⁴⁷ Even though the context of such

²⁴⁰ Art 28 (2).

²⁴¹ A Xanthaki, (n 76) above at 32.

²⁴² Art 28 (1).

²⁴³ See Arts 26 (1), 26 (2), 28 (1).

²⁴⁴ See Art 27.

²⁴⁵ Art 32 (1), (2) and (3).

²⁴⁶ Art 26 (1), (2) and (3).

²⁴⁷ A Xanthaki, (n 76) above at 31.

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ownership of natural resources by IPs is not clear, this is another area where UNDRIP goes beyond ILO 169, which also recognises the right of IPs to the 'use and management' of natural resources.²⁴⁸ This rather progressive nature and strong contents of the provisions of UNDRIP in terms of how it articulates the rights of IPs to own, manage and control lands and resources have been rightly said to challenge traditional notions of State sovereignty to a very high degree.²⁴⁹

UNDRIP also makes provisions for other rights that have a direct connection to IPs' rights to land and natural resources. For example, UNDRIP recognises the right of IPs to be free from any kind of discrimination,²⁵⁰ the right to practice and revitalise their culture,²⁵¹ the right to manifest and practice religious and spiritual traditions,²⁵² the right for them to participate in decisions on matters that would have an effect upon them,²⁵³ and the right to be the determinants of their identities as well as membership of their communities in consonance with their traditions and customs.²⁵⁴ However, as UNDRIP is a UNGA resolution and not a treaty, it is important to examine its legal status and effect in international law so as to assess its significance to the case study of Abuja.

7.2.3.3. Legal Status and Effect of UNDRIP

Although ILO 169 and its predecessor, the ILO 107 have recognised land rights of IPs as demonstrated in sub-section 7.2.1 and 7.2.2 above, such as the right to demarcation of their lands, which go beyond the provisions of UNDRIP on land

²⁴⁸ See Art 15 (1) and (2).

²⁴⁹ A Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, 2007) at 102.

²⁵⁰ Art 2.

²⁵¹ Art 11.

²⁵² Art 12.

²⁵³ Art 18.

²⁵⁴ Art 33.

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rights of IPs, the small number of signatories and ratification of ILO 169 negates and limits the protection of land rights of IPs contained therein. Indeed, Nigeria is not a Party to either ILO 107 or ILO 169. In paragraphs a-c below, the legal status of UNDRIP as customary international law, or general principles of international law, and its relationship with other international human rights instruments is examined in more detail.

a. UNDRIP as Customary International Law

There appear to be many academic views that customary international law (CIL) is comprised of the two elements of State practice and *opinio juris*.²⁵⁵ Article 38 (b) of the *Statute of the International Court of Justice* (ICJ Statute)²⁵⁶ provides that the Court shall apply among others 'international custom as evidence of a general practice accepted as law'. However, the ICJ Statute does not expressly state the elements that must exist to determine whether a rule of CIL has been established. This has led to several legal scholarly views on this issue. For example, Dennis Arrow proposes four-elements that should exist before the creation of CIL which are: State practice; *opinio juris*; adherence to a norm by a majority of 'specially affected States'; and continuous practice over a period.²⁵⁷ In the *North Sea Continental Shelf cases*,²⁵⁸ the ICJ stated that the need for the

²⁵⁵ AE Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) *American Journal of International Law* 757; A D'Amato, 'Trashing Customary International Law' (1987) 81 *The American Journal of International Law* 101; and JL Kunz, 'The Nature of Customary International Law' (1953) 47 *The American Journal of International Law* 662 at 665.

²⁵⁶ The *Statute of the International Court of Justice* is an integral part of the United Nations Charter, as specified by Chapter XIV of the *United Nations Charter*. All UN Member States are Parties to the Statute by their ratification of the *UN Charter*. See, Art 93(2) of the *UN Charter*.

²⁵⁷ DW Arrow, 'The Proposed Regime for the Unilateral Exploitation of Deep Seabed Mineral Resources by the United States,' (1980) 21 *Harvard International Law Journal* 337 at 337-418 and JL Slama, 'Opinio Juris in Customary International Law' (1990) 15 *Oklahoma City University Law Review* 603 at 617-618.

²⁵⁸ *North Sea Continental Shelf Cases (Federal republic of Germany v Denmark; Federal republic of Germany v Netherland)* [1969] ICJ Reports at 4.

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belief in the existence of *opinio juris* by States was central to the formation of CIL.²⁵⁹

Anaya maintains that UNGA resolutions could lead to the creation of CIL by evidencing consensus in the international community that imbue the contents of such resolutions with the expectation that they are obligatory when supplemented with additional activities by the international community.²⁶⁰ Indeed, in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Nicaragua case)*,²⁶¹ the ICJ relied on UNGA resolutions to determine that the principle of non-use of force and non-intervention in the internal affairs of States were principles of CIL. However, the decision of the ICJ in the Nicaragua case has been criticised 'as a failure of legal scholarship ... [i]t reveals the august judges of the International Court of Justice as collectively naïve about the nature of custom as the primary source of international law.'²⁶²

The idea of whether or not *opinio juris* is necessary to the formation of CIL remains largely contentious and unsettled.²⁶³ Gunning argues that the requirement of actual physical practice by States for the formation of CIL has a tendency to result in an international society where only physical actions may be the means of resolving international disputes and not non-physical means.²⁶⁴ He maintains that uniformity of practice may come to be seen as evidence that such practice may

²⁵⁹ Ibid, at 44.

²⁶⁰ SJ Anaya, 'Contemporary Conception of Customary International Law' (1998) Proceedings of the American Society of International Law 41 at 43.

²⁶¹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Merits, 1986 ICJ Reports 14, 27 June 1986.

²⁶² A D'Amato, (n 255) above at 105.

²⁶³ See G Norman and JP Trachtman, 'The Customary International Law Game' (2005) American Journal of International Law 541 at 542.

²⁶⁴ IR Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights' (1990) 31 Virginia Journal of International Law 211 at 214-215.

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be performed with the understanding that such arises out of legal obligations, thereby creating *opinio juris*.²⁶⁵ Kelly argues that acceptance by States give CIL legitimacy and that without this acceptance, practice is merely habitual and not CIL, but since there is no universally agreed mechanism for quantifying general practice of States as proof of *opinio juris*, this means it is a legal fiction.²⁶⁶ He maintains that even the ICJ has difficulty in investigating and proving State practice of a majority of States and 'when the I.C.J. has required direct proof of the *opinio juris* element, the Court has found the evidence inadequate.'²⁶⁷

Despite the above shortcoming, the main way of ascertaining *opinio juris* is through finding out the practice of States.²⁶⁸ The first case in which an international court determined the significance of *opinio juris* to the formation of CIL is the case of *SS Lotus (France v Turkey) (Lotus case)*.²⁶⁹ In that case the French claimed that a CIL rule had emerged which required acceptance that criminal trials arising from accidents on the high seas were within the exclusive jurisdiction of the flagship State.²⁷⁰ They contended that as States had abstained from claiming jurisdiction in the matter, this was evidence of State practice which prevented other States other than France from asserting jurisdiction in the instant case.²⁷¹ The Permanent Court of International Justice (PCIJ) rejected this argument and held that *opinio juris* was necessary to demonstrate that such

²⁶⁵ Ibid, at 241.

²⁶⁶ JP Kelly, 'The Twilight of Customary International Law' (1999) 40 Virginia Journal of International Law 449.

²⁶⁷ See *North Sea Continental Shelf (France v Denmark, France v Netherland)* 1969 ICJ 344 (20 February 1969); *SS Lotus (France v Turkey)*, 1927 PCIJ (ser. A) No 10, at 28 (7 September 1927); and *SS Wimbledon (United Kingdom v France)* [1923] PCIJ (ser. A) No 1, at 25 (17 August 1923).

²⁶⁸ JP Kelly, (n 266) above at 470.

²⁶⁹ Supra.

²⁷⁰ Ibid, at 25-26.

²⁷¹ Ibid, at 28.

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abstentions 'were based on states being conscious of having a duty to abstain ... to speak of an international custom.'²⁷²

However, in the *Trail Smelter Arbitration (United States v Canada)*,²⁷³ the tribunal did not rely on State practice to establish *opinio juris* as it found none, choosing rather to apply US Supreme Court judgments, this has led to the argument that the decision here was not based upon 'any grounding in state practice, its conclusions about CIL are neither persuasive, nor evidence of anything.'²⁷⁴ Likewise, in *Libya v Malta*,²⁷⁵ the ICJ did not rely on *opinio juris* or State practice in the determination of the principle of 200 nautical miles of Exclusive Economic Zone (EEZ) on the continental shelf, it chose rather to rely on the provisions of the *UN Law of the Sea Convention 1982*²⁷⁶ to rule that the principle of EEZ was CIL.²⁷⁷ The above decisions demonstrates the uncertainty about whether *opinio juris* is really necessary to establish a rule of customary international law.²⁷⁸

In the *Asylum case (Colombia v Peru)*,²⁷⁹ Colombia asserted a right based upon a principle of CIL applicable in the Latin American region,²⁸⁰ in order to prosecute an offense committed by a political refugee against the government of Peru.²⁸¹

²⁷² Ibid.

²⁷³ *Trail Smelter Arbitration (United States v Canada)* [1941] UN Reports of International Arbitral Awards (RIAA) 1905 at 1949.

²⁷⁴ JP Kelly, (n 266) above at 471-472.

²⁷⁵ *Libya v Malta* [1985] ICJ Reports 13.

²⁷⁶ *UN Law of the Sea Convention 1982*, adopted 10 December, 1982 in Montego Bay, Jamaica, came into force 16 November 1994.

²⁷⁷ Ibid.

²⁷⁸ RM Walden, 'The Subjective Element in the Formation of Customary International Law' (1977) 12 *Israel Law Review* 344 at 459.

²⁷⁹ *Asylum case (Colombia v Peru)* [1950] ICJ Reports 266.

²⁸⁰ Ibid, at 276.

²⁸¹ Ibid, at 274.

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Colombia demanded that the alleged refugee be free to leave Peru since he had been granted asylum by Colombia.²⁸² In finding if such a rule existed as CIL, the Court expressed the need to establish *opinio juris* through State practice.²⁸³

The above decision regarding the requirement of State practice to prove *opinio juris* was affirmed in the *Case Concerning Right of Passage Over Indian Territory (Portugal v India)*.²⁸⁴ In this case, the ICJ was presented with the issue of whether there was a regional CIL between India and Portugal in which Portugal had the right of passage through Indian territory. It was held that based on State practice on the right of passage in the region, a CIL had emerged in favour of Portugal.²⁸⁵

However, in *North Sea Continental Shelf Cases (Germany v Denmark) (Western Germany v Netherland)*,²⁸⁶ the ICJ confirmed that *opinio juris* was necessary to the formation of CIL and that in looking for evidence of such, the Court could rely on treaties.²⁸⁷

In terms of time and its relevance to the formation of CIL, it seems the length of time in which a norm has been practiced by States is not of the essence. Thus, in the *Continental Shelf* cases the ICJ held that:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State

²⁸² Ibid, at 273.

²⁸³ Ibid, at 276.

²⁸⁴ *Case Concerning Right of Passage Over Indian Territory (Portugal v India)*, [1960] ICJ Reports 266 at 277.

²⁸⁵ Ibid, at 40.

²⁸⁶ *North Sea Continental Shelf Cases (Germany v Denmark) (Western Germany v Netherland)*, [1969] ICJ Reports 3.

²⁸⁷ Ibid, at 42-44. See generally, JL Slama, 'Opinio Juris in Customary International Law' (1990) 15 Oklahoma City University Law Review 603 at 641-645.

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practice, including that of States whose interests are especially affected, it should have been both extensive and virtually uniform in the sense of the provision invoked ...'.²⁸⁸

However, it has been argued that consistent State practice of a norm over a long period of time may outweigh one that has been practiced over a shorter period in determining whether such norms have metamorphosed into CIL.²⁸⁹ Karol Wolfke argues that continuous practice by States without interruption is not a *sine qua non* for the emergence of CIL.²⁹⁰ Cheng appears to agree with Wolfke on the issue of length of time not being of the essence in State practice.²⁹¹ Therefore, the issue of length of time in State practice for the purpose of the emergence of a norm as CIL is not essential.²⁹² Kuntz maintains that State practice by a majority of States is not sufficient, rather such practice must be in existence and applied 'by the overwhelming majority of states which hitherto had an opportunity of applying it.'²⁹³ Therefore, it would appear that irrespective of the length of time in which a norm has been practiced by States, once such norm has been practiced by a substantial number of States specially affected by such rule a CIL would be deemed to have emerged.

It is argued that the role of State practice in providing evidence of *opinio juris* in the formation of CIL is largely unclear.²⁹⁴ It is not certain whether State practice is needed as evidence of *opinio juris* or if it is an independent ingredient to the

²⁸⁸ *North Sea Continental Shelf*, (supra) at para 74.

²⁸⁹ J Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems' (2004) 15 *European Journal of International Law* 523 at 530.

²⁹⁰ K Wolfke, *Custom in Present International Law* (Tow Nauk, 1964) at 60.

²⁹¹ B Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law' (1965) 23 *Indian Journal of International Law* 23 at 45.

²⁹² J Kammerhofer, (n 289) above at 530.

²⁹³ JL Kunz, (n 255) above at 666.

²⁹⁴ *Ibid*, at 532.

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formation of CIL.²⁹⁵ In the determination of whether there is sufficient State practice and whether there is evidence of the existence of *opinio juris* to establish CIL, Kuntz recommends that courts could rely on diplomatic correspondence, the decisions of domestic courts and provisions of international treaties.²⁹⁶ However, Anaya and Williams have argued that there should not be an over reliance and emphasis on actual State practice and that mere express communications amongst States, irrespective of whether this is done in association with real events or not should be counted as 'a form of practice that builds customary rules.'²⁹⁷

Academic debates about the legal status of some of the rights of IPs which are now guaranteed under UNDRIP, have led some scholars into arguing that some IPs' rights are already CIL. For example, Anaya and Wiessner contend that several categories of IPs' rights have developed into CIL, such as the rights to 'demarcation, ownership, development, control and the use of lands that [indigenous peoples] have traditionally owned or otherwise occupied and used'.²⁹⁸ In line with the above claim, a 1999 comparative research conducted by

²⁹⁵ See generally, CA Bradley and JL Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) Harvard Law Review 815 and PR Trimble, 'A Revisionist View of Customary International Law' (1985) 33 University of California Law Review 665.

²⁹⁶ JL Kunz, (n 255) above at 667-668. See also, RR Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965) 41 British Year Book of International Law 275 at 277-278.

²⁹⁷ SJ Anaya and RA Williams, 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System, ' (2001) 14 Harvard Human Rights Journal 33 at 54-55.

²⁹⁸ SJ Anaya and S Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment' (2007) 206 Third World Resurgence 15; SJ Anaya, 'Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend' (2005) 16 Colorado Journal of International Environmental Law & Policy 237; and SJ Anaya, 'International Human Rights and Indigenous Peoples: The Move Towards the Multicultural State' (2004) 21 Arizona Journal of International and Comparative Law 13 at 44. See also, RT Ako and O Oluduro, 'Identifying Beneficiaries of the UN-Indigenous Peoples' Partnership (UNIPP): The Case for the Indigenes of Nigeria's Delta Region' (2014) 22 African Journal of International & Comparative Law 369 at 385.

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Wiessner into State practice on IPs' rights demonstrates that there are many positive developments in States' legislation, policies and practices,²⁹⁹ which provide evidence that land rights and rights to natural resources by IPs have crystallised into CIL.³⁰⁰ As Weisner puts it '[t]oday, many of these proposed or actual prescriptions, coinciding, as they do, with domestic state practice as documented above, have created a new set of shared expectations about the legal status and rights of indigenous people that has matured and crystallized into customary international law.'³⁰¹

The above claim appears to be supported by the Inter-American Commission on Human Rights (IACHR). In the *Mayagna (Sumo) Awas Tigni Community v Nicaragua (Awas Tingi)* case,³⁰² the IACHR asserted that 'there is an international customary law norm which affirms the rights of indigenous peoples to their traditional lands'.³⁰³ Also in *Maya v Belize*,³⁰⁴ the Belize Supreme Court supported this opinion as the senior judge in that case argued that 'both customary international law and general principles of international law would require that Belize respect the rights of its indigenous peoples to their lands and resources'.³⁰⁵

²⁹⁹ S Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 Harvard Human Rights Journal 57 at 109.

³⁰⁰ S Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous People' (2008) 41 Vanderbilt Journal of Transnational Law 1141 at 1152.

³⁰¹ S Wiessner, (n 299) above at 109. See also, S Wiessner, 'The United Nations Declaration on the Rights of Indigenous Peoples' in A Constantines and N Zaikos (eds), *The Diversity of International Law* (Brill, 2009) at 343-362.

³⁰² *Mayagna (Sumo) Awas Tigni Community v Nicaragua* [2001] Inter-Am Court of Human Rights (IACHR) (ser C) No 79. For a critique of the jurisprudence of the IACHR in relation to UNDRIP and IPs land, see JM Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 27 Wisconsin International Law Journal 51.

³⁰³ *Mayagna (Sumo) Awas Tigni Community v Nicaragua* (supra) at 71.

³⁰⁴ *Aurelio Cal v Attorney-General of Belize*, Claim 121/2007 (Supreme Court, Belize, 18 October 2007) 127.

³⁰⁵ Ibid.

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One possible authority that could support the claim that the provision of UNDRIP may contain or provide evidence of norms of CIL is the decision of the ICJ which has stated that UNGA resolutions could provide evidence for the purpose of establishing a rule of CIL,³⁰⁶ if there is 'overwhelming evidence of a long-established rule, or some very authoritative evidence of a recently established rule (such as a decision of the ICJ or a sufficiently widely accepted treaty provision)'.³⁰⁷

However, it has also been argued that CIL in relation to land rights of IPs 'does not yet exist' but 'there is a clear consensus within international human rights jurisprudence that at a minimum States must engage in good faith consultations with indigenous peoples prior to the exploration or exploitation of resources within their lands'.³⁰⁸ Xanthaki maintains that 'the suggestion that indigenous rights already constitute uniform state practice seems over-ambitious. Such a suggestion actually undermines the importance of the *Declaration*: its adoption was such a success exactly because **it anticipated changes to indigenous rights in national systems**'.³⁰⁹

In this thesis, it is argued that although IPs have benefited from increasing better protection in several States and regions across contemporary international society and UNDRIP seems to have been a catalyst for more positive outcomes in relation to IPs' rights at the national, regional and international levels,³¹⁰ the

³⁰⁶ See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

³⁰⁷ RK Gardiner, *International Law* (Pearson Education Limited, 2003) at 104-105.

³⁰⁸ T Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law,' (2011) 10 New York University Journal of International Human Rights 54 at 54-55.

³⁰⁹ A Xanthaki, (n 76) above at 35-36. The emphasis is added. See also, K Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 European Journal of International Law 141 at 163.

³¹⁰ A Xanthaki, (n 76) above at 35-36.

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view by some scholars that some categories of IPs' rights, including land rights, already have developed into CIL appear to be too hasty. Indeed, the text of UNDRIP anticipates that the circumstances of IPs and their rights in various States vary around the world.³¹¹ The varying circumstances of IPs around the world make it very difficult for State practice to be uniform. Therefore, to argue that IPs' rights to land as provided under UNDRIP have crystallised into CIL appears erroneous as this overlooks the differing practices regarding IPs' rights to land by various States in the Americas, Australia and Africa.

The position of the International Law Association on the formation of CIL is that UNGA resolutions may constitute or create CIL,³¹² subject to the *proviso* that such resolutions 'have been accepted unanimously or almost unanimously and that there is a clear intention by the States that support it to lay down a rule of international law.'³¹³ However, in the case of UNDRIP initially States such as the US, Canada, Australia and New Zealand that have some IPs communities voted against its adoption. In addition, statements and comments by some of the States who voted in favour of it made it expressly clear that they had no intention to lay down any rule of CIL.³¹⁴ Even the preamble to UNDRIP states that it '[s]olemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples **as a standard of achievement to be pursued** in a spirit of partnership and respect'.³¹⁵ Since UNDRIP was not adopted by a unanimous vote at the

³¹¹ Para 23 preamble to UNDRIP states that: 'Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularise and various historical and cultural backgrounds should be taken into consideration.'

³¹² See International Law Association (ILA), (2000) *Statement of Principles Applicable to the Formation of Customary International Law*, available at: <http://legal.un.org/ilc/reports/2011/english/annex.pdf>, accessed 23 September 2016.

³¹³ Ibid.

³¹⁴ A Xanthaki, (n 76) above at 28.

³¹⁵ See the last paragraph to UNDRIP. The emphasis is added.

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UNGA, there is strength in the argument that it may be erroneous to view UNDRIP or substantial portions of its provision as CIL.³¹⁶

In a futuristic sense however, there is the possibility that UNDRIP and its provisions may contribute to the formation of CIL on IPs' rights at regional levels as it can be used as evidence to establish the existence of rules or the development of *opinio juris*.³¹⁷ Although a few countries voted against it, thereby limiting its contribution in this respect, the ICJ has held that the limited legal weight of UNGA resolutions would normally be a result of opposition from a substantial number of States whose interests are affected specially.³¹⁸ While considering the issue of whether a rule contained in a Convention can be considered to have become a CIL, the ICJ ruled that representative and widespread participation in a Convention would be sufficient provided such participation 'includes that of States whose interests are specially affected.'³¹⁹

Although UNDRIP is not a convention or treaty, it is argued that its provision can be used as evidence of *opinio juris* at a regional level. Although four countries casted contrary votes,³²⁰ during the adoption of UNDRIP, they do not constitute a majority of States specially affected by UNDRIP most of whom voted in favour of it.³²¹ The contrary votes do not represent the views of a substantial portion of the international community and those votes may not of themselves prevent the

³¹⁶ A Xanthaki, (n 76) above at 10.

³¹⁷ BJ Richardson, S Imai and K McNeil, (2009) above at 174; M Barelli, (2009) above at 967-968 and MJ Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2008) University of South Wales Australia (UNSW) Law Research Paper. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392569, accessed 07 October, 2016. See *Legality of the Threat or Use of Nuclear Weapons* (supra).

³¹⁸ *North Sea Continental Shelf*, Judgement, ICJ Reports [1969] at 3.

³¹⁹ *Ibid*, at para 73.

³²⁰ USA, Canada, New Zealand and Australia.

³²¹ UNDRIP was adopted by a vote of 143 in favour.

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emergence of such *opinio juris* on the rights of IPs at a regional level. Moreover, the effect of the votes by those countries that initially voted against it, has now been wittled down as a result of developments from the USA, Canada and Australia that suggest their acceptance of it.³²²

Compared with ILO 107 and 169 (hard-laws), UNDRIP appears to be able to make a much broader impact among States as an UNGA resolution. It is not legally binding and falls within the category of soft-law.³²³ However, as demonstrated in paragraphs (b)-(c) below the legal significance of UNDRIP cannot be dismissed on the basis that it is soft-law *simpliciter*. Indeed, it has been vehemently argued that 'a soft law document is to be preferred to no document at all, and, similarly, a soft law document represents a better outcome than a treaty whose value is substantially impaired by a poor number of ratifications, or by rather ambiguous or diluted provisions.'³²⁴ Instead, its legal weight must be ascertained by taking into account of the fact that contemporary international law-making and standards emerges as a result of interactions between different forms of law, irrespective of their legal nature.³²⁵

³²² M Barelli, (n 200) above at 968. On recent development in Canada, Australia and the USA see further analyses below.

³²³ On the nature of 'soft-law' in international law, see A Boyle, 'Soft Law in International Law-Making' in M Evans (ed), *International Law* (2nd edn, 2006) at 141-158; A Di Robilant, 'Genealogies of Soft Law' (2006) *The American Journal of Comparative Law* 499; and CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International & Comparative Law Quarterly* 850 at 850-866. For a critique of 'soft-law' in international, see J Klabbers, 'The Undesirability of Soft Law' (1998) 67 *Nordic Journal of International Law* 381.

³²⁴ M Barelli, (n 200) above at 964. See also, CM Chinkin, (n 323) above at 861.

³²⁵ M Barelli, (n 200) above at 959. See also, A Boyle and CM Chinkin, *The Making of International Law* (Oxford University Press, 2007); A Hurrell, 'International Law and the Changing Constitution of International Society', *The Role of Law in International Politics* (Oxford University Press, 2000) at 327 - 347; and CM Chinkin, 'Normative Development in the International Legal System' in D Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000) at 21-42.

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b. UNDRIP and International Human Rights Law

Another way to understand the legal significance of UNDRIP is to consider the nature of its relationship with hard international human rights instruments discussed sub-sections 7.1.2-7.1.6 above and section 7.2 below. Although, the nature of the rights of IPs under UNDRIP discussed above are commonly referred to as *sui generis* (special rights), these rights are not distinct rights in the sense of being compartmentally different 'from the fundamental human rights that are deemed to be of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples.'³²⁶

It follows logically, that the rights of IPs including land rights under UNDRIP certainly sets standards that must be respected by States within their national legal systems.³²⁷ Alan Boyle argues that UNGA declarations represent 'at least an element of good faith commitment, evidencing in some cases a desire to influence state practice or expressing some measure of law-making intention and progressive development'.³²⁸ This is an argument that is particularly relevant in the area of international human rights law, where declarations of the UNGA have proved to be more effective instruments than hard law.³²⁹ In this respect, it has been argued that the UNDRIP 'is substantially informed by international law [and can be] perceived as agreed interpretation of the UN human rights treaties concerning indigenous rights.'³³⁰

³²⁶ SJ Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9. 11 August 2008, at para 40.

³²⁷ *Ibid*, at 960.

³²⁸ A Boyle, 'Soft Law in International Law-Making' in M Evans (ed), *International Law* (2nd edn, 2006) at 141 and 143.

³²⁹ For example, the UNDHR 1948 is now incorporated into the constitutions of many States in the world as hard law including regional human rights instruments.

³³⁰ A Xanthaki, (n 200) above at 36-37.

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To buttress Xanthaki's claim above, Boyle argues that the 'interaction with related treaties may transform [declarations] legal status into something more'.³³¹ However, others argue that UNGA resolutions have no legal effects.³³² Nevertheless, UNDRIP's effect and contribution to the development of the international law on IPs' rights is demonstrated by its usage by international, regional and national bodies as a legal source and authority on the rights of IPs, as since its adoption, many bodies have established that UNDRIP is an authority of legal standards on IPs' rights.³³³ In addition to the national and international case law referred to above, the United Nations Permanent Forum on Indigenous Issues (UNPFII) uses UNDRIP as a guide to its work on IPs.³³⁴ Likewise, the UN Development Group, which is composed of various UN programs, bodies and agencies working on development, has accepted the UNDRIP as its main framework for the implementation of its *Guidelines on Indigenous Peoples' Issues*.³³⁵

³³¹ A Boyle, (n 328) above at 148. For more analyses on the interaction between soft-law and hard-law in international law see, A Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' in V Gowlland-Debbas (ed), *Multilateral Treaty-Making* (Springer, 2000) at 25-40; G Shaffer and MA Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 *Minnesota Law Review* 706; and KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421.

³³² See J Castaneda, *Legal Effects of United Nations Resolutions* (Columbia University Press, 1969) and D Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations' (1955) 32 *British Year Book of International Law* 97.

³³³ See section 7.3 below on UNDRIP's application and usage by the African Commission on Human and Peoples Rights. See also, Chapter Nine below where its application by the national courts of Kenya is discussed in more details.

³³⁴ See United Nations Permanent Forum on Indigenous Issues (UNPFII), *Indigenous Peoples: Development with Culture and Identity: Articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples – Report of the International Expert Groups Meeting*, adopted at the UNPFII Ninth session in New York on 19-30 April 2010. E/C.19/2010/14. 5 February 2010.

³³⁵ UN Development Group, *Guidelines on Indigenous Peoples' Issues* (1 February 2008). Available at: www.ohchr.org/EN/Issues/IPeoples/Pages/UNDGGuidelines.aspx. Accessed 23 September, 2016.

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The legal weight attached to the rights of IPs under UNDRIP therefore lies in the fact that it takes into account previous and recent normative developments in the general body of international human rights law with particular applications to IPs, which have occurred at international, regional and national levels.³³⁶ It is important to note that as quoted earlier in the context of the relationship between individual and collective rights, UNDRIP recognises and affirms that IPs are entitled 'to **all human rights recognized in international law**, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as people.'³³⁷

It then merges and crystallises such normative developments and concepts with long established principles and norms of general international human rights law to create elaborate international legal standards on the rights of IPs.³³⁸ For example, Article 1 provides that IPs are entitled to 'all human rights and fundamental freedoms **as recognized in the Charter of the United Nations, the Universal declaration of Human Rights and international human rights law**.'³³⁹

The land rights of IPs provided under Articles 25 and 26 of UNDRIP already exist under similar categories of norms articulated under ILO 169.³⁴⁰ Because of such effective synthesis and synchronisation of international, regional and national

³³⁶ M Barelli, (n 200) above at 962. See also, W van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104 *American Journal of International Law* 29.

³³⁷ Para 22. The emphasis is added.

³³⁸ M Barelli, (n 200) above at 962. See also, W Van Genugten and C Perez-Bustillo, 'The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional and National Dimensions' (2004) 11 *International Journal on Minority and Group Rights* 379.

³³⁹ The emphasis is added.

³⁴⁰ For example, Arts 14 and 15 of ILO 169 makes provisions for land rights of IPs which are similar to those provided under Arts 24 and 25 of UNDRIP. See below for similar provisions under the African Charter.

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human rights law, UNDRIP establishes 'far-reaching, comprehensive and innovative categories of human rights principles which are heavily grounded on established international human rights laws.'³⁴¹

The above argument is applicable to the land rights of IPs articulated under UNDRIP. Land rights of IPs under UNDRIP ought to be interpreted and understood in accordance with the broader body of international human rights law as required by various preambular paragraphs and substantive provisions of UNDRIP which make references to the UN Charter, ICCPR, ICESCR, the *Vienna Declaration and Programme of Action* and the UDHR.³⁴² Therefore, it is logical to argue that since the UNDRIP incorporates and make references to the rights and principles already existing and emerging in the general body of international human rights law such as land rights, freedom from discrimination and cultural rights, this suggests that it has strong legal significance and its provisions must be complied with by Member States of the UN such as Nigeria.

c. UNDRIP as Incorporating General Principles of International Law

Also, connected to the above arguments about the relationship between UNDRIP and other international human rights instruments, it is the argument in this thesis that a less contentious but more defensible approach in relation to the legal status of UNDRIP is that its provisions can be understood within the context of laying down general norms or principles of international law (GPIL) which can influence the decisions of courts.

GPIL are recognised as sources of law at national and international levels.³⁴³ They have been used in the resolution of disputes between various States by

³⁴¹ EIA Daes, 'Dilemmas posed by the UN Draft Declaration on the Rights of Indigenous Peoples' (1994) 63 *Nordic Journal of International Law* 205 at 211.

³⁴² See for example, paras 1 and 16 of the preamble, and Arts 1 and 46 of UNDRIP.

³⁴³ L Oppenheim, *International Law: A Treatise*, vol 1 (Lauterpacht, 1955) at 29-30.

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international courts and tribunals.³⁴⁴ GPIL encompasses two main components: 'general principles' and recognition by 'civilized nations'. In terms of the latter, it appears that in the era of the UN all Member States are 'civilized' in the context of the UN Charter. However, there is more uncertainty regarding 'general principles'. Some have contended that GPIL are both 'expressions of national legal systems'³⁴⁵ and 'expressions of other unperfected sources of international law in the statutes of the ICJ'.³⁴⁶

Boyle and Chinkin have rightly argued that GPIL do not need to emanate exclusively from treaties, binding instruments or from national law.³⁴⁷ Rather, it is the recognition of such general principles by States that confer them legitimacy. In Chapter Nine, the way African States incorporate GPIL into their domestic legal systems will be examined in further detail.³⁴⁸ When such sources of GPIL are 'perfected' as treaties, conventions GPIL and decisions of international courts and tribunals they create binding legal obligations upon States.³⁴⁹ However, where they have not been 'perfected' as CIL, treaties or by the decisions of courts their combined cumulative effects with other legal instruments 'may possibly be considered to be expressions of a given principle'.³⁵⁰ It has been argued that UNGA and UN Security Council (UNSC) resolutions may contain or express such principles.³⁵¹

³⁴⁴ Ibid.

³⁴⁵ MC Bassiouni, 'A Functional Approach to General Principles of International Law' (1989) 11 Michigan Journal of International Law 768 at 768.

³⁴⁶ Ibid.

³⁴⁷ A Boyle and C Chinkin, (n 325) above at 223.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ MC Bassiouni, (n 345) above at 769.

³⁵¹ See LB Sohn, 'Generally Accepted International Rules' (1986) 61 Washington Law Review 1073.

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GPIL can emerge from their existence within the domestic legal systems of States.³⁵² In line with this, it has been argued that there are common ideas of justice and law shared by all States.³⁵³ The international legal arena is then seen as a manifestation of this fact in the various customary rules and normative understandings that regulate the relation between international actors.³⁵⁴ GPIL could fill a vacuum in international treaties or CIL by being the basis of decision making in the affairs of the international community.³⁵⁵ Likewise, they could aid in the interpretation of treaties and CIL even though they are equally primary sources of international law.³⁵⁶ Bin Cheng maintains that GPIL perform three main functions, these are: being sources of legal rules, being guidelines for judiciaries in the interpretation of law and with *lacunae* in the law.³⁵⁷

The Permanent Court of International Justice (PCIJ) and International Court of Justice (ICJ) have provided guidance as to how to identify if GPIL have emerged. For a GPIL to emerge under Article 38 (1) (3) and (c) of the Statute of the ICJ they must exist as principles of law in many States but do not have to be of universal acceptance by all States and it appears no numerical criteria has been established. In *SS Lotus (France v Turkey) (Lotus case)*,³⁵⁸ the PCIJ held that

³⁵² MC Bassiouni, (n 345) above at 772.

³⁵³ R Gupta, 'Resolutions of the United Nations General Assembly as a Source of International Law' (1986) 23 *International Studies* 143.

³⁵⁴ MC Bassiouni, (n 345) above at 772.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

³⁵⁷ B Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, vol 2 (Cambridge University Press, 1994). See also, W Friedman, 'The Uses of "General Principles" in the Development of International Law' (1963) 57 *The American Journal of International Law* 279 at 287; G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1950) 27 *British Year Book of International Law* 1; HG Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community' (2011) 44 *New York University Journal of International Law & Policy* 1049; and AL Paulus, 'The International Legal System as a Constitution' (2009) *Ruling the World* 69.

³⁵⁸ *SS Lotus (France v Turkey)* [1927] PCIJ (ser A) No 10, 16 September 1927.

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Article 38 (1)(3) demands that such principles should be of universal acceptance by States by stating that GIPL 'is applied between all nations belonging to the community of states.'³⁵⁹ However, the facts of the case suggest that the principle at issue was known to be of universal application by all States. The principle in question was the territorial jurisdiction of States in criminal matters. It has been argued that based on the facts, the Court did not intend to establish a principle of universality in relation to GPIL.³⁶⁰

Indeed, the ICJ jettisoned the requirement of universality in relation to the emergence of GPIL in the *South West Sahara Cases (SW Sahara cases)*, where it noted that '[t]he recognition of a principle by civilized nations ... does not mean recognition by all civilized nations ...'.³⁶¹ Similarly, the universality test was rejected by the same Court in the *North Sea Continental Shelf Case* where it was stated that 'the evidence should be sought in the behavior of a great number of states, possibly the majority of States, in any case the great majority of the interested States.'³⁶²

The PCIJ and the ICJ usually find evidence of GPIL by looking into various areas of national laws such as public, private, administrative and constitutional law.³⁶³ For instance, in the case of *International Status of South West Africa*,³⁶⁴ the ICJ in order to ascertain the principles that underlie the Mandate of the League of

³⁵⁹ Ibid.

³⁶⁰ MC Bassiouni, (n 345) above at 788.

³⁶¹ *South West Sahara Cases (Ethiopia v South Africa; Liberia v South Africa)* [1966] ICJ 4 at 299 18 July 1966 (Judge Tanaka's dissenting opinion).

³⁶² *North Sea Continental Shelf Case (Western Germany v Denmark, Western Germany v Netherland)* [1969] ICJ 101 at 229, 20 February 1969 (dissenting opinion of Judge Lachs).

³⁶³ MC Bassiouni, (n 345) above at 79.

³⁶⁴ *International Status of South West Africa*, [1950] ICJ 146.

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Nations had to look into the national laws of England and the US.³⁶⁵ However, this does not suggest that principles of law at national levels automatically translate into GPIL.³⁶⁶ In some instances international courts look to sources such as the origins of roman law.³⁶⁷

In relation to the expression 'civilized nations' under Article 38 (1) (c) of the ICJ Statute it has been held that the expression adds nothing to the content of GPIL as it appears to be discriminatory and instead it should be interpreted 'as a whole the representation of the main forms of civilization and of the principal legal systems of the world.'³⁶⁸ In addition, the PCIJ and ICJ do identify GPIL in the context of the international legal system through examining the activities and conduct of States in the international arena which could differ from the practice in domestic legal systems. For example, in the *Asylum Case (Columbia v Peru)*,³⁶⁹ the ICJ was presented with the issue of whether a State can legally impose qualifications on an offense to grant asylum to a foreign national who has been charged with the offence of embarking on military coup in Peru. The Court relied on GPIL as espoused under the diplomatic relationship policies between the United States and Latin American States including international and regional instruments to hold that such asylum principle was recognised.³⁷⁰

³⁶⁵ Ibid, at 148-149 11 July 1950 (separate opinion of Judge Mc-Nair).

³⁶⁶ MO Hudson, 'The Permanent Court of International Justice' (1922) 35 Harvard Law Review 245.

³⁶⁷ For example, see *North Sea Continental Shelf Cases (Western Germany v Denmark, Western Germany v Netherland)* (supra).

³⁶⁸ Ibid, separate opinion of Judge Ammoun.

³⁶⁹ *Asylum Case (Columbia v Peru)* [1950] ICJ 359 at 369 3 March 1950.

³⁷⁰ Ibid at 378-379 (Judge Castilla's dissenting judgement).

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GPIL have been applied by the PCIJ and the ICJ in a chain of cases. In *Experte Change of Greek and Turkish Population (Greece v Turkey)*,³⁷¹ the Advisory Opinion of the PCIL declared that the principle that an international obligation should be incorporated in States' legislations in order to fulfil such an international obligation was a GPIL.³⁷² In *Certain German Interests in Polish Upper Silesia (Germany v Poland)*,³⁷³ it was held that the procedural rules applicable before the court included GPIL.³⁷⁴ In *The Frontier Between Iraq and Turkey*,³⁷⁵ the Advisory Opinion of the PCIJ affirmed that the principle in which no one may be a judge in their own case was acknowledged as a GPIL.³⁷⁶

In the *Lotus case*,³⁷⁷ in determining if there was a principle of international law which could prevent Turkey from prosecuting an individual the Court conducted research into the teaching of experts, judicial precedents and facts which might prove the existence of any principle of international law and it found no such principle.³⁷⁸ In *Charzow Factory (Germany v Poland)*,³⁷⁹ where the Court was to determine if Germany could claim any damages for harm caused by two companies, it was found on the basis of 'established principles by international

³⁷¹ *Experte Change of Greek and Turkish Population (Greece v Turkey)* [1925] PCIJ (ser. B) No 10, 21 February 1925.

³⁷² *Ibid*, at 20.

³⁷³ *Certain German Interests in Polish Upper Silesia (Germany v Poland)* [1925] PCIJ (ser. A) No 6, 25 August 1925.

³⁷⁴ *Ibid*, at 19.

³⁷⁵ *Article 3, paragraph 2 of the Treaty of Leusenne (The Frontier Between Iraq and Turkey)* [1925] PCIJ (ser. B) No 12, 21 November 1925.

³⁷⁶ *Ibid*, at 32.

³⁷⁷ *Supra*.

³⁷⁸ *Ibid*, at 31,

³⁷⁹ *Charzow Factory (Germany v Poland)* [1928] PCIJ (ser. A) No 17, 13 September 1928.

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practice and in particular by decisions of arbitral tribunals³⁸⁰ that a GPIL connected to reparation being made where there is a breach of an obligation existed.

In *Lighthouses (France v Greece) (Lighthouses case)*,³⁸¹ the Court held that the private law principle in which Parties to an agreement are assumed to be acting 'honestly and in good faith ... cannot be ignored in international law' and it was recognised as a GPIL.³⁸² However, it is not all instances where the PCIJ found GPIL to exist and applied to cases. For example, in *Serbian Loans (France v Serb-Croat-Slovans)*,³⁸³ the court found that the principle of impossibility of performance was not applicable to the case as a GPIL.³⁸⁴ However, in *Brazilian Loans (France v Brazil)*,³⁸⁵ the Court recognised as a GPIL the principle of judicial interpretation *contra proferendum*.

Like the PCIJ, the ICJ has used various approaches to establish the existence or otherwise of GPIL. For example, in *Nuclear Test (Australia v France)*,³⁸⁶ the ICJ referred to the international law principle of *pacta sunt servanda* which applies to the law of treaties to hold that the principle was also 'of a binding character of an international obligation assumed by unilateral declaration'³⁸⁷ as a GPIL. In the *Western Sahara* case, the Court relied on the existence of the principle of self-determination in international law by references to the UN Charter, UNGA

³⁸⁰ Ibid, at 47.

³⁸¹ *Lighthouses (France v Greece) (Lighthouses case)* [1934] PCIJ (ser. A/B) No 62, 17 March 1934.

³⁸² Ibid, at 47 (separate opinion of Judge Seferiades).

³⁸³ *Serbian Loans (France v Ser.-Croat-Slovans)* [1926] PCIJ (ser. A) Nos 20 and 21.

³⁸⁴ Ibid, at 39-40.

³⁸⁵ *Brazilian Loans (France v Brazil)* [1929] PCIJ (ser. A) Nos 20 and 21.

³⁸⁶ *Nuclear Test (Australia v France)* [1974] ICJ 253 at 268, 30 December 1974.

³⁸⁷ Ibid.

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resolutions and prior decisions of the court to hold that self-determination was a fundamental GPIL.³⁸⁸

However, in *Right of Passage Over Indian Territory (Portugal v India)*,³⁸⁹ where the issue before the Court was whether Portugal had a right of passage in the area in dispute. The Court rejected the GPIL in relation to the right of passage and opted instead for a regional CIL rule as the proper rule applicable in the case in dispute.³⁹⁰ While it has been argued that Article 38 (1) (c) of the ICJ Statute in relation to GPIL appears to give judicial discretion to judges in the development of international law,³⁹¹ the approaches of courts in examining whether a norm has attained that status has been categorised into two main approaches to wit: the 'categoricist' and 'comparativist' approaches.³⁹² The comparativist approach is said to guide in the conduct of comparative law research for the determination of GPIL.³⁹³ Indeed, while an investigation into the domestic laws of various nations will inevitably involve comparative research in the search of such principles of law as practiced by various States, this is not the same as the application of the laws practiced by other States. Strictly following this approach comes with the risk that it could result in the imposition of the laws recognised by majority States on a minority of States who may not recognise such laws.³⁹⁴ It appears the ICJ has been good at avoiding this risk as it held in *SW Africa cases*³⁹⁵ that Article 38 of

³⁸⁸ Supra at 30-35.

³⁸⁹ *Right of Passage Over Indian Territory (Portugal v India)* [1960] ICJ 43, 12 April 1960.

³⁹⁰ Ibid.

³⁹¹ CA Ford, 'Judicial Discretion in International Jurisprudence: Article 38 (1) (c) and General Principles of Law' (1994) 5 Duke Journal of Comparative & International Law 35 at 65.

³⁹² Ibid, at 65-66.

³⁹³ See W Friedmann, (n 357) above at 284-285 and CA Ford, (n 391) above at 66.

³⁹⁴ CA Ford, (n 391) above at 70.

³⁹⁵ Supra.

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the ICJ in relation to GPIL must be restricted to 'the general principles of law' recognised by States and not all laws recognised by States.

The 'categoricist' approach used in identifying GPIL implies that a comparative approach is not necessary, rather they are inherent in the notion of law and legal principles which could be found in general propositions of law in domestic and international law.³⁹⁶ It has been argued that while the comparative approach encompasses the onerous task of ascertaining the practice and acceptance of certain principles of law in national and international law, the categoricist approach gives to the Court the discretion to determine GPIL by adopting whatever approach that seems necessary to identify such.³⁹⁷ Ford argues that a hybrid approach that synthesises the comparativist and categorisation technique would be more effective in the determination of whether a GPIL law has emerged.³⁹⁸

Land rights of IPs as protected under UNDRIP illustrates the creation and elaboration of GPIL with a synthesis of hard and soft international law. When the provisions of UNDRIP and the general body of international human rights law are taken together with regional human rights instruments as examined above, the conclusion suggests that a GPIL in which land rights of IPs should be protected has developed.³⁹⁹ At the international level, evidence that UNDRIP's provisions in relation to IPs' rights are GPIL is supported by the works of the HRC, CESCR, and CERD.

For example, in its Concluding Observations on the fourth, fifth and sixth periodic reports on the USA whilst acknowledging that the USA voted against the adoption

³⁹⁶ CA Ford, (n 391) above at 73-74. See also, B Cheng, (n 357) above at 24.

³⁹⁷ CA Ford, (n 391) above at 73-74.

³⁹⁸ *Ibid*, at 75-76.

³⁹⁹ M Barelli, (n 200) above at 977.

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of the UNDRIP, the CERD still recommended that it must ‘... be nevertheless used as a guide to interpret the State Party’s obligations under ICERD relating to indigenous peoples.’⁴⁰⁰ Similar attitudes have been adopted by CERD in relation to the following IPs’ rights: self-identification and recognition in Denmark⁴⁰¹ and France;⁴⁰² land rights in Costa-Rica⁴⁰³ and Guatemala;⁴⁰⁴ and free, prior and informed consent in Norway.⁴⁰⁵

The argument that land rights of IPs are GPIL has been supported by developments at some national levels. For example, the Supreme Court of Belize has held that the protection of land rights of IPs is now a GPIL.⁴⁰⁶ Indeed, the Bolivian State has adopted UNDRIP *verbatim* as part of its State legislation,⁴⁰⁷ while Ecuador and Nepal have used it as a reference point in the process of revising their constitutions.⁴⁰⁸ Even those States that voted against UNDRIP now

⁴⁰⁰ Committed on the Elimination of Racial Discrimination (CERD), *Concluding Observations of the Committee on the Elimination of Racial Discrimination United States of America*, UN Doc. CERD/C/USA/CO/6 at 29, 8 May 2008.

⁴⁰¹ CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination Denmark*, UN Doc., CERD /C/DNK/CO/20–21. 20 September 2010.

⁴⁰² CERD, *Concluding Observations on the Combined Twentieth and Twenty-First Periodic Reports of France*, UN Doc. CERD/C/FRA/CO/20–21. 10 June 2015.

⁴⁰³ CERD, *Concluding Observations on the Combined Nineteenth to Twenty-Second Periodic Reports of Costa Rica*, UN Doc. CERD /C/CRI/CO/19–22. 25 September 2015.

⁴⁰⁴ CERD, *Concluding Observations on the Combined Fourteenth and Fifteenth Periodic Reports of Guatemala*, UN Doc. CERD /C/GTM/CO/14 – 15. 12 June 2015.

⁴⁰⁵ CERD, *Concluding Observations on the Combined Twenty-First and Twenty-Second Reports of Norway*, UN Doc. CERD /C/NOR/CO/21-22. 17 October 2016.

⁴⁰⁶ In *Manuel Coy et al v The Attorney General of Belize et al*, Supreme Court of Belize, Claims No 171 and 172 (10 October 2007), the Belize Supreme Court held with regards to land rights of some Mayan peoples, that once a UNGA resolution incorporates principles of general international law, States cannot disregard them. It also found that UNDRIP incorporates general principles in relation to the land rights of IPs that must to be taken into account. See para 132 of the judgement as cited above.

⁴⁰⁷ See *Bolivian Rights of Indigenous Peoples Law No 3760* 2007.

⁴⁰⁸ SJ Anaya, ‘Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous people’, UN Doc A/HRC/9/9 11 August 2008 at para 54.

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appear to have reversed their decision on it. For example, Australia has now formally endorsed and supports UNDRIP,⁴⁰⁹ and in an earlier case the Court of Australia affirmed the native title of IPs.⁴¹⁰ Canada's Parliament has passed a motion demanding that the Government should implement the standards set out under UNDRIP.⁴¹¹ In the Kenyan case of *Joseph Letuya and 21 Ors v Attorney General and Ors*,⁴¹² the Kenya Court relied on the provisions of UNDRIP to recognise and uphold the land rights of IPs. In the more recent *African Commission on Human and Peoples' Rights v The Republic of Kenya (Ogiek case)*,⁴¹³ the African Court on Human and Peoples's Rights (African Court) affirmed that land rights of IPs are protected under the African Charter (see section 7.3 below).

The logical conclusion from the analysis above is that IPs' rights to land and natural resources have emerged as GPIL. Such emergence does not require the acceptance of every State in the world to be legally binding.⁴¹⁴ It is argued that the views that land rights of IPs have attained the status of GPIL are strengthened by State practice as demonstrated above. Indeed, Article 38 of the UNDRIP

⁴⁰⁹ See a 2009 Media Release entitled 'United We Stand – Support for United Nations Indigenous Rights Declaration: A Watershed Moment for Australia', 3 April 2009 available here: www.humanrights.gov.au/news/media-releases/2009-media-release-united-we-stand-support-united-nations-indigenous-rights, accessed 07 October 2016.

⁴¹⁰ In *Mabo v Queensland (No2)* [1992] 175 CLR 1. See also *The Wik's Peoples v The State of Queensland* [1996] 134 ALR 637, where it was held that pastoral leases cannot extinguish native title.

⁴¹¹ See 'UN Experts Welcome Canada's Backing for Indigenous Rights Declaration', 18 April 2008 available at: www.un.org/apps/news/story.asp?NewsID=26376#.V_fORfWcGM8, accessed 07 October 2016.

⁴¹² *Joseph Letuya and 21 Ors v Attorney General and Ors* [2014] eKLR 1.

⁴¹³ *African Commission on Human and Peoples' Rights v The Republic of Kenya*. Application No., 006/2012. This case emanated from the African Commission but was referred to the African Court. See, <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples'%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf>, accessed 31 May 2017.

⁴¹⁴ Malanczuk P, *Akehurst's Modern Introduction to International Law* (Routledge, 2002) at 45.

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demands that 'States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.' When a rule contained in UNDRIP has been recognised by States as a GPIL, all States are bound by it and it does not matter whether a State not wanting to be bound claims that it is not a Party to that GPIL.⁴¹⁵ Although Nigeria abstained from voting during its adoption, the provisions of UNDRIP are binding on Nigeria as a Member State of the UN which adopted it and as a GPIL. GPIL are binding even if a State disagrees with it or refrains from expressing its assent or opposition to it.⁴¹⁶ Therefore, a State like Nigeria is bound by the emergent GPIL requiring States to respect and protect land rights of IPs and is obligated in accordance with Article 38 of UNDRIP to adopt legislative measures to bring its provisions into effect in Nigeria by amending the offending sections of the Nigerian Constitution and FCT Act already highlighted above.⁴¹⁷

In the context of reconciling the seeming contradiction between solving a problem with origins in colonialism such as the case study in this thesis through international law which is characterised with Western ideological frameworks, it is argued that such contradiction is a positive development. It is argued that if international law is can adapt to the peculiar circumstances of African societies, then there is nothing wrong with it addressing problems that may have been exacerbated by colonialism in Africa.

⁴¹⁵ For more detailed analyses of UNDRIP, see S Errico, 'The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview' (2007) *Human Rights Law Review* at 1; J Gilbert, 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 *International Journal on Minority and Group Rights* 207; and S Allen and A Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Bloomsbury Publishing, 2011).

⁴¹⁶ JI Charney, 'Universal International Law' (1993) 87 *The American Journal of International Law* 529.

⁴¹⁷ KS Ebeku, 'Oil and the Niger Delta People in International Law-Resource Rights, Environmental and Equity Issues' (2006) 4 *Oil, Gas & Energy Law Journal* at 120.

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Indeed, it was in an attempt to reconcile the above contradictions in international human rights law that Africa adopted the African Charter as a document that aims to articulate international human rights norms already existing in the international arena in the peculiar context of Africa that takes the special circumstances and values of the continent into account. Therefore, such contradictions have been effectively resolved by the adoption of the African Charter. Since the case study is located in Africa, and having examined the legal position in relation to the land rights of IPs under international law and the implications on the case study of Abuja, it is important to examine the African regional human rights regime to further demonstrate that land rights of IPs have been recognised as principles of African regional international law.

7.3. The African Charter and Land Rights of IPs

All the analyses above relate to the position of the law at the general level of international law. The main objective of this section is to answer the research question: Are the land rights of IPs protected under the African Charter? Indeed, as the African Charter has been celebrated as an international human rights instrument made by Africans for Africans, it is important to examine the relevance of its provisions to the thesis and case study of Abuja.⁴¹⁸ The argument that land rights of IPs now constitute GPIL is buttressed by the provisions of the African Charter and the jurisprudence of the African Commission in relation to land rights of IPs as demonstrated in sub-section 7.3.1 below.

According to the *Constitutive Act of the African Union* (AU Constitutive Act),⁴¹⁹ one of the main objectives of the African Union (AU) is to encourage international

⁴¹⁸ See R Chongwe, 'African Charter on Human and Peoples' Rights' (1987) 13 Commonwealth Law Bulletin 1605; M Evans and R Murray, *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press, 2008); and R Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis,' (1981) 22 Vermont Journal of International Law 667.

⁴¹⁹ *Constitutive Act of the African Union*, adopted in 2000 at Lomé, Togo, entered into force in 2001.

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cooperation amongst African States 'taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights'⁴²⁰ as well as to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments'.⁴²¹

It appears then that the intention of the AU is to make the African Charter the main standard and framework for the promotion and protection of human rights in Africa.⁴²² At a general level, the African Charter⁴²³ has been described as one instrument that uniquely establishes and makes provision for collective rights of peoples whilst balancing such collective rights with individual rights.⁴²⁴ It has been argued that the focus on collective rights is intended to introduce an African conception of human rights into the international regime on human rights.⁴²⁵

Like other regional institutions,⁴²⁶ the African Commission has also developed its own jurisprudence on the land rights of IPs as provided under UNDRIP in several

⁴²⁰ Art 3 (e) of the AU Constitutive Act.

⁴²¹ Art 3 (h).

⁴²² E Baimu, 'The African Union: Hope for Better Protection of Human Rights in Africa,' (2001) 1 African Human Rights Law Journal 299 at 311.

⁴²³ Supra.

⁴²⁴ See UO Umozurike, 'The African Charter on Human and Peoples' Rights' (1983) 77 The American Journal of International Law 902; UO Umozurike, *The African Charter on Human and Peoples' Rights*, (Martinus Nijhoff Publishers, 1997); M Evans and R Murray, *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press, 2008); R Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1981) 22 Vermont Journal of International Law 667; and CM Peter, *Human Rights in Africa: A Comparative Study of the African Human and People's Rights Charter and the New Tanzanian Bill of Rights* (Praeger Pub Text, 1990) at 54-74.

⁴²⁵ African Commission on Human and Peoples Rights (ACHPR) and International Work Group on Indigenous Affairs (IWGIA), *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (ACHPR and IWGIA, 2005) above at 72.

⁴²⁶ For the jurisprudence of the IACHR which add to the '*corpus juris*' of international human rights law in this regard see the following cases: *Mayagna (Sumo) Awas Tingi Community v Nicaragua* (supra); *Moiwa Community v Suriname* [2005] IACHR, Series C 124; *Comunidad Indigena Yakye v Paraguay* [2005] IACHR, Series C 125; *Sawhoyamaya Indigenous Community*

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ways.⁴²⁷ In its Report on IPs,⁴²⁸ the African Commission acknowledges that rights to land and natural resources are very important to the existence and survival of IPs.⁴²⁹ Such rights are protected under Articles 20 (right to existence), 21 (right to freely dispose of their wealth and natural resources), and 22 (right to economic, social and cultural development) of the African Charter. Also, Article 14 of the African Charter guarantees the right of every individual to property, and it is argued that this right is exercisable by individual members of IPs and as collectives in Africa.

Indeed, in its *Advisory Opinion*⁴³⁰ on UNDRIP, the African Commission observed that the provisions of Article 21 (1) of the African Charter were in *pari materia* with Articles 10, 11 (2), 28 (1) and 32 of UNDRIP.⁴³¹ Equally significant to the protection of land rights of IPs is the view of the African Commission to the effect that Articles 2 (right to the enjoyment of the rights in the African Charter without distinction of any kind including ethnic group) and 3 (right to equal protection of the law) are applicable to the benefit of IPs.⁴³² Accordingly, the African Commission has concluded that '[b]y not protecting individual members of

v Paraguay [2006] IACHR, Series C 146; and *Saramaka People v Suriname*, [2007] IACHR Series C 172.

⁴²⁷ See W van Genugten, 'The African Move Towards the Adoption of the 2007 Declaration on the Rights of Indigenous Peoples: The Substantive Arguments Behind the Procedures' (2010) 104 *The American Journal of International Law* at 29-65.

⁴²⁸ See ACHPR and IWGIA, (n 425) above.

⁴²⁹ *Ibid.*, at 21.

⁴³⁰ African Commission, *Advisory Opinion*, adopted at its forty first ordinary session held 16-30 May 2007 in Accra, Ghana.

⁴³¹ *Ibid.* See also, the *African Convention on the Conservation of Nature and Natural Resources*, adopted 1 July 2003. Available at: <http://lawnigeria.com/TREATIES/AFRICAN-CONVENTION-ON-THE-CONSERVATION-OF-NATURE-AND-NATURAL-RESOURCES-REVIEWED.html>, accessed 25 October 2016. It provides under Art VI (4) that '[P]arties shall develop and implement land tenure policies ... inter alia by taking into account the rights of local communities.'

⁴³² ACHPR and IWGIA, (n 425) at 77-78.

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indigenous communities against discrimination, the member states of the African Union violate Articles 2 and 3 of the African Charter.⁴³³ Also, Article 17 (2) recognises the right to cultural life in community.

In addition to the above substantive provisions of the African Charter, the African Commission is empowered to draw guidance from the general body of international human rights law like the UN Charter, the UDHR, and other instruments adopted by the UNGA and by African countries in the area of human rights.⁴³⁴ The African Commission applied and interpreted the afore-mentioned provisions of the African Charter in the case of *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria (Ogoni case)*.⁴³⁵ In that case, the African Commission held that the failure to involve the Ogoni people in the decision process in relation to the exploitation of oil and gas on their traditional lands was a violation of their right to freely dispose of their natural resources and wealth under the African Charter.⁴³⁶ It also found that the Nigerian Government was in violation of Article 14 (right to property) of the African Charter in relation to the Ogoni peoples.⁴³⁷ The African Commission emphasised that '[i]nternational law and human rights must be responsive to African circumstances. Clearly, collective rights, and economic and social rights are essential elements of human rights in Africa.'⁴³⁸

⁴³³ Ibid, at 77.

⁴³⁴ Art 60 of the African Charter.

⁴³⁵ *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria*. Application No 155/96.

⁴³⁶ Ibid, at para 58.

⁴³⁷ Ibid, at paras 60 and 62.

⁴³⁸ Ibid, at para 68. For further analyses of this case in relation to the African Charter, see JC Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria' (2005) 1 African Journal of Legal Studies 129.

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In the more recent case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya (Endorois case)*,⁴³⁹ the Endorois alleged that they were forcibly removed 'from their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts within the Rift Valley Province in Kenya, without prior consultations, and payment of adequate compensation by the Kenyan Government.'⁴⁴⁰ They claimed that such forceful evictions constituted violations of their land rights as this resulted in their displacement as an indigenous community from their ancestral lands, including disrupting their pastoral enterprise. They argued further that there were violations of the right to practise their religion and culture in contravention of Articles 14, 21 and 22 of the African Charter and international law.⁴⁴¹

Citing the *Ogoni* case⁴⁴² with approval the Complainants also argued that their collective land rights were guaranteed under the African Charter.⁴⁴³ The Respondent State claimed that following the designation of the disputed land as a game reserve, it compensated and resettled members of the Endorois community.⁴⁴⁴ The African Commission noted that '[w]hat is clear is that all attempts to define the concept of indigenous peoples recognise the linkages between peoples, their land, and culture and that such a group expresses its

⁴³⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. Application No 276/03.

⁴⁴⁰ *Ibid*, at para 2.

⁴⁴¹ *Ibid*, at paras 1 and 2.

⁴⁴² *Supra*.

⁴⁴³ *Ibid*, at para 75.

⁴⁴⁴ *Ibid*, para 143.

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desire to be identified as a people or have the consciousness that they are a people.’⁴⁴⁵

It then held that Endorois’ culture, and traditional way of life were intrinsically linked with their ancestral lands - Lake Bogoria and the surrounding area. It also found that the Endorois were unable to fully exercise their cultural and religious rights, and felt disconnected from their land and ancestors, as a result of the evictions.⁴⁴⁶ Going even further, it affirmed that ‘the alleged violations of the African Charter are those that go to the heart of indigenous rights – **the right to preserve one’s identity through identification with ancestral lands.**’⁴⁴⁷ To enable it to arrive at its findings and decision, the African Commission made references to several cases decided by the IACHR,⁴⁴⁸ and concluded that there was a violation of the land rights of the Endorois peoples⁴⁴⁹ as well as violations of their cultural rights,⁴⁵⁰ and their rights to natural resources in contravention of Article 21 of the African Charter including the right to development.⁴⁵¹

In case of the *African Commission on Human and Peoples’ Rights v The Republic of Kenya (Ogiek case)*,⁴⁵² before the African Court, the Ogieks of the Mau Forests of Kenya,⁴⁵³ claimed that they are an indigenous minority ethnic group in Kenya

⁴⁴⁵ Ibid, at para 151.

⁴⁴⁶ Ibid, at para 156.

⁴⁴⁷ Ibid, at para 162. The emphasis is added.

⁴⁴⁸ Ibid, at paras 190 and 197.

⁴⁴⁹ Ibid, at para 238.

⁴⁵⁰ Ibid, at paras 241-251.

⁴⁵¹ Ibid, at paras 268 and 298.

⁴⁵² *African Commission on Human and Peoples’ Rights v The Republic of Kenya*. Application No 006/2012. This case emanated from the African Commission but was referred to the African Court. See <http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#pending-cases>, accessed 13 December 2016.

⁴⁵³ See Chapter Five above for a more detailed discussion on the Ogiek as IPs.

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comprised of about 20,000 members, about 15,000 of whom inhabit the greater Mau Forests.⁴⁵⁴ The Applicant alleged that in October 2009, through the Kenya Forestry Service, the Kenyan Government issued a thirty days eviction notice to the Ogiek and other settlers of the Mau Forests, demanding that they move out of the forest on the grounds that the forest had been designated as a reserved water catchment zone, and was part of the Government of Kenya's land under Section 4 of the *Government Land Act*.⁴⁵⁵ The Applicant consequently alleged violations of Articles 1, 2, 4, and 17 (2) and (3), 21 and 22 of the African Charter by the Kenyan Government.⁴⁵⁶ The Respondent claimed *inter alia* that the Applicants were fully and adequately compensated and that 'communal ownership of land is recognized under Articles 61(1) and 63 of the *Constitution of Kenya*.'⁴⁵⁷ In a provisional ruling, the African Court ordered the respondents to refrain from any further restriction of the Ogieks on land transactions on the disputed area and to refrain from any further actions, pending the determination of the substantive suit.⁴⁵⁸

Giving judgment on the merits,⁴⁵⁹ and in the context of the substantive provision of the African Charter in promoting land rights of IPs, the African Court found that

⁴⁵⁴ See Case Summary, *African Commission on Human and Peoples' Rights v the Republic of Kenya* Application No 006/2012, available at: http://en.african-court.org/images/Cases/Case%20Summaries/APPLICATION_006_OF_2012_CASE_SUMMARY.pdf, at para 1, accessed 12 October 2016.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*, at para 3.

⁴⁵⁷ *Ibid.*, at para 8 (f).

⁴⁵⁸ See Order of Provisional Measures, *In the Matter of African Commission on Human and Peoples' Rights V the Republic of Kenya* Application No 006/2012, available at: http://en.african-court.org/images/Cases/Orders/006-2012-ORDER_of_Provisional_Measures-African_Union_v_Kenya.pdf, at para 25, accessed 12 October 2016.

⁴⁵⁹ See *African Commission on Human and Peoples' Rights v The Republic of Kenya*. Application No 006/2012. Available at: <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20->

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Article 14 (right to property) is applicable to safeguard the collective rights of IPs to land.⁴⁶⁰ Indeed, the Court also referred to Article 26 of UNDRIP and held that the rights enshrined therein are variable and inclusive of the rights of IPs to land as equally safeguarded under Article 14 of the African Charter.⁴⁶¹ The African Court therefore did not have trouble in holding that by evicting the Ogiek from their ancestral lands against their will, the respondent State had violated their rights to land as guaranteed by Article 14 of the African Charter and Article 26 of UNDRIP.⁴⁶² Likewise, it was held that there were violations of their rights to practice their culture contrary to Article 17 (2) and (3) of the African Charter to the extent that they were prevented from using their ancestral lands to practice their religion and culture.⁴⁶³ Other violations that the Court found are Article 21 (right to dispose of one's property) and Article 22 (right to development) of the African Charter.⁴⁶⁴

In view of the findings of the Court above, it held that the Respondent State of Kenya was also in violation of Article 1 of the Charter which provides that: 'The Member States ... parties to the Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.'⁴⁶⁵ This decision signifies that there is now a GPIL in the context of the African Charter in which rights of IPs and in the context of this thesis their rights to land should be respected and protected in

[%20African%20Commission%20on%20Human%20and%20Peoples'%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf](#), accessed 31 May 2017.

⁴⁶⁰ Ibid, at para 123.

⁴⁶¹ Ibid, at para 127.

⁴⁶² Ibid, at paras 131-146.

⁴⁶³ Ibid, at para 190.

⁴⁶⁴ Ibid, at paras 195-211.

⁴⁶⁵ Ibid, at paras 214-215.

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Africa. The decision is therefore a watershed moment in the development of African regional law on IPs and their rights in Africa.

The articulation and protections of land rights of IPs at international and regional levels raise important academic issues in relation to how the international and regional jurisprudence on the land rights of IPs have impacted on the domestic national policies, laws and practices of States in Africa.⁴⁶⁶ The impact of the African Charter on land rights of IPs at national levels will now be discussed in 7.3.1 below.

7.3.1. The African Charter and Land Rights of IPs at National Levels

In a 2015 Concluding Observation,⁴⁶⁷ the African Commission affirmed that Nigeria is a Party to the African Charter having ratified it on 22 June 1983.⁴⁶⁸ It found that Nigeria has submitted its Initial and Periodic State Reports from 1992 to 2014.⁴⁶⁹ Indeed, the African Charter is domesticated into Nigerian laws as the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*.⁴⁷⁰ However, it was also observed that Nigeria has failed to ratify seven regional and international human rights treaties,⁴⁷¹ including the *Protocol to the*

⁴⁶⁶ See S Dersso, 'The African Human Rights System and the Issue of Minorities in Africa,' (2012) 20 African Journal of International & Comparative Law 42 and CK Nkongolo Jr, 'The Justiciability of Socio-Economic Rights under the African Charter on Human and Peoples' Rights: Appraisal and Perspectives Three Decades after Its Adoption,' (2014) 22 African Journal of International & Comparative Law 492.

⁴⁶⁷ ACHPR, *Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011 – 2014)*, adopted at the fifty seventh ordinary session of the African Commission on Human and Peoples' Rights held from 4-18 November, 2015, in Banjul, The Gambia. Available at: www.achpr.org/files/sessions/57th/conc-obs/5th-2011-2014/concluding_observations_nigeria_5th_sr_eng.pdf, accessed 12 October 2016.

⁴⁶⁸ Ibid, at para 1.

⁴⁶⁹ Ibid, paras 3 and 4.

⁴⁷⁰ CAP 10 *Laws of Nigeria* 1990.

⁴⁷¹ ACHPR, *Concluding Observations* (n 467) above at paras 59 and 60.

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African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol to the African Court).⁴⁷²

The reason for the above failure according to the African Commission was 'due to **prolonged procedures for domestication of international law under its legal architecture**'⁴⁷³ and that there was failure by the Nigerian Government to include the situation of indigenous communities in Nigeria in its latest Periodic Report.⁴⁷⁴ It therefore recommended that there was a need for Nigeria to include information about the legislative and policy measures that have been adopted to enhance the protection of IPs in Nigeria in the next Periodic Report.⁴⁷⁵

The Protocol to the African Court empowers individuals and groups to institute actions before it for the enforcement of their rights under the African Charter.⁴⁷⁶ However, Nigeria has refused to make the mandatory declaration necessary⁴⁷⁷ to enable individuals from Nigeria to bring cases directly before the African Court.⁴⁷⁸ Similarly, in a 2007 Concluding Observations,⁴⁷⁹ the African Commission noted

⁴⁷² *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, adopted on 9 June 1998 in Burkina Faso and came into force on 25 January 2004, available at: <http://en.african-court.org/images/Protocol-Host%20Agrtmt/africancourt-humanrights.pdf>, accessed 17 October 2016. It merges the work of the African Commission with the African Court, thereby giving more legal weight to the advisory nature of the decisions of the African Commission.

⁴⁷³ ACHPR, *Concluding Observations* (n 467) above at para 60. The emphasis is added.

⁴⁷⁴ Ibid, at para 89. See Federal Republic of Nigeria (FRN), *Nigeria's 5th Periodic Country Report: 2011-2014 on the Implementation of the African Charter on Human and Peoples' Rights in Nigeria*, (2014), available at: www.achpr.org/files/sessions/56th/state-reports/5th-2011-2014/staterep5_nigeria_2013_eng.pdf, accessed 17 October 2016.

⁴⁷⁵ FRN (n 474) above at 136.

⁴⁷⁶ Art 2 (1).

⁴⁷⁷ By Art 34 (6) of the Protocol to the African Court (n 471) above.

⁴⁷⁸ ACHPR, *Concluding Observations* (n 467) above at para 60.

⁴⁷⁹ ACHPR, *Concluding Observations and Recommendations on the Initial Report of the Republic of Kenya*, adopted at the Forty-First Ordinary Session 16-30 May 2007, Accra, Ghana, available at: www.achpr.org/files/sessions/41st/conc-obs/1st-1992-2006/41os_kenya_cos_eng.pdf, accessed 17 October 2016.

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that although Kenya was a Party to the African Charter,⁴⁸⁰ it had not domesticated it into its national laws including the Protocol to the African Court.⁴⁸¹ It was therefore recommended that Kenya took urgent steps to domesticate the African Charter and the Protocol to the African Court.⁴⁸²

There is a link between the concept of self-determination in international law and land rights of IPs as demonstrated in section 7.4 below, where the relevance of the concept of self-determination in advancing and articulating the land rights of IPs and Abuja peoples of Nigeria in particular will now be examined. In addition to the discussions on international human rights law in sections 7.1 and 7.2 above, this will provide the reader with a comprehensive overview of international law on land rights of IPs and the relevance to the the case study of Abuja.

7.4. Self-Determination, IPs and the Land Rights of Abuja Peoples

Like the concept of IPs examined in the preceding Chapter Six, the concept of self-determination is equally relevant to protecting rights of IPs such as land

⁴⁸⁰ Ibid, at para 1.

⁴⁸¹ Ibid, at para 33.

⁴⁸² Ibid, at para 42. See also, ACHPR and IWGIA, *Report on the African Commission's Working Group on Indigenous Populations/Communities: Research and Information visit to Kenya*, (ACHPR and IWGIA, 2012), available at: www.achpr.org/files/sessions/50th/mission-reports/indigenous-2010-kenya/misrep_specmec_indig_kenya_2010_eng.pdf, accessed 17 October 2016, at paras 16–16. Where the African Commission found that there were still issues with the land rights of IPs in Kenya leading to the dispossession of the lands of the Ogieks and Endorois among others. Therefore, it was recommended that Kenya should ratify ILO 169 and adopt UNDRIP, while noting that the Kenyan Government had agreed to abide by the decision of the African Commission in the *Endorois case*. It was also recommended that Kenya should implement its new National Land Policy, compensate and pay reparations to IPs dispossessed of their lands as well as to protect their land rights and ensure that they are consulted. It also emphasised that their free, prior and informed consent must be obtained before any developmental activities on their ancestral lands are carried out. Accordingly, in a combined Periodic Report, the Kenya Government claims to have now domesticated the African Charter and the Protocol to the African Court. Kenya also claims to have taken several constitutional, legislative and policy measures to protect the land rights of its IPs. Therefore, the next Chapter will comparatively examine the legal systems of Kenya and Nigeria in context of the relationship between national and international law and in the light of recent post-colonial constitutional reforms in Kenya.

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rights. Without definition, the concept of self-determination is mentioned in the 1945 UN Charter,⁴⁸³ as the Charter sets out to achieve international cooperation in economic and social contexts based on respect of 'self-determination of peoples'.⁴⁸⁴ This reference to self-determination was again echoed in the *Declaration on the Granting of Independence to Colonial Countries and Peoples* 1960⁴⁸⁵ which provided expressly that all peoples have the right to self-determination.⁴⁸⁶ With the emergence of the UN in 1945, the right to self-determination became an important issue under international law.⁴⁸⁷ Crawford argues that the concept of self-determination has four main implications in international law to wit: Mandated Territories under the UN; States within the context of seeking independence from colonial rule; other geographical political entities within States; and other claimants.⁴⁸⁸ However, Kingsbury identifies three main dimensions to self-determination in international law that include: the emergence of new political entities; claims by political entities to be free from external interference; and claims by groups within political entities for special recognition and protection.⁴⁸⁹

This right is guaranteed for 'all peoples' under the ICCPR and ICESCR to 'freely determine their political status and freely pursue their economic, social and

⁴⁸³ Art 1. See also preamble to the UN Charter.

⁴⁸⁴ Art 55.

⁴⁸⁵ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA resolution 1514, adopted 14 December 1960.

⁴⁸⁶ *Ibid*, at para 2.

⁴⁸⁷ B Kingsbury, 'Self-Determination and "Indigenous Peoples"' (1992) Proceedings of the Annual American Society of International Law 383 and M Colchester, 'Self-Determination or Environmental Determinism for Indigenous Peoples in Tropical Forest Conservation' (2000) 14 Conservation Biology 1365.

⁴⁸⁸ JR Crawford, *The Creation of States in International Law* (Oxford University Press, 2006) at Chapter 14.

⁴⁸⁹ B Kingsbury, (n 487) above at 384.

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cultural'⁴⁹⁰ development including the right to 'freely dispose of their natural wealth and resources'.⁴⁹¹ However, this provision has been restrictively interpreted to apply to populations of people within States (and colonial territories) established by European colonial authorities.⁴⁹² This restrictive interpretation has also focused on the right to permanent sovereignty over natural resources by post-colonial States.⁴⁹³ This is as a result of the fact that international human rights law has its origins in the decolonisation process which was mainly predicated on enshrining the independence of people in areas subject to colonial domination but only so long as existing boundaries and borders are preserved.⁴⁹⁴ This had a negative impact on minorities and IPs in Africa as they have become trapped in pre-existing territorial units that were defined by European colonial States.⁴⁹⁵ However, as Kingsbury argued in 1992 this narrow interpretation appears to be giving way to a more expansive approach that may be relevant to the articulation of the rights of IPs that live within such States.⁴⁹⁶

The idea behind self-determination in the context of secession has meant that most States have been sensitive to it.⁴⁹⁷ Contemporarily, the concept of self-

⁴⁹⁰ See Art 1.

⁴⁹¹ See Art 1 (2). See also, HRC, *General Comment No. 12 Article 1 (The right to self-determination of peoples)*, 13 March 1984, HRI/GEN/1/Rev.9 (Vol. I) at para 5.

⁴⁹² B Kingsbury, (n 487) above at 387-388.

⁴⁹³ EIA Daes, 'Some Considerations on the Right of Indigenous Peoples to Self-Determination' (1993) 3 *Transnational Law & Contemporary Problems* 1 at 4

⁴⁹⁴ ME Turpel, 'Indigenous People's Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition' (1992) 25 *Cornell International Law Journal* 579 at 580.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ B Kingsbury, (n 487) above at 388.

⁴⁹⁷ RL Barsh, 'Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force' (1996) 18 *Human Rights Quarterly* 782 at 795 and CJ Iorns, 'Indigenous Peoples and Self Determination: Challenging State Sovereignty' (1992) 24 *Case Western Reserve Journal of International Law* 199 at 202-203.

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determination goes beyond the initial narrow context of political independence or of groups seceding from such States to an emphasis on the need to protect and safeguard the rights and interests of sub-State groups within States.⁴⁹⁸ In this context, it has been argued that self-determination should be conceived 'not simply in terms of end result, but in terms of process and political legitimation'⁴⁹⁹ of the rights of peoples. In the context of this thesis, it is argued that the concept of self-determination is relevant to the protection of the land rights of Abuja peoples. The realisation of their land rights is in line with the principles underlying the right to self-determination as articulated under Article 1 (2) of the ICCPR in relation to the rights of peoples to social, cultural and economic development as well as the right to freely dispose of their resources.⁵⁰⁰

It has also been argued that the rights of peoples under Article 27 of the ICCPR is connected to the right to self-determination.⁵⁰¹ In this respect two points are relevant. Firstly, self-determination is herein conceived as a continuous process in which land rights of Abuja peoples can be located. Secondly, the right of Abuja peoples to self-determination would require that they be allowed to manage, control and occupy their ancestral lands under customary law in line with their

⁴⁹⁸ See G Sacerdoti, 'New Developments in Group Consciousness and the International Protection of the Rights of Minorities' (1983) *Israel Year Book of Human Rights* 116; H Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, 2011); C Scott, 'Indigenous Self-Determination and Decolonization of the International Imagination: A Plea' (1996) 18 *Human Rights Quarterly* 814; LM Graham, 'Self-Determination for Indigenous Peoples after Kosovo: Translating Self-Determination into Practice and into Peace' (1999) 6 *ILSA Journal of International & Comparative Law* 455 at 456; and I Brownlie, 'The Rights of Peoples in Modern International Law' (1985) 9 *Bulletin of the Australian Society of Legal Philosophy* 104.

⁴⁹⁹ B Kingsbury, (n 487) above at 391. See also, SJ Ferrell, 'The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples' (2001) 14 *Thomas Law Review* 259 at 262.

⁵⁰⁰ J Castellino and J Gilbert, 'Self-Determination, Indigenous Peoples and Minorities' (2003) 3 *Macquarie Law Journal* 155.

⁵⁰¹ FL Kirgis, 'The Degrees of Self-Determination in the United Nations Era' (1994) 88 *The American Journal of International Law* 304 at 307.

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cultural rights.⁵⁰² Indeed, Daes argues that the determination of whether the right to self-determination can validly be claimed by a group in the context suggested for Abuja peoples should depend on how such groups consider themselves 'as distinct from the identities of other groups'.⁵⁰³ In Chapter Six,⁵⁰⁴ the distinctiveness of the various ethnic groups in Abuja *viz-a-viz* other ethnic groups in Nigeria and among themselves *inter se* was demonstrated. In line with this argument it has been submitted that IPs are certainly 'people' in every social and cultural ramification of the word.⁵⁰⁵ Following on from this approach to self-determination American Indians and their lawyers have continuously looked to the principle of self-determination in advancing their rights before domestic courts in America.⁵⁰⁶ Similar findings have been made in the context of IPs in Australia, Canada and New Zealand.⁵⁰⁷

⁵⁰² See A Xanthaki, *Indigenous Rights and United Nations Standards: Self-determination, Culture and Land* (Cambridge University Press, 2007) at 131-196; SJ Anaya, 'A Contemporary Definition of the International Norm of Self-Determination' (1993) 3 *Transnational Law and Contemporary Problems* 131 at 161-162; and M Colchester, 'Self-Determination or Environmental Determinism for Indigenous Peoples in Tropical Forest Conservation' (2000) 14 *Conservation Biology* 1365.

⁵⁰³ EIA Daes, (n 493) above at 5. See also, J Corntassel, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33 *Alternatives: Global, Local, Political* 105 at 109.

⁵⁰⁴ See sub-section 6.2.5.

⁵⁰⁵ EIA Daes, (n 493) above at 6.

⁵⁰⁶ CG Berkey, 'International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples' (1992) 5 *Harvard Human Rights Journal* 65 at 73. For critical analyses about how law has been used discriminatively against the rights of IPs to self-determination in America see, RA Williams Jr, 'Columbus's Legacy: Law as an Instrument of Racial Discrimination against Indigenous Peoples' Rights of Self-Determination' (1991) 8 *Arizona Journal of International & Comparative Law* 51.

⁵⁰⁷ See SE Cornell, *Indigenous Peoples, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States* (Native Nations Institute for Leadership, Management and Policy, 2006). See also, JE Brady, 'The Huaorani Tribe of Ecuador: A Study in Self-Determination for Indigenous Peoples' (1997) 10 *Harvard Human Rights Journal* 291; and W Sanders, *Towards an Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy: Discussion Paper No 230* (Centre for Aboriginal Economic Policy Research, 2002). For the Guam and Hawaii contexts, see JM Van Dyke, CD Amore-Siah and GW Berkley-Coats, 'Self-Determination for Nonself-governing Peoples and for

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The emergence of self-determination as a distinct right for IPs is crystallised by the provision for such right under UNDRIP,⁵⁰⁸ leading to the argument that this is a new dawn in the evolution of the concept under international law.⁵⁰⁹ In so doing, UNDRIP takes into account the importance of recognising the culture and identity of IPs in the law, policies and practices of States.⁵¹⁰ Indeed, Thornberry argues that self-determination and the rights of groups such as IPs 'are two sides of the same coin.'⁵¹¹ In the context of addressing historical injustices against IPs, Corntassel and Holder conclude that the recognition of their rights to self-determination should be the first step by States in addressing such injustices.⁵¹² In the context of Nigeria, the concept of self-determination has been used in articulating the rights of the Ogonis.⁵¹³ However, there are others who are not so optimistic of the concept of self-determination in the context of the rights of IPs

Indigenous Peoples: The Cases of Guam and Hawai'i' (1996) 18 University of Hawaii Law Review 623.

⁵⁰⁸ See Arts 3 and 4.

⁵⁰⁹ DB Suagee, 'Self-Determination for Indigenous Peoples at the Dawn of the Solar Age' (1991) 25 University of Michigan Journal of Law Reform 671 at 691-694. For additional reading on this, see generally GT Morris, 'In Support of the Right of Self-Determination for Indigenous Peoples under International Law' (1986) 29 German Year Book of International Law 277; MC Lam, 'Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination' (1992) 25 Cornell International Law Journal 603; and J Corntassel, 'Re-envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-Determination' (2012) 1 Decolonization: Indigeneity, Education & Society 86.

⁵¹⁰ CE Foster, 'Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples' (2001) 12 European Journal of International Law 141.

⁵¹¹ P Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 International & Comparative Law Quarterly 867 at 867.

⁵¹² J Corntassel and C Holder, 'Who's Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru' (2008) 9 Human Rights Review 465.

⁵¹³ See EE Osaghae, 'The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State' (1995) 94 African Affairs 325; CE Welch, 'The Ogoni and Self-Determination: Increasing Violence in Nigeria' (1995) 33 The Journal of Modern African Studies 635; CR Ezetah, 'International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma' (1996) 19 Loy Los Angeles International & Comparative Law Journal 811; and EE Osaghae, 'From Accommodation to Self-Determination: Minority Nationalism and the Restructuring of the Nigerian State' (2001) 7 Nationalism and Ethnic Politics 1.

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choosing to argue that the concept has lost its relevance and is fast disappearing as a relevant principle of international law.⁵¹⁴

Conclusion

As highlighted in sections 7.1, 7.2 and 7.3 above, the provisions of section 297 (2) of the Nigerian Constitution, 1999 and section 1 (3) of the *FCT Act* constitute *de jure* violations of Nigeria's human rights obligations under the provisions of the relevant international human rights instrument in relation to the IPs of Abuja. And on the authority of Article 27 of the *Vienna Convention on the Law of Treaties*,⁵¹⁵ Nigeria cannot rely on the provisions of its domestic laws to violate its international human rights treaty obligations. One possible solution to the problem is to amend the laws to accommodate the customary land rights of Abuja peoples. A second solution is for the Federal Government to resettle them and pay adequate compensation to them in compliance with international human rights law. A third possibility is that whenever this issue comes up for determination before the Courts of law in Nigeria, the Nigerian judiciary will be liberal minded enough to interpret the relevant provisions of the Nigerian Constitution and the FCT Act in line with Nigeria's human rights obligation under the relevant international instruments examined in this Chapter. It will be demonstrated in Chapter Nine that recent trends in the Commonwealth suggest that domestic courts can look to international law to interpret the provisions of their national constitutions.

However, at national levels land rights of IPs are often claimed and articulated based on customary laws, which have their foundations in the cultures and identities of IPs which most of the international and regional instruments examined above aim to preserve as a matter of cultural rights. For example, in

⁵¹⁴ See TH Primeau and J Corntassel, 'Indigenous' Sovereignty" and International Law: Revised Strategies for Pursuing" Self-Determination" (1995) 17 Human Rights Quarterly 343 and E Kowal, 'The Politics of the Gap: Indigenous Australians, Liberal Multiculturalism, and the End of the Self-Determination Era' (2008) 110 American Anthropologist 338.

⁵¹⁵ *Supra*.

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principle, Article 14 (1) ILO 169 makes provision for a protective approach based on the manner of land use, ownership and occupation in accordance with traditional or customary forms of use, ownership and occupation. Indeed, Article 26 (2) of UNDRIP appears to follow a similar approach by providing for the 'right to own, use, develop and control the lands, territories and resources that indigenous peoples possess by reason of traditional ownership or other traditional occupation or use'.⁵¹⁶

However, neither ILO 169 nor UNDRIP prioritises IPs' customary or traditional laws over national law, or regional and international law over national law in articulating IPs' land rights domestically at national levels.⁵¹⁷ While it appears that the provisions of ILO 169 require that the national laws of a State should be the instrument through which these rights should be protected,⁵¹⁸ it 'does not dissociate international standards (or indeed indigenous customs and laws) from national practice.'⁵¹⁹ Also while Article 26 (3) of UNDRIP recognises that 'customs, traditions and land tenure systems' should be the basis of IPs' land rights, such protection of IPs' land rights as provided under Article 26 (2) of UNDRIP seems to rely upon State law rather than international law.⁵²⁰ Article 21 of the African Charter which provides for the right to freely dispose of wealth and resources is completely silent on customary law and its relevance to the land rights of IPs at national levels. The only clear direction that enjoins States to give

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

⁵¹⁸ L Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No 169 of 1989, ' (1990) 15 Oklahoma City University Law Review 677 at 696 and G Pentassuglia, (n 2) above at 168.

⁵¹⁹ G Pentassuglia, (n 2) above at 168.

⁵²⁰ Ibid.

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priority to customary laws of IPs are the guidelines issued by the Food and Agriculture Organisation (FAO).⁵²¹

All the international instruments examined in this Chapter, the activities of the human rights treaty Monitoring Bodies in relation to State compliance with their human rights treaty obligations as well as the decisions of the African Commission place a lot of emphasis on implementation of States' human rights obligations in their domestic laws. This raises interesting academic issues about the general relationship between national and international law, but more specifically this raises interesting questions about the simultaneous coexistence and inter-face between international human rights law and national law. Therefore, in the following Chapter Eight there will be analyses of the relationship between international law and the Nigerian legal system and in Chapter Nine, the relationship between international and national law in post-colonial Nigeria and Kenya will be comparatively examined.

⁵²¹ See Food and Agriculture Organization (FAO) and Committee on World Food Security(CFS) *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (FAO & CFS, 2012) at para 8.2, where it is recommended that: 'Where States own or control land ... the legitimate tenure rights of individuals and communities, including where applicable those with customary tenure systems, should be recognized, respected and protected, consistent with existing obligations under national and international law, and with due regard to ... regional and international instruments. To this end, categories of legitimate tenure rights should be clearly defined and publicized, through a transparent process, and in accordance with national law.' See also, RS Knight, *Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Law making and Implementation – Legislative Study 105* (FAO, 2010) at 243-286.

CHAPTER EIGHT: INTERNATIONAL AND NATIONAL LAW IN POST-COLONIAL AFRICA: THE CASE OF NIGERIA

Introduction

In Chapter Six, it was argued and demonstrated that Abuja peoples are indigenous peoples (IPs) as well as minorities under international law. In the preceding Chapter Seven, it was demonstrated that as IPs under international law, Abuja peoples' land rights are protected as such under international law and that the provisions of section 1 (3) of the Nigerian *Federal Capital Territory Act, 1976* (FCT Act) and section 297 (2) of the *Constitution of the Federal Republic of Nigeria, 1999* (Nigerian Constitution) constitute *de jure* violations of international human rights law in relation to the land rights of Abuja peoples. The aim of this Chapter is to examine the interaction of international and national law in Nigeria. This is because the case study of Abuja demonstrates the need for a viable relationship between international and national law in Nigeria for Nigeria to be following its international human rights law obligations as a Member of the United Nations (UN), the Commonwealth and the African Union (AU).

As demonstrated in Chapters Six and Seven, international law has various sources which include: treaties, customary rules of international law and general principles of international law recognised by civilised States.¹ Other sources include 'the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'² However, the enforcement and application of international law within the domestic jurisdictions of States can be fraught with difficulties given the fact that States are sovereign and may tend to put their self-interest ahead of those of the international

¹ See Art 38 (1) (a), (b) and (c) *Statute of the International Court of Justice*.

² *Ibid*, Art 38 (1) (d).

community.³ In the early development of international law, treaties operated mainly at the international level and did not require States to give their provisions effect domestically.⁴ However, contemporary international law protects and promotes human rights by demanding that States should respect and protect their international human rights obligations within their domestic jurisdictions.⁵ As the manner in which States implement their international obligations domestically is not often specified in most if not all international instruments, how States implement the provisions of treaties ratified by them is for them to define.⁶ Inevitably, the approaches adopted by different States as to how treaties may be enforced and applied varies from one State to another.⁷ There is now a comprehensive body of literature on the subject about the role of domestic courts in the enforcement of international law.⁸

³ EA Oji, 'Application of Customary International Law in Nigerian Courts' (2011) 1 Nigerian Institute of Advanced Legal Studies (NIALS) Law and Development Journal 151.

⁴ G van Ert, 'Canada' in D Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press, 2009) at 169.

⁵ Ibid. This is achieved through the periodic monitoring mechanisms of the UN Human rights Treaty Monitoring Bodies such as the UN Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on Economic Social and Cultural Rights (CESCR). There are also regional bodies such as the African Commission on Human and Peoples Rights (ACHPR), Inter-American Commission on Human Rights (IACHPR) and the European Commission (EC).

⁶ LL Chmura, 'International Law in Domestic Legal Orders: A Comparative Perspective' (1997) Proceedings of American Society of International Law 289; E Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 European Journal of International Law 159; and A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 International & Comparative Law Quarterly 57.

⁷ A Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2013).

⁸ See M Hunt, *Using Human Rights Law in English Courts* (Bloomsbury Publishing, 1997); HH Koh, 'How is International Human Rights Law Enforced' (1998) 74 Indiana Law Journal 1397; HH Koh, 'International Law as Part of our Law' (2004) 98 The American Journal of International Law 43; and R Bahdi, 'Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts' (2002) 34 George Washington International Law Review 555.

To achieve the main objective of this Chapter, the following second central and sub-research questions are posed. The second central research question in this thesis is: What is the nature of the relationship between international and national law in post-colonial Africa? The sub-research questions are: 1) What are the differences in approach and how does this impact on the domestic application of international law? 2) What is the nature of the relationship between international and national law in post-colonial Nigeria? To answer these second central and sub-research questions, following this introduction, section 8.1 will briefly demonstrate the general attitude to international law by Anglophone African States on the one hand, and Francophone African States on the other. This is important because such comparative analyses will provide the reader with the background knowledge and information to the examination of the relationship between international and national law in Nigeria as well as the comparative study of Nigeria and Kenya in the following Chapter Nine.

There will also be a few examples from other jurisdictions in Africa that do not fall within these two broad categories. This Chapter has been sub-divided into three main sections. Section 8.1 is aimed at answering the research questions: What is the nature of the relationship between international and national law in post-colonial Africa? What are the differences in approach and how does this impact on the domestic application of international law in those States? Section 8.2 is aimed at answering the research question: What is the nature of the relationship between international and national law in post-colonial Nigeria? In the final section 8.3, the judicial application of international law by the domestic laws of Nigeria will be critically examined.

8.1. International and National Law in Post-Colonial Africa

The main objective of this section is to answer the research question: What is the nature of the relationship between international and national law in post-colonial Africa? At an African level, international treaties, general principles of international

law as well as other international regimes made up of multilateral treaties constitute a growing part of the international regime which post-colonial African States have to engage with in the process of governance.⁹ Although the process of governance in post-colonial Africa operates mostly on the basis of national and sub-national laws and domestic institutions, there is a growing need for a viable relationship between national governance and institutions on the one hand, and international governance as well as international law on the other hand.¹⁰ It is the need for such viable relationship that has necessitated the adoption of national constitutions by some African States expressly incorporating international law into to them with the objective of enhancing linkages between international law and national legal systems.¹¹

Historically some pre-colonial African States developed their parameters for engaging and relating with international law through customs,¹² but most post-colonial African States have chosen to do this through their national constitutions.¹³ Indeed, it is somewhat inevitable for national constitutions to enhance a viable relationship between national and international law as globalisation and the increasing interconnectedness of the global society have made this necessary.¹⁴ Therefore, it has become imperative for the national constitutions of post-colonial African States to determine whether and how

⁹ TM Franck and AK Thiruvengadam, 'International Law and Constitution-Making' (2003) 2 Chinese Journal of International Law 467 at 516.

¹⁰ Ibid.

¹¹ Ibid.

¹² TO Elias and R Akinjide, *Africa and the Development of International Law* (Martinus Nijhoff Publishers, 1988).

¹³ TM Franck and AK Thiruvengadam, (n 9) above at 516.

¹⁴ Ibid.

international treaties should be entered into by State governments, as well as how they should be transposed and applied in relation to domestic law.

Questions have arisen as to whether international treaties should automatically become part of domestic law when they have been signed and ratified by post-colonial African States. Should international treaties have precedence over national laws in domestic settings? What is the role and legal status of general principles of international law in the form of customary rules of international or *ius cogens* in domestic law?¹⁵ In the context of international human rights law, the general attitude of post-colonial African states is to implement international human rights law into their national constitutions as a way of encouraging the convergence of their constitutions with international human right instruments.¹⁶ Indeed, it has been argued that research into 'comparative constitutionalism today intersects with the study of international human rights law.'¹⁷

At a general level, there are two main approaches that have been used to explain the relationship between international and national law in the existing body of literature on the subject. These approaches are dualism and monism.¹⁸ According to dualism, international law and national law are different systems of legal norms independent of each other in their validity.¹⁹ Dualists maintain that the two forms of law (international and national) are simultaneously valid and so it is possible to

¹⁵ See T Maluwa, *International Law in Post-Colonial Africa* (Martinus Nijhoff Publishers, 1999).

¹⁶ Ibid. See also, RMM Wallace and O Martin-Ortega, *International Law* (6th edn, Sweet & Maxwell, 2009).

¹⁷ G Dannemann, 'Comparative Law: Study of Similarities or Differences?' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) at 1233.

¹⁸ See T Maluwa, (n 15) above at 34; RMM Wallace and O Martin-Ortega (n 16) above at 37-39 and R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994).

¹⁹ RMM Wallace and O Martin-Ortega, (n 16) above at 37.

explain their validity from the distinct perspective of both international and national law and not from the perspective of either alone or in any hierarchical way.²⁰ For international law to be applicable and enforceable in dualist States, it needs to be domesticated into national law by passing legislation through Parliament. The doctrine of recognition which is the cornerstone of dualism was espoused in the English case of *Commercial Estates Co of Egypt v Board of Trade*,²¹ where Justice Atkin stated that '[i]nternational law as such can offer no right cognisable in the municipal courts. It is only in so far as the rules of international law **are recognised as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations.**'²²

On the contrary, monism maintains that international law and national law form a unity and that this unity²³ could be achieved in two ways: firstly, by conceiving of international law as superior to national law, with the implication that the validity of the latter is dependent on the former; alternatively, national law could be conceived of as superior to international law, the validity of which is dependent on national law.²⁴ Thus, while in one scenario we have the primacy of international law; in the other we have the primacy of national law.²⁵

²⁰ H Kelsen, 'Sovereignty and International Law' (1959) 48 Georgia Law Journal 627 at 629. See also, BL Paulson; F Morgenstern, 'Judicial Practice and the Supremacy of International Law' (1950) 27 British Year Book of International Law 42 and SL Paulson and BL Paulson, (eds) *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press, 1998) at 541.

²¹ *Commercial Estates Co of Egypt v Board of Trade* [1925] 1 KB 271.

²² *Ibid.*, at 295. The emphasis is added. See also, *Higgs & Anor v Minister of National Security & Ors* [2000] AC 228 (PC) and *Attorney General of Canada v Attorney General of Ontario* [1937] UKPC 6, [1937] AC 326.

²³ H Kelsen, *General Theory of Law & State* (Transaction, 2005) at 351.

²⁴ *Ibid.*

²⁵ H Kelsen, (n 20) above at 629.

The practical implications of the two conventional approaches to explaining the relationship between international and national law discussed above becomes evident in the way different States approach the application or otherwise of international law within their domestic jurisdictions. The approaches between common law and civil law jurisdictions vary, in that while the former take the dualist approach²⁶ the latter appear to prefer the monistic approach.²⁷ With a few exceptions, the attitude of some post-colonial African States appears to have followed the traditions of their former colonial Governments.²⁸ Francophone African countries have followed the attitude of the French in directly incorporating international law into their national constitutions.²⁹

For example, the *Constitution of Algeria* 1989;³⁰ the *Constitution of the Republic of Benin* 1990;³¹ the *Constitution of Burkina Faso* 1991;³² the *Constitution of the Central African Republic* 2013;³³ the *Constitution of Chad* 1996;³⁴ the *Constitution of Congo* 2001;³⁵ the *Constitution of Cote d' Ivoire* 1960;³⁶ the *Constitution of the*

²⁶ For example, the United Kingdom and most post-colonial common law States like Nigeria.

²⁷ For example, France, Germany, Portugal and Spain.

²⁸ TM Franck and AK Thiruvengadam, (n 9) above at 516.

²⁹ The constitutional provision of the various States discussed below are as provided by Constitute and they are available for verification and for updated versions at: <www.constituteproject.org/>, accessed 15/12/2015.

³⁰ Art 132. (As reinstated in 1996 and revised in 2008).

³¹ Art 147.

³² Art 151. (As revised in 2012).

³³ Art 97.

³⁴ Art 221. (As revised in 2005).

³⁵ Art 184.

³⁶ Art 56. As amended in 2000.

Democratic Republic of Congo (former Zaire) 2005;³⁷ the *Constitution of Djibouti* 1992;³⁸ the *Constitution of Guinea* 2010;³⁹ the *Constitution of Mali* 1992;⁴⁰ the *Constitution of Mauritania* 1991;⁴¹ the *Constitution of Niger* 2010;⁴² and the *Constitution of Senegal* 2009⁴³ among others have near *verbatim* reproductions of the *French Constitution* 1958⁴⁴ which provides that '[t]reaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party.'⁴⁵

Indeed, the *Constitution of Cape Verde* 1992⁴⁶ goes even further to incorporate 'judicial acts emanating from competent offices of supranational organizations to which Cape Verde belongs' as well as general 'rules and principles of international law, validly approved and ratified internationally and nationally, and in force.'⁴⁷ Other non-Francophone African countries that have adopted a similar positive attitude towards international law within their domestic constitutions

³⁷ Art 215.

³⁸ Art 70. (As amended in 2010).

³⁹ Art 151.

⁴⁰ Art 116.

⁴¹ Art 80.

⁴² Art 171.

⁴³ Art 98.

⁴⁴ As revised in 2008.

⁴⁵ Art 55.

⁴⁶ As amended in 1999.

⁴⁷ Art 11 (3) (4).

include: Ethiopia,⁴⁸ Malawi,⁴⁹ Namibia,⁵⁰ and South Africa.⁵¹ Indeed, the three constitutions of Malawi⁵², Namibia⁵³ and South Africa⁵⁴ incorporate both customary international law and treaties as part of their national laws. In addition, the Constitutions of Malawi⁵⁵ and South Africa⁵⁶ contain interpretation clauses that empower the domestic courts to have regard to international law in interpreting the provisions of those constitutions.

However, by contrast to the positive attitude of the afore-mentioned African States to international law, it appears most of the former British colonies have not adopted such similar positive incorporation of international law in terms of treaty law and customary rules of international law into their constitutions. For example, the *Constitution of Zimbabwe* 2013 provides that '[a]n international treaty which has been concluded or executed by the President or under the President's authority ... does not bind Zimbabwe until it has been approved by Parliament; and ... does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament.'⁵⁷ Paradoxically, like the constitutions

⁴⁸ See Art 9 (4) of the *Constitution of Ethiopia* 1994 which provides that '[A]ll international agreements ratified by Ethiopia are an integral part of the law of the land.'

⁴⁹ See section 211 of the *Constitution of Malawi* 1994 (as revised in 1999).

⁵⁰ See Art 144 of the *Namibian Constitution* 1990 (as revised in 2010).

⁵¹ See section 231-133 of the *Constitution of the Republic of South Africa* 1996 (as revised in 2012).

⁵² See section 211 (3).

⁵³ Section 144.

⁵⁴ See section 232.

⁵⁵ Art 11 (2) (c) *Malawian Constitution* (supra).

⁵⁶ See section 39 (1) (c) and 233.

⁵⁷ Section 327 (2).

of Malawi,⁵⁸ Namibia⁵⁹ and South Africa,⁶⁰ the *Constitution of Zimbabwe* 2013 provides that '[c]ustomary international law is part of the law of Zimbabwe'⁶¹ and the courts are enjoined to give effect to customary rules of international law when interpreting the provisions of the Constitution.⁶² *Ghana's Constitution* 1992⁶³ merely provides that in its relationship with other States, the Government of Ghana shall 'promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means.'⁶⁴

It has been argued that as a general proposition (with a few exceptions) State practice among Anglophone African States has been the avoidance of incorporating international law into their constitutions, whereas the opposite is the case for most Francophone African States.⁶⁵ Anglophone Africa appears to reproduce the position of English law that customary international law is part of English law when there is no conflict with domestic law, but treaties have to be incorporated.

It would appear then that, while courts in most civil law countries, as in the case of Francophone African States may quite easily apply international law when interpreting the provisions of their constitutions or in deciding cases, in the case of courts in most Anglophone African States, they have less constitutional authorisation to have recourse to international law in interpreting the constitutions

⁵⁸ See Art 211 (3) of the *Malawian Constitution* (supra).

⁵⁹ Art 144 of the *Namibian Constitution* (supra).

⁶⁰ Section 232 of the *Constitution of the Republic of South Africa* (supra).

⁶¹ See section 326 (1).

⁶² Section 326 (2).

⁶³ As revised in 1996.

⁶⁴ Art 40 (c).

⁶⁵ For detailed analyses of constitutional incorporation of international amongst African States, see T Maluwa, (n 15) above at 40-48.

of such States and in deciding cases. However, in an Anglophone State like Zimbabwe, where the courts are empowered constitutionally (or by other laws) to give effect to customary rules of international law when interpreting the provisions of its constitution, the difference between it and a civil law country becomes blurred.⁶⁶ Therefore, the constitutional and legal attitude of a State to international law would impact upon the enforceability or otherwise of international human rights law before the courts of that particular State as demonstrated further below.

Inevitably, the attitude of national courts towards the application of international human rights law in the domestic jurisdictions of States depends on whether a State follows a common law or civil law approach as well as on the specific provisions in the constitution and laws of that State.⁶⁷ A general analysis of the judicial decisions in this regard in both civil and common law countries is beyond the scope of this thesis as some of the analysis have already been done.⁶⁸ However, it should be noted that the incorporation of international human rights norms into the constitutional order of States as a means of checking and controlling State power has been increasingly practiced all over the world.⁶⁹ This

⁶⁶ See generally, CM Vázquez, 'Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties' (2008) *Harvard Law Review* 599.

⁶⁷ There is an exception in the European Union, where the Member States are required to give effect to the provisions of the *European Convention for the Protection of Human Rights and Fundamental Freedom*, adopted in Rome on 04 November 1950. For failure to do this a State may be liable in an action before the European Court of Human Rights.

⁶⁸ T Maluwa, (n 15) above at 36-39; R Higgins, (n 18) above at 205-218; A Nollkaemper, 'The Effects of Treaties in Domestic Law' in CJ Tams, A Tzanakopoulos and A Zimmerman (eds), *Research Handbook on the Law of Treaties* (Edward Elgar Publishing, 2014) at 143-150; and TA Doherty, 'The Application of Human Rights Treaties in the Development of Domestic and International Law: A Personal Perspective' (2009) 22 *Leiden Journal of International Law* 753; J Quigley, 'Toward More Effective Judicial Implementation of Treaty-Based Rights' (2005) 29 *Fordham International Law Journal* 552. For how some national African courts have used international law in deciding human rights cases, see ME Adjami, 'African Courts, International Law, and Comparative Case Law: Chimera on Emerging Human Rights Jurisprudence' (2002) 24 *Michigan Journal of International Law* 103.

⁶⁹ AW Munene, 'The Bill of Rights and Constitutional Order: A Kenyan Perspective,' (2002) 2 *African Human Rights Law Journal* 135.

Chapter will henceforth focus on the legal situation in Nigeria. As the case study in this thesis is Nigeria, it is important to examine the relationship between Nigeria's State law and international law as a foundation upon which subsequent comparative analyses will be made with the situation in Kenya later in Chapter Nine below.

8.2. Nigerian State Law and International Law

The main purpose in this section is to answer the research question: What is the nature of the relationship between international and national law in post-colonial Nigeria? Nigeria and Africa in general engaged with international law prior to British colonial rule but they lost their sovereignty to European powers because of colonialism and consequently the loss of capacity to participate in the development of international law.⁷⁰ However, prior to the colonial encounter, Nigeria like most pre-colonial African States did engage with international law in various ways.⁷¹

Therefore, although some writers claim that the development of the Nigerian legal system is associated with the commencement of British colonial rule in Nigeria,⁷² this claim has been rightly challenged by much legal scholarship as incorrect.⁷³ At the point of political independence of Nigeria in 1960 it acquired its treaty making powers as a State, and at a general level, Nigeria appears not have

⁷⁰ See TO Elias and R Akinjide, (n 12) at 22; NL Bruce-Wallace, 'Africa and International Law—the Emergence to Statehood' (1985) 23 *The Journal of Modern African Studies* 575 at 578; OC Okafor, 'After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa' (2000) 41 *Harvard International Law Journal* 503; and JJG Syatauw, *Some Newly Established Asian States and the Development of International Law* (Springer Science & Business Media, 2013).

⁷¹ TO Elias and R Akinjide, (n 12) above at 15.

⁷² See for example, O Adewoye, *The Legal Profession in Nigeria, 1865-1962* (Longman, 1977).

⁷³ See CN Okeke, *The Theory and Practice of International Law in Nigeria* (Fourth Dimension, 1986) at 15-21.

jettisoned the rules of international law.⁷⁴ Neither did it accept to be bound by all international treaties entered into by the predecessor colonial Government.⁷⁵ However it has been argued that the generality of '[n]ew States, above all African, all of them developing, act continually and untiringly to strengthen these positive tendencies of change in world politics and international law.'⁷⁶ In a communication to the United Nations (UN) Nigeria stated that '[a]ll obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instruments shall henceforth insofar as such instruments may be held to have application to Nigeria, be assumed by the Government of the Federation'.⁷⁷ The post-colonial relationship between Nigeria's national laws and international law began with making provision for human rights in its *Independence Constitution* 1960 of international human rights norms articulated under the *UN Charter*,⁷⁸ the *Universal Declaration of Human Rights* (UDHR),⁷⁹ 1948 and the *European Convention on Human Rights and Fundamental Freedoms* (ECHR)⁸⁰ and since then all subsequent Nigerian constitutions made provision for those rights.⁸¹ Nigeria is also currently a Party to most international and regional human rights

⁷⁴ H Fox, 'The Settlement of Disputes by Peaceful Means and the Observance of International Law—African Attitudes' (1969) 3 *International Relations* 389.

⁷⁵ CN Okeke, 'International Law in the Nigerian Legal System' (1996) 27 *California Western International Law Journal* 311 at 331.

⁷⁶ M Mushkat, 'Some Remarks on the Factors Influencing the Emergence and Evolution of International Law' (1961) 8 *Netherlands International Law Review* 341 at 345.

⁷⁷ See 384 *United Nations Treaty Series* (UNTS) (1961) at 207-210.

⁷⁸ *The Charter of the United Nations*, signed on 26 June 1945, in San Francisco, and came into force on 24 October 1945.

⁷⁹ The *Universal Declaration of Human Rights* (UDHR), adopted by the United Nations General Assembly (UNGA) on 10 December 1948 at the Palais de Chaillot, Paris.

⁸⁰ *European Convention on Human Rights and Fundamental Freedoms* (supra). It is the first instrument that gave effect to the rights articulated under the *Universal Declaration of Human Rights* by making them legally binding.

⁸¹ TM Franck and AK Thiruvengadam, (n 9) above at 501-505 and CN Okeke, (n 73) above at 328-337.

treaties.⁸² Most of the rights provided under the UDHR have been applied with some modifications under Chapter IV of the *Constitution of the Federal Republic of Nigeria* 1999 (Nigerian Constitution).⁸³ Nigeria has also enacted national legislation which is a *verbatim* reproduction of the *African Charter on Human and Peoples Rights* (African Charter)⁸⁴ making it directly enforceable before Nigerian Courts of law.⁸⁵ In *Gbemre v Shell*,⁸⁶ it was held that the applicant's right to life and dignity of human person was violated as a result of gas flaring in the Niger

⁸² Some these are: The *International Covenant on Civil and Political Rights* (ICCPR) 1966, adopted by the United Nations General Assembly on 16 December 1966; The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1966, adopted by the United Nations General Assembly on 16 December 1966; and the *African Charter on Human and Peoples Rights*, 1981 adopted in Nairobi on 27 June 1981, entered into force October 21, 1986 among other regional and international human rights instruments. See, <http://hrlibrary.umn.edu/research/ratification-nigeria.html>, accessed 10 November 2016.

⁸³ See sections 33-46 of the *Nigerian Constitution* of 1999.

⁸⁴ *The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act No 2 Cap A. 9 Laws of the Federation of Nigeria*, 2004. Available at: <http://lawnigeria.com/LawsOfTheFederation/AFRICAN-CHARTER-ON-HUMAN-AND-PEOPLES-RIGHTS.html>, accessed 10 November, 2016.

⁸⁵ For general analyses of the impact of the African Charter on human rights litigation in Nigeria and Africa, see EO Ekhaton, 'The Impact of the African Charter on Human and Peoples' Rights on Domestic Law: A Case Study of Nigeria' (2015) 41 *Commonwealth Law Bulletin* 253; F Viljoen, *International Human Rights Law in Africa* (Oxford University Press, 2012); F Viljoen, 'Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa', (1999) 43 *1 Journal of African Law* 12; MW Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Vermont Journal of International Law* 339; D Olowu, 'The African Charter on Human and Peoples' Rights, its Regional System, and the Role of Civil Society in the First Three Decades: Calibrating The "Paper Tiger"' (2013) 34 *Obiter* 29; and M Evans and R Murray, *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press, 2008). In addition, para 3 (b) of the Nigerian *Fundamental Rights (Enforcement Procedure) Rules*, 2009 states that: 'For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court shall respect municipal, **regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions**. Such bills include: (i) The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system, (ii) The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system'. The emphasis is added.

⁸⁶ *Gbemre v Shell*. Suit No FHC/B/CS/153/05.

Delta region of Nigeria by the Respondent contrary to the provisions of the African Charter.

Presently, the Nigerian Constitution⁸⁷ provides that:

(1) 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.

(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

(3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted **unless it is ratified by a majority of all the Houses of Assembly in the Federation.**⁸⁸

Based on a literal interpretation of Section 12 (1) above, it appears all bilateral treaties concluded between Nigeria and 'any other country' shall not have the force of law in Nigeria unless there is an Act of the Nigerian Parliament enabling their implementation in accordance with Section 12 (1) above. The constitution is silent on the legal status of multilateral treaties signed between Nigeria and other 'countries'.

For the Federal Parliament of Nigeria to be able to legislate on any bilateral treaty which contains matters within the concurrent legislative competences of the Nigerian Federal Parliament and the Parliaments of the other 36 States that make up the Nigerian federation, Section 12 (3) above requires ratification by a majority

⁸⁷ As amended. Available at: www.lawnigeria.com/CONSTITUTIONHUB/Constitution/Constitution.html, accessed 3 November 2016.

⁸⁸ Section 12 (1), (2) and (3). The emphasis is added. For critical analysis of this section of the Nigerian Constitution, see AO Enabulele, 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts' (2009) 17 African Journal International & Comparative Law 326.

of the 36 different legislative houses. It is argued that this requirement is unnecessarily burdensome and difficult. In addition to the already lengthy processes of enacting legislation at the Federal Parliament, such requirements would lead to long delays in the implementation of treaties that have been already signed and ratified by the Federal Government of Nigeria.

In another non-justiciable part of the Nigerian Constitution,⁸⁹ it provides that '[t]he foreign policy objectives shall be ... respect for international law and treaty obligations'.⁹⁰ However, these foreign policy guidelines 'do not reflect a binding commitment to international law on the part of the state.'⁹¹ Indeed, the non-justiciability of Chapter II of the Nigerian Constitution implies that the provisions thereunder are not enforceable by Nigerian Courts.

The above constitutional provisions demonstrate that although Nigeria claims to have a positive disposition towards international law, an international treaty concluded between Nigeria and 'any other country' (bilateral treaty) requires further domestic legislation to give it the effect of law in Nigeria. Although the above provisions of the Nigerian Constitution are clear in relation to bilateral treaties, it will be demonstrated later in section 8.3 below that the way the Nigerian courts have interpreted section 12 of the Nigerian Constitution in relation to multi-lateral treaties creates ambiguity on the constitutional basis for the application of international law in Nigeria.

⁸⁹ Chapter II: Fundamental Objectives and Directive Principles of State Policy.

⁹⁰ Section 20 (d). In the case of *Odafe and Ors v Attorney General of the Federation* [2004] AHRLR 205 at 211, it was held the right of prisoners to medical care were not non-justiciable and unenforceable. However, a contrary decision was reached in the case of *Mrs Georgina Ahamefule v Imperial medical Centre and Dr Alex Molokwo*. Suit No IBID1627/2000.

⁹¹ CN Okeke, 'The Use of International Law in the Domestic Courts of Ghana and Nigeria,' (2015) 32 *Arizona Journal of International & Comparative Law* 371 at 405.

On the relationship between the Nigerian Constitution and other laws, like the previous constitutions of Nigeria since political independence the Nigerian Constitution proclaims itself as the 'grundnorm' of the land⁹² when it provides that:

This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria ... **If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.**⁹³

The supremacy of the Nigerian Constitution over other laws has been affirmed by the Nigerian Court of Appeal (CA) in the case of *Musa v Hamza*⁹⁴ where the CA stated that:

It [the Constitution] is a document containing the *fons et origo* (i.e. the source and origin) of the laws and rights of its people. It is in a sense what in Kelsenian terminology **may be regarded as the Grundnorm of the State. The Constitution is therefore aptly described as the supreme law of the land. This is because it is a law, which does not depend upon any other for its validity.**⁹⁵

By holding that the Nigerian Constitution 'is a law, which does not depend upon any other for its validity', the Nigerian CA appears then to suggest that even if any provision(s) of the Nigerian Constitution conflicts with any international treaty which Nigeria has signed and ratified, the provisions of the Constitution shall prevail. There is no known case as at the time of writing where the validity of any

⁹² See H Kelsen, *General Theory of Law & State* (Transaction, 2005); U Bindreiter, *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine* (Lund University, 2000); T Hopton, 'Grundnorm and Constitution: The Legitimacy of Politics' (1978) 24 McGill Law Journal 72; A Ojo, 'The Search for a Grundnorm in Nigeria—the Lakanmi Case' (1971) 20 International & Comparative Law Quarterly 117; and J Rachuonyo, 'Kelsen's Grundnorm in Modern Constitution-Making: The Kenya Case' (1987) *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 416.

⁹³ Section 1 (1) and (3). The emphasis is added.

⁹⁴ *Musa v Hamza* [1982] 2 NCLR 229.

⁹⁵ *Ibid*, at 250. The emphasis is added.

provision(s) of the Nigerian Constitution has or have been challenged on the grounds of conflicting with Nigeria's obligations under international treaties to which it is a Party. The above decision by the Nigerian CA is reaffirmed by the decisions of the Nigerian Supreme Court (SC) in the cases of *Adigun v Attorney-General of Oyo State*,⁹⁶ *Attorney-General of Bendel State v Attorney-General of the Federation & Ors*,⁹⁷ *Nafiu Rabiu v Kano State*,⁹⁸ and *Obaba v Military Governor of Kwara State*.⁹⁹

While the Nigerian Constitution is express on the legal status of bilateral treaties in Nigeria, it is silent on the application of customary rules of international law as well as general principles of international law in Nigeria.¹⁰⁰ Christian Okeke argues that Nigeria recognises customary rules of international law as binding upon it.¹⁰¹ However, he maintains that Nigeria regards most customary rules of international law as Euro-centric and since it did not participate in the formation of some rules of customary international law, when such rules are not in its national interest they are often rejected.¹⁰²

⁹⁶ *Adigun v Attorney-General of Oyo State* [1987] 4 SC 272 at 344.

⁹⁷ *Attorney-General of Bendel State v Attorney-General of the Federation & Ors* 1 [1983] All N.L.R 208.

⁹⁸ *Nafiu Rabiu v Kano State* [1980] LPELR-SC.49/1980.

⁹⁹ *Obaba v Military Governor of Kwara State* (1994) 4 NWLR (Pt.336) 26.

¹⁰⁰ See Art 38 (1) (b) and (c) of the *Statute of the International Court of Justice*, is attached to the *United Nations Charter*, as specified by Chapter XIV of the United Nations Charter, signed at San Francisco June 26, 1945.

¹⁰¹ CN Okeke, (n 75) above at 314-315.

¹⁰² *Ibid.* See also, H Bokor-Szegö, *New States and International Law* (Akadémiai Kiadó, 1970); RP Anand, 'Attitude of the Asian-African States Toward Certain Problems of International Law' (1966) 15 *International and Comparative Law Quarterly* 55; and SP Sinha, 'Perspective of the Newly Independent States on the Binding Quality of International Law' (1965) 14 *International & Comparative Law Quarterly* 121.

If the above perspective about customary international law is widely followed by post-colonial African States, it would imply that no post-colonial African State would accept customary international law as binding upon them. Azoro contends that the applicability of customary rules of international law in Nigeria remains unclear and uncertain.¹⁰³ Others have argued that the applicability of customary rules of international law in the domestic jurisdictions of African States should be determined by the willingness and consent of such post-colonial African States.¹⁰⁴ As for general principles of international law, the Nigerian Constitution¹⁰⁵ is also silent in this respect.

Although section 19 of the Nigerian Constitution suggests that the foreign policy objectives of Nigeria shall be the observance of international law, that section is not justiciable and do not represent a legally binding commitment by Nigeria towards international law. However, the inclusion of some of the rights provided under UDHR into Chapter IV of the Nigerian Constitution and the domestication of the African Charter suggest that Nigeria is willing to abide by international human rights norms. Therefore, on the basis of section 12 of the Nigerian Constitution no international treaty signed and ratified by Nigeria can have the force of law in Nigeria unless such has been domesticated.

The position of general principles and customary international law in the Nigerian legal system is less clear. It seems they are applicable in Nigeria on the basis of the fact that Nigerian courts often make references to the decisions of English

¹⁰³ C Azoro, 'The Place of Customary International Law in the Nigerian Legal System—A Jurisprudential Perspective' (2014) 1 *International Journal of Research* 74.

¹⁰⁴ See MW Janis and Y Makonnen, *International Law and the New States of Africa* (JSTOR, 1985); EC Djamson, *The Dynamics of Euro-African Co-operation: Being an Analysis and Exposition of Institutional, Legal and Socio-economic Aspects of Association/Co-operation with the European Economic Community* (Springer, 2012); and RP Anand, 'Attitude of the Asian-African States Toward Certain Problems of International Law' (1966) 15 *International and Comparative Law Quarterly* 55.

¹⁰⁵ *Supra*.

Courts, decisions of other courts in common law jurisdictions as well as the decisions of the US Supreme Court in deciding matters coming before them, where there is a *lacuna* on the subject under Nigerian law as demonstrated in section 8.3 below.

8.3. Judicial Application of International Law in Nigeria

The Nigerian Courts have decided a few cases relating to the applicability of international treaties in Nigeria and most but not all of them relate to the African Charter and its legal status in Nigeria.¹⁰⁶ The relationship between international treaties and national law in Nigeria as well as their legal status in Nigeria, were at issue in the Nigerian *locus classicus* case of *Abacha and Ors v Fawehinmi*.¹⁰⁷ In that case, the Supreme Court (SC) of Nigeria was presented with the question of when an international human rights treaty (the African Charter) becomes binding law in Nigeria. In arriving at its decision, the SC while citing with approval an earlier English case stated per Michael Ekundayo Ogundare Justice of the Supreme Court (JSC) 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...See the recent decision of the *Privy Council in Higgs & Anor. V. Minister of National Security & Ors*...where it was held that - "**In the law of England and the Bahamas ... Treaties formed no part of domestic law unless enacted by the legislature...**" In my respectful view, I think the above passage represents the correct position of the law, not only in England but in Nigeria as well.¹⁰⁸

It is argued that although the decision of the Nigerian SC in the above case stated the correct position of the law in relation to bilateral treaties, in that case it was

¹⁰⁶ C Nwapi, 'International Treaties in Nigerian and Canadian Courts' (2011) 19 African Journal of International & Comparative Law 38 at 38.

¹⁰⁷ *Abacha and Ors v Fawehinmi* [2000] LPELR-14 (SC).

¹⁰⁸ Per Ogundare, JSC at 30-31, paras C-F. The emphasis is added.

the African Charter - a multilateral treaty - which was at issue.¹⁰⁹ It is therefore a misinterpretation of Section 12 (1) of the Nigerian Constitution for the Nigerian SC to have held that the provisions of the African Charter were enforceable in Nigeria only on the ground that it has been domesticated through an Act of Nigeria's Parliament. This error of misinterpretation also led the Nigerian SC to decide erroneously in *The Registered Trustees of National Association of Community Health Practitioners of Nigeria and Ors v Medical and Health Workers Union of Nigeria and Ors*.¹¹⁰ The SC was here presented with the issue of deciding on the condition for the application of an international treaty or convention in Nigeria. It stated that:

By virtue of section 12(1) of the 1999 Constitution, no treaty between the Federation and any country has the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. Thus, an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. In the instant case, **in so far as the International Labour Organization (ILO) conventions have not been enacted into law by the National Assembly, they have no force of law in Nigeria, and they cannot possibly apply.**¹¹¹

It is argued that although the Court was right to have held that the ILO Convention that was at issue was not applicable and did not have the force of law in Nigeria, it ought to have based its decision on the fact that Nigeria had neither signed nor ratified the Convention in question. To have justified its decision based on Section (12) (1) of the Nigerian Constitution was to misinterpret the express wordings of that provision. The ILO Convention at issue was not a bilateral treaty, most of the

¹⁰⁹ Perhaps a counter argument to this is the provision of Section 14 (b) of the *Interpretation Act* which provides that: 'words in the singular include the plural and words in the plural include the singular'. This could explain the attitude of the Supreme Court of Nigeria in relation to multilateral treaties, however, the SC did not made references to the *Interpretation Act* in any of its decisions above.

¹¹⁰ *The Registered Trustees of National Association of Community Health Practitioners of Nigeria and Ors v Medical and Health Workers Union of Nigeria & Ors* [2008] LPELR-3196 (SC).

¹¹¹ Per Mukhtar, JSC and Per Onu, JSC. The emphasis is added.

ILO Conventions are usually multilateral treaties. The argument is that whereas section 12 (1) of Nigerian Constitution expressly requires the domestication of bilateral treaties through domestic legislation before they have the force of law in Nigeria, there is no such requirement in relation to multilateral treaties going by the express wordings of section 12 (1) of the Nigerian Constitution.

However, in a much earlier case of *Chief (Mrs.) Olufunmilayo Ransome-Kuti and Ors v Attorney General of the Federation*¹¹² where the issue before the SC was the inalienable and immutable nature of fundamental rights, the Nigerian SC stated that '[a] fundamental right is certainly a right which stands above the ordinary laws of the land.'¹¹³ Indeed, in the case of *Abacha and Ors v Fawehinmi*,¹¹⁴ the Nigerian SC determined the legal status of the African Charter in relation to other domestic statutory laws of Nigeria by noting that it was a law that superseded all domestic legislation with the exception of the Nigerian Constitution.¹¹⁵

Therefore, it would appear that on the basis of the decision in the *Abacha* case, international treaties ratified and domesticated into Nigeria are superior to other domestic legislation but their legal status will be inferior to the Nigerian

¹¹² *Chief (Mrs.) Olufunmilayo Ransome-Kuti and Ors v Attorney General of the Federation* (1985) 2 NWLR (Pt. 6) 211. See also *El-Rufai v Senate of the National Assembly & Ors* [2014] LPELR-23115(CA).

¹¹³ *Chief (Mrs.) Olufunmilayo Ransome-Kuti and Ors v Attorney General of the Federation* (supra) at 229-230.

¹¹⁴ Supra.

¹¹⁵ Ibid. On similar decisions on the legal status of the African Charter in Nigeria see also, *Garba v Attorney-General of Lagos State* Suit IBID/599/91 decided on 31 October 1991; *Ohakosim v COP Imo State* [2009] 15 (Pt. 1164); *Onyirioha v IGP* [2009] 3 NWLR (Pt. 1128); *IGP v ANPP* [2007] 18 NWLR (Pt. 1066) 457 at 500; *Abiodun v Attorney General of the Federation* [2007] LPELR-8550(CA). However, see the contrary decision that the provisions of the African Charter cannot override provisions of domestic legislation in Nigeria in the case of *Wahab Akanmu v Attorney General of Lagos State*. Suit No M/568/91.

Constitution. In an earlier case of *Chief JE Oshevire v British Caledonian Airways Limited*,¹¹⁶ it was similarly held that:

It is useful to appreciate that an international agreement embodied in a Convention or treaty is autonomous, as the high contracting parties have submitted themselves to be bound by its provisions, which are therefore above domestic legislation. Thus any domestic legislation in conflict with the convention is void.¹¹⁷

Likewise, in *Ibidapo v Lufthansa Airlines*,¹¹⁸ where the applicability of the *Warsaw Convention* in Nigeria was at issue, the SC of Nigeria held that since Nigeria was a Commonwealth country, it could continue to follow the common law tradition of determining the status of international law in municipal law, and hence, Nigeria 'shall continue to adhere to, respect and enforce both multilateral and bilateral agreements where their provisions are not in conflict with our fundamental law.'¹¹⁹

With the decisions of the Nigerian SC in the cases of *Chief (Mrs.) Olufunmilayo Ransome-Kuti and Ors v Attorney General of the Federation*,¹²⁰ and *Uzoukwu v Ezeonu II*,¹²¹ it seems the Nigerian SC has positive dispositions towards international human rights law in relation to the interpretation of Nigeria's domestic laws. However, when the provisions of the Nigerian Constitution itself conflict with international human rights law, it seems such conflict would be

¹¹⁶ *Chief JE Oshevire v British Caledonian Airways Limited* [1990] 7 NWLR (Pt. 163) at 507.

¹¹⁷ *Ibid.*, at 519-520. See also *Attorney-General of the Federation v Attorney-General of Abia State and Ors*, [2001] SC 28/2001.

¹¹⁸ *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Pt. 498) 124.

¹¹⁹ *Ibid.*

¹²⁰ *Supra.*

¹²¹ *Supra.*

resolved in favour of the Constitution as it is regarded as the 'grundnorm' in Nigeria.¹²²

In Nigeria, like all other States that reserve the supremacy of their constitutions over other laws, there would be problems in giving effect to and enforcing the provision of international human rights treaties and laws that conflict with their constitutions. Therefore, since there is a presumption that Parliament does not intend to violate international law in all jurisdictions,¹²³ it is argued that whenever a provision of Nigeria's Constitution conflicts with international human rights law, such conflicts must as far as possible be interpreted by the courts in such a way as to comply with international human rights law. It must be acknowledged however that there is a limit to what can be done through interpretation by the courts. Moreover, it appears that the courts have not yet been presented with a case where the provision of the Nigerian Constitution conflict with the obligations of the Nigerian State under international law. None was found as at the time of writing.

There is also a dearth of judicial authorities on the legal status of customary rules and general principles of international law in Nigeria. Perhaps, this is because Section 12 of the Nigerian Constitution 1999 is silent on the issue.¹²⁴ Azoro argues that as customary rules of international law are part of the common law of England,¹²⁵ as well as that of the Nigerian legal system by virtue of Section 32 of

¹²² See section 1 (3) of the *Nigerian Constitution* 1999.

¹²³ See TA Doherty, (n 68) above at 754.

¹²⁴ See E Egede, 'The New Territorial Waters (Amendment) Act 1998-Comments on the Impact of International Law on Nigerian Law, ' (2000) 12 *African Journal of International & Comparative Law* 84 and CN Okeke, (n 91) above at 415.

¹²⁵ See, the following: *Ex Parte Pinochet* (No 3) [2000] 1 AC 61; *Lord Advocate's Reference* No 1 of 2000 (2000) SLT at 512; *R v Jones* [2006] UKHL 16; and *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271.

Nigerian *Interpretation Act*,¹²⁶ this implies that customary rules of international law are applicable in Nigeria to the extent that such rules are not inconsistent with any domestic legislation.¹²⁷ In the case of *Attorney-General of the Federation v Attorney-General of Abia State and Ors*¹²⁸ the SC of Nigeria appears to have indirectly held that customary rules of international law were applicable in Nigeria when it stated that:

While it is recognised in customary international law that the sea is *res nullius* and it is therefore, available for the enjoyment of all nations of the world, land-locked nations inclusive ... maritime nations are entitled to some privileges not available to others to protect their security.¹²⁹

Despite the statements of the Nigerian SC in the above cases, it is argued that the legal status of customary international law and general principles of international law remain largely unclear and uncertain in Nigeria.¹³⁰ However, Chilenye Nwapi argues that there are legal grounds to claim that customary international law is part of Nigerian law and enforceable before Nigerian courts of law.¹³¹ She argues that customary international law can be applied by courts in Nigeria, once proved as a matter of fact, just as Nigerian customary law is usually proved and recognised by courts of law in Nigeria,¹³² as demonstrated in Chapter

¹²⁶ *Interpretation Act*, CAP I23 *Laws of the Federation of Nigeria* 2004

¹²⁷ C Azoro (n 103) above at 97 and C Nwapi, (n 106) above at 54-55.

¹²⁸ *Supra*.

¹²⁹ *Ibid*, per Michael Ekundayo Ogundare (JSC) at para 51.

¹³⁰ C Nwapi, 'International Treaties in Nigerian and Canadian Courts' (2011) 19 *African Journal of International & Comparative Law* 38 at 45.

¹³¹ *Ibid*, at 54.

¹³² *Ibid*.

Three.¹³³ Indeed, in *Ibidapo v Lufthansa Airlines*,¹³⁴ the Nigerian Supreme Court (SC) held that ‘Nigeria like any other commonwealth country, inherited the English common law rules governing the municipal application of international law ...’,¹³⁵ this has in turn led to the argument that ‘a conventional rule that is at the same time customary international law has automatic application in Nigeria (just as it does in English law) as part of the common law’.¹³⁶

The English law position on the application of customary international law in England is demonstrated by the statement of Lord Denning in the case of *Trendex Trading Co v Central Bank of Nigeria*, where he stated that ‘... it follows to my mind inexorably that the rules of [customary] international law, as existing from time to time, do form part of our English law.’¹³⁷ Indeed, in *Attorney-General of the Federation v Attorney-General of Abia State and Ors*,¹³⁸ the Nigerian SC appears to have indirectly held that this was the position in Nigeria.

However, as the application of customary rules of international law in England is subject to the fact that such customary rules of international law must not conflict with domestic law, it would appear that where there is conflict between rules of customary international law and domestic law, the latter will prevail in Nigeria.¹³⁹ However, with the decision of the Nigerian SC in *Abacha’s* case, it remains

¹³³ See sub-section 3.1.1.

¹³⁴ *Ibidapo v Lufthansa Airlines* [1997] 4 NWLR (Pt. 498) 124.

¹³⁵ *Ibid*, at 150.

¹³⁶ E Egede, 'The New Territorial Waters (Amendment) Act 1998-Comments on the Impact of International Law on Nigerian Law, ' (2000) 12 African Journal of International & Comparative Law 84 at 162 and E Egede, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria' (2007) 51 Journal of African Law 249.

¹³⁷ *Trendex Trading Co., v Central Bank of Nigeria* [1977] 1 All ER 881 at 889–890.

¹³⁸ *Attorney-General of the Federation v Attorney-General of Abia State & Ors* (supra).

¹³⁹ See the decisions in the following English cases: *Mortensen v Peters* [1906] 14 Scotts LTR 1481 and *R v Cheun* [1939] AC 160 at 168.

unclear if in fact customary international law would prevail over domestic legislation in Nigeria.¹⁴⁰

It is the argument in this thesis that a monist approach to international law as practiced by Francophone and civil law African States as discussed in section 8.1 above that gives primacy to international human rights law over national law or some similar approach is the best way for Nigeria to be in compliance with its international human rights obligations. While such monist approach may not provide all the answers to the challenges of enforcing international human rights law in the domestic jurisdictions, as States need the will and ability of law enforcement agencies to enforce the provision of international law domestically, nevertheless monism seems to provide better answers to the application of international law in domestic jurisdictions than dualism.

The current strictly dualist approach of the Nigerian legal system towards international law appears to be anti-thetical to the enforceability of international human rights treaties signed and ratified by Nigeria before the domestic courts in Nigeria. In searching for solutions within Africa to the problem of enforcing international human rights treaties and instruments in Nigeria, in the following Chapter Nine a comparative analysis will be made between the Kenyan legal system and its Nigerian counter-part in the context of the relationship between the legal systems of the two States and international law.

Conclusion

It has been rightly observed that States are often not trusted as effective agents for the protection and promotion of international human rights norms, despite the fact that international human rights law 'is ultimately concerned with the conduct

¹⁴⁰ C Nwapi, (n 106) above at 55.

and welfare of individuals'.¹⁴¹ Indeed, compared with national law, international law appears to be the better framework through which human rights may be promoted.¹⁴² There is therefore credibility in the argument in this thesis that international human rights law has been more progressive in promoting and protecting human rights than the Nigerian domestic legal system. This argument is supported by the work and jurisprudence of the UN human rights treaty Monitoring Bodies as well as the African Commission discussed in Chapter Seven¹⁴³ even though these are soft agencies without enforcement mechanisms. This is not to say that no progress has been made in terms of protecting human rights in Nigeria, as most of the human rights guaranteed under the 1948 UDHR have been applied under Chapter IV of the *Constitution of the Federal Republic of Nigeria*, 1999. Nigeria has ratified the two 1966 international human rights Covenants, the *International Convention on the Elimination of All forms of Racial Discrimination* (ICERD) (infra, note 141) and has also domesticated the African Charter.

However, with a situation such as we have in the case study of Abuja, where the Nigerian Constitution effectively terminates the land rights of Abuja peoples by its Section 297 (2) without adequate payment of compensation to all the affected IPs nor resettling all of them to some other location in compliance with international law, a situation arises where the Nigerian Constitution violates the rights to property as well as the right to be paid prompt and adequate compensation guaranteed under its Chapter IV. It is argued that since such rights provided under Chapter IV have indisputably attained the status of customary international law as demonstrated in the preceding Chapter Seven,¹⁴⁴ whenever the courts in

¹⁴¹ I Brownlie, *Principles of Public International Law* (Oxford University Press, 2008) at 32.

¹⁴² Ibid.

¹⁴³ See subsection 7.1.4-7.1.6.

¹⁴⁴ See subsection 7.1.2.

Nigeria are presented with a case on this issue they should interpret Section 297 (2) and Section 1 (3) of the FCT Act, in line with Chapter IV of the Constitution of Nigeria and in accordance with Nigeria's human rights obligations under the African Charter,¹⁴⁵ the *International Covenant on Civil and Political Rights* (ICCPR) 1966,¹⁴⁶ *International Covenant on Economic Social and Cultural Rights* (ICESCR) 1966¹⁴⁷ and the *International Covenant on the Elimination of All Forms of racial Discrimination* (ICERD) 1965.¹⁴⁸

As demonstrated in the preceding Chapter Seven, it is now clear that international law has evolved from an era when States were the exclusive subjects of international law to an era when individuals and groups such as IPs living within States have become direct subjects and bearers of rights under international law without the intervention of States as intermediaries.¹⁴⁹ In this respect, it has been rightly contended that contemporary international law has progressed into 'a human commonwealth encompassing individuals, States, and other aggregates'¹⁵⁰ that go beyond the confines of any State. Despite this positive development in international law, it suffers from the problem of a lack of effective mechanisms for its enforcement when compared with domestic law. In this

¹⁴⁵ Supra.

¹⁴⁶ *International Covenant on Civil and Political Rights* 1966, adopted and opened for signature, ratification and accession by UNGA Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with its Art 49.

¹⁴⁷ *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by UNGA Resolution 2200A (XXI) of 16 December 1966, entered into Force 3 January 1976, in accordance with its Art 27.

¹⁴⁸ *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) 1965, adopted and opened for signature and ratification by UNGA Resolution 2106 (XX) of 21 December 1965, entered into force on 4 January 1969, in accordance with its Art 19.

¹⁴⁹ AM Slaughter and W Burke-White, 'The Future of International Law Is Domestic (or, the European Way of Law)' (2006) 47 *Harvard International Law Journal* 327.

¹⁵⁰ A Cassese, *International Law* (2nd edn, 2005) at 217.

context, effective mechanisms for enforcement refer to the ability of law to provide sanctions and hold individuals and institutions accountable in instances where there are violations.

It appears State law is more capable of using the power of coercive force by the State to enforce law and this is often lacking for international law.¹⁵¹ This implies that State courts are the most effective institutions through which international law may be enforced.¹⁵² It is because of this, that in the following Chapter Nine there will be comparative examination of the relationship between international and national law in Nigeria and Kenya. This is informed by recent constitutional reforms in relation to the application of international law within the domestic legal system of Kenya. The purpose is to compare Nigeria with Kenya to investigate if there are any lessons which Nigeria may glean from Kenya.

¹⁵¹ K Knop, 'Here and There: International Law in Domestic Courts' (1999) 32 New York University Journal of International Law & Policy 501 at 516.

¹⁵² Ibid.

CHAPTER NINE: INTERNATIONAL AND NATIONAL LAW IN POST-COLONIAL KENYA - A COMPARATIVE ANALYSIS WITH NIGERIA

Introduction

In the preceding Chapter Eight,¹ the relationship between international and national law in Nigeria was critically examined. It was demonstrated that going by section 12 (1) of the *Constitution of the Federal Republic of Nigeria* 1999 (Nigerian Constitution), bilateral treaties require domestication into Nigerian law before they can be enforced in Nigeria. In addition, it was demonstrated that judicial application of international law in Nigeria illustrates that, once domesticated, international treaties supersede the provisions of municipal legislation but remain legally inferior to the Nigerian Constitution.² It was also argued in Chapter Eight that, while the constitution of Nigeria is silent on the legal status of customary and general principles of international law in Nigeria, the practice is to apply them whenever they are not in conflict with any domestic law in Nigeria.

The main purpose of this Chapter is to critically examine the post-colonial application of international law within the domestic legal system of Kenya. This is informed by the recent constitutional reforms in Kenya in relation to the application of international law in Kenya's legal system. The purpose is to make comparative analyses between Nigeria and Kenya in terms of how both states apply international law within their domestic legal systems. The reason for the choice of Kenya as a comparator is because like Nigeria, Kenya is also an Anglophone African State. More importantly, Kenya has embarked on constitutional reforms in terms of the relationship between its legal system and international law. Therefore, the objective herein is to find out if there are lessons that Nigeria may

¹ See section 8.2-8.3.

² See section 8.3.

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learn from Kenya's constitutional reforms. To achieve the main objective in this Chapter, the following research questions are posed: 1) What is the nature of the relationship between international and national law in post-colonial Kenya? 2) What are the differences and similarities in the approaches of Nigeria and Kenya towards international law? 3) Do either of the post-colonial African States of Nigeria and Kenya have anything to learn from each other in terms of the relationship between international and national law?

The comparative study³ of Nigeria and Kenya in the context of the manner of interpretation of domestic and international law by the courts of Nigeria and Kenya is intended to highlight the current approaches of both States towards international law, and the impact that a choice of either approaches has on the hierarchical place of international law in both legal systems. This comparison aims to demonstrate the need for a protective and progressive attitude towards international law in Nigeria. The comparative examination will reveal the common historical and constitutional challenges that Anglophone African States are typically presented with, in terms of the application and enforcement of international law domestically. It demonstrates how Kenya has responded to these challenges and it indicates how Nigeria can improve the application and enforcement of international law in its domestic legal system.⁴

This Chapter has been sub-divided into three main sections. In section 9.1, the objective is to answer the research question: What is the nature of the relationship between international and national law in post-colonial Kenya? In section 9.2 the main task is to answer the research question: What are the differences and

³ See Z Konrad and K Hein, *Introduction to Comparative Law* (Oxford University Press, 1998) at 5 and 6.

⁴ G Dannemann, 'Comparative Law: Study of Similarities or Differences?' in M Reimann and R Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) 385-418.

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similarities in the approaches of Nigeria and Kenya towards international law? In the final section 9.3, the objective is to answer the research question: Do either of the post-colonial African States of Nigeria and Kenya have anything to learn from each other in terms of the relationship between international and national law? It will be argued that, if Nigeria is to keep up with its desire to operate in accordance with respect for international law as provided under Section 19 of the Nigerian Constitution, Nigeria will be required to amend its Constitution to make provision enabling the direct enforceability of any international instruments to which it is a party in Nigeria. Before the comparative analyses, the post-colonial legal situation in relation to the place of international law within the Kenyan legal system is examined in section 9.1 below.

9.1. Kenyan State Law and International Law

The aim in this section is to answer the research question: What is the nature of the relationship between international and national law in post-colonial Kenya? The development of Kenya's post-colonial legal system and legal order is traceable to the declaration of Kenya as the East Africa Protectorate on 15 June 1895 by the British colonial authorities.⁵ This marked the beginning of formal colonial administration by the East African Company by virtue of the *Royal Charter*.⁶ International law and particularly international human rights law has had a mixed history in the history of the Kenyan legal system.⁷ The 1963

⁵ For a comprehensive historical analysis of this, see C Singh, 'The Republican Constitution of Kenya: Historical Background and Analysis' (1965) 14 *International and Comparative Law Quarterly* 878.

⁶ See SA Koppelman and YP Ghai, *Public Law and Political Change in Kenya* (JSTOR, 1971) and JB Ojwang, *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (African Centre for Technology Studies, 1990).

⁷ NW Orago, 'The 2010 Kenyan Constitution and the Hierarchical Place of International Law in the Kenyan Domestic Legal System: A Comparative Perspective' (2013) 13 *African Human Rights Law Journal* 415.

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Independence Constitution of Kenya, did not make provision for the direct application of international law or international human rights law in the domestic legal system of Kenya.⁸ This happened later in 1969,⁹ when a bill of rights entitled 'Protection of Fundamental Rights and Freedom of Individuals' was incorporated into Articles 14 – 30 of the *Kenya Constitution* 1963.¹⁰ This was as a result of the influence of the *UN Charter, Universal Declaration of Human Rights* 1948 (UDHR) and the *European Convention on Human Rights and Fundamental Freedoms* (ECHR).¹¹ It has been claimed that such incorporation of international human rights norms into the Kenyan Constitution was also due to the influence of the Ugandan example which was in turn inspired by the approach of the Nigerian *Independence Constitution* 1960.¹²

Before the adoption of the current *Constitution of the Republic of Kenya* 2010, Kenya's general approach towards international law was dualist.¹³ This was affirmed by the decision of the Kenyan Court in the case of *David Njorege Macharia v Republic of Kenya*,¹⁴ where the Court observed that previously Kenya adopted a dualist approach to international law and consequently the provisions of a treaty did not as a general rule have the force of law in Kenya unless it had

⁸ Ibid, at 416-417.

⁹ Ibid.

¹⁰ The Kenya Bill of Rights were included as Chapter V of the *Constitution of Kenya Act No 5* 1969 as cited in NW Orago, (n 7) above at 417.

¹¹ TM Franck and AK Thiruvengadam, 'International Law and Constitution-Making' (2003) 2 *Chinese Journal of International Law* 467 at 503.

¹² AW Munene, 'The Bill of Rights and Constitutional Order: A Kenyan Perspective,' (2002) 2 *African human Rights Law Journal* 135 at 144.

¹³ Ibid.

¹⁴ *David Njorege Macharia v Republic of Kenya* [2011] eKLR 1.

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been domesticated by way of domestic legislation by the Kenyan Parliament,¹⁵ thereby echoing the doctrine in other dualist States that national and international legal orders were two different and distinct legal systems.¹⁶ International law was not recognised as part of the *corpus* of national law in Kenya either under the defunct *Kenyan Constitution 1963* nor under the Kenyan *Judicature Act 1967*.¹⁷ However, in spite of this early dualist approach, Kenyan Courts had developed and adopted a very positive and progressive attitude towards international law by applying international law directly into the domestic jurisdiction of Kenya.¹⁸

The practice under the *Kenyan Constitution 1963* was towards adopting an approach wherein the courts permitted direct application of international law in Kenya in a restrictive way in so far as such international laws were not in conflict with the Kenyan Constitution or any other statutory provisions.¹⁹ In line with this general approach, in the case of *Rono v Rono*,²⁰ the Court held that the practice that has been developed within common law theory on the application of international law in the domestic sphere was that in the absence of domestic legislation, both ratified treaties as well as customary rules of international law were applicable directly in the domestic jurisdiction where they did not conflict

¹⁵ See also, *Okunda v Republic* [1970] EA 512.

¹⁶ See A Cassese, *International Law in a Divided World* (Oxford University Press, 1987).

¹⁷ *Judicature Act 1967 CAP 8 Laws of Kenya*, by its section 3 enumerated sources of Kenyan law to include only: The Constitution; Acts of Parliament; common law; doctrines of equity and statutes of general application which were in force in England as at 12 August 1897; and customary law.

¹⁸ T Kabau and C Njoroge, (2011) 'The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonisation of the Legal System,' (2011) 44 *Comparative & International Law Journal of South Africa* 293 at 296.

¹⁹ *Ibid.*

²⁰ *Rono v Rono* [2005] KeCA 16.

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with any domestic laws.²¹ In *RM and Another v Attorney General*,²² the Court ruled that where there was no ambiguity in domestic legislation and where such legislation was in conflict with international law, the common law approach favoured the provisions of domestic legislation in terms of supremacy.²³

Following the above decisions in *RM and Another v Attorney General*,²⁴ and *Rono v Rono*,²⁵ in *Re Estate of Lerionka Ole Ntutu*²⁶ the Court relied on the provisions of the *Bangalore Principles on Domestic Application of International Human Rights Norms* (Bangalore Principles),²⁷ as a basis for justifying the domestic application of undomesticated international human rights treaties in Kenya.²⁸ The Bangalore Principles which the Court relied on in this case are principles on the domestic application of international human rights treaties adopted by an international consortium of Commonwealth judges in India in 1988.²⁹

²¹ Ibid.

²² *RM and Another v Attorney General* [2006] eKLR 1.

²³ Ibid.

²⁴ Supra.

²⁵ Supra.

²⁶ *Re Estate of Lerionka Ole Ntutu* [2008] eKLR 1.

²⁷ *Bangalore Principles on Domestic Application of International Human Rights Norms*, the Bangalore Principles were released as a summary of issues discussed at a judicial colloquium on 'The Domestic Application of International Human Rights Norms', held in Bangalore, India from 24-26 February 1988, reprinted in Commonwealth Secretariat *Developing Human Rights Jurisprudence* vol 3 151 and in (1989) 1 *African Journal of International and Comparative Law/RADIC* 345.

²⁸ Ibid.

²⁹ See generally, J Ambani, 'Navigating Past the 'Dualist Doctrine': The Case for Progressive Jurisprudence on the Application of International Human Rights Norms in Kenya' in M Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press, 2010) at 25 and 30.

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In terms of the hierarchical status of laws in pre-2010 Kenya, international treaties ratified and domesticated by Kenya ranked *pari pasu* with municipal legislation and such domesticated international treaties could be amended by a simple majority vote in the Kenyan legislative house.³⁰ The problem of the applicability of international law in the domestic legal system of Kenya was compounded by very few incidences of domestication or incorporation of international treaties into the domestic laws of Kenya by the Kenyan Parliament with the resultant effect that many treaties ratified by Kenya did not have legal effect in Kenya.³¹ As a result of the afore-mentioned *lacuna* in Kenyan law wherein neither the 1963 Constitution nor the *Kenyan Judicature Act 1967*³² made mention of international law as a source of law, the courts developed an unclear jurisprudence on the applicability of international law in Kenya.³³

The uncertainty in the jurisprudence of Kenyan courts on the applicability or otherwise of international law in Kenya was illustrated by the judicial attitude in the High Court case of *Okunda v Republic*,³⁴ where the Court held that as international law was not mentioned as a source of law under any law in Kenya, such international laws do not have legal effects in the domestic legal system of Kenya. Therefore, there was a situation where, on the one hand, some courts held that international treaties had the force of law in Kenya in the absence of local legislation in Kenya based on the decision in *Rono v Rono*,³⁵ on the other

³⁰ TM Franck and AK Thiruvengadam, (n 11) above at 477-485.

³¹ NW Orago, (n 7) above at 417.

³² Cap 8 *Laws of Kenya*.

³³ NW Orago, (n 7) above at 417.

³⁴ *Okunda v Republic* [2001] KLR 1.

³⁵ *Supra*.

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hand, there was the situation where, as held in the case of *Okunda v Republic*,³⁶ international law was not a source of law in Kenya. In another High Court case of *Pattini and Another v Republic*,³⁷ the Court held that although international law could be used as persuasive authority, international law was not a binding source of law in the domestic legal system of Kenya.³⁸ Notwithstanding this uncertainty, the dominant legal position under the defunct Constitution of Kenya remained the decision of the then highest Court in Kenya, which was the Court of Appeal (CA) in *Rono v Rono (Rono's case)*.³⁹

It has been rightly argued that the decision of the Kenyan CA in *Rono's case* above, wherein it was held that international customary law and treaty law were applicable by courts of law in Kenya if they are not in conflict with any existing State law, was one of the cases dealt with in pre-2010 Kenya which were precursors to the enactment and adoption of the *Constitution of the Republic of Kenya 2010*.⁴⁰ Indeed, in that case the CA went ahead to rely on the provisions of the *International Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), which had not been domesticated by the Kenyan Parliament,⁴¹ to rule that a rule of customary law of succession and inheritance that discriminated against women was a violation of international human rights law.⁴²

³⁶ Supra.

³⁷ *Pattini & Another v Republic* [2001] eKLR 1.

³⁸ Supra.

³⁹ *Rono v Rono*. Supra.

⁴⁰ NW Orago, (n 7) above at 418.

⁴¹ *Rono v Rono*. Supra at para 23.

⁴² Ibid.

9.1.1. The Kenyan Constitution 2010 and International Law

The enactment and adoption of the *Constitution of the Republic of Kenya 2010* (Kenyan Constitution) has been described as a departure from a dualist approach towards the application of international law within the domestic jurisdiction of Kenya,⁴³ leading some writers to argue that Kenya has effectively adopted a monist approach to the application of international law within its legal system.⁴⁴ Indeed, Article 2 (5) of the Kenyan Constitution provides that '[t]he general rules of international law shall form part of the law of Kenya.' This has been interpreted as implying that customary rules of international law are applicable in Kenya under its current Constitution.⁴⁵ It is also provided that '[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'⁴⁶ Therefore, under the current Kenyan Constitution, both general principles of international law and all treaties or conventions ratified by the State of Kenya are applicable before courts of law and within the legal system of Kenya.

However, under Article 2 (1) of the Kenyan Constitution, the constitution proclaims itself as the supreme law of the land and by its Article 2 (4) any law that is inconsistent with any of its provision shall to the extent of such inconsistency be void. It has been rightly argued that the afore-mentioned supremacy clause makes no exemption and would have to be interpreted as including international

⁴³ See *David Njorege Macharia v Republic of Kenya* (supra).

⁴⁴ J Gathii, 'Pitfalls of Adopting International Laws' (2011) *Nairobi Law Monthly* at 70 and M Mwangi, 'From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice' (2011) 3 *Journal of Language, Technology & Entrepreneurship in Africa* 144. For a contrary opinion on this, see EO Asher, 'Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya' (2013) 3 *International Journal of Humanities and Social Science* 266.

⁴⁵ T Kabau and C Njoroge, (n 11) above at 294.

⁴⁶ See Art 2 (6).

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law.⁴⁷ It has also been argued that under the Kenyan Constitution, international law supersedes any conflicting constitutional provision.⁴⁸ It would therefore appear that based on the supremacy clause in the Kenyan Constitution above, the relationship between international law and municipal laws of Kenya is not entirely monist. Despite the supremacy of the Kenyan Constitution, international laws supersede any conflicting provision of other domestic Kenyan legislations except for the Constitution.

The new approach adopted in the Kenyan Constitution towards international law illustrates a very effective harmonisation of international law with municipal law in the context of being a very good example of how to establish a viable interaction between international and national law. It will be clearly wrong to assume that the Kenyan Constitution derives its legitimacy from international law. Rather it is the Kenyan Constitution that seeks to validate the application of international law within the municipal legal system of Kenya. This is not to say that international law may not be used in the interpretation of the provision of the Constitution in situations of conflict between the provision of the Constitution and those of an international treaty. In line with this argument, it has been rightly argued that the provisions of an international treaty may be used in interpreting provisions of the Kenyan Constitution in cases of ambiguity and conflicting provisions of the Kenyan Constitution with international human rights instruments.⁴⁹

It is obvious from above that the status of international law within the domestic legal system of Kenya has improved significantly. However, the current challenges appear to be how the provisions of Article 2 of the Kenyan Constitution which directly incorporate international law into Kenya should be interpreted by

⁴⁷ T Kabau and C Njoroge, (n 11) above at 298.

⁴⁸ See J Gathii, (n 44) above.

⁴⁹ T Kabau and C Njoroge, (n 11) above at 300.

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the Courts in relation to international human rights treaties and their hierarchical status *vis-à-vis* the provisions of the Kenyan Constitution and domestic laws in situations of conflict. In the Kenyan, post-2010 Constitution High Court case of *Re the Matter of Zipporah Wambui Mathara*,⁵⁰ it was held that international treaties ratified by Kenya superseded the provisions of Kenya's domestic statutes by Article 2 (6) of the 2010 Kenyan Constitution. In *Wanjiku and Another v The Attorney-General and Another*, the High Court also affirmed that '[t]he Constitution and in particular articles 2 (5) and 2 (6) gave a new colour to the relationship between international law and international instruments and national law.'⁵¹

In *David Njorege Macharia v Republic of Kenya*,⁵² the High Court made references to *Wambui Mathara's*⁵³ case with approval and held that beyond the provisions of international treaties ratified by Kenya being directly applicable in Kenya under the Kenyan Constitution, their provisions superseded those of any Kenyan statute. This decision was upheld by the Kenyan CA.⁵⁴ Also in the case of *Karen Njere Kandie v Alssane Ba and Another*, the CA asked itself the question '[w]hat is a Court deciding a matter in 2015 to make of a treaty ratified without reservation long before the Constitution 2010 came into force. Is such a treaty or convention part of the laws of Kenya under Article 2 (6) of the Constitution or not'.⁵⁵ It then answered the question affirmatively with a single sentence - 'We

⁵⁰ *Re the Matter of Zipporah Wambui Mathara* [2010] eKLR 1.

⁵¹ *Wanjiku and Another v The Attorney-General and Anor* [2011] High Court of Kenya at Nairobi, Petition No 190 at para 17.

⁵² *Supra*.

⁵³ *Supra*.

⁵⁴ See Criminal Appeal No 497 2007.

⁵⁵ *Karen Njere Kandie v Alssane Ba and Anor* [2015] eKLR 1.

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think it is.'⁵⁶ This view has also been supported by the dissenting opinion of Chief Justice Willy Mutunga in the Supreme Court of Kenya *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*.⁵⁷ However, in the case of *Joseph Njuguna Nwaura v Republic*, the Kenyan CA refused the Applicants' request to quash the death penalty under Kenyan legal system as Kenya was not a Party to the *Second Optional Protocol to the International Covenant on Civil and Political Rights*.⁵⁸

It appears then that the current legal position in Kenya in terms of the relationship between international law and municipal legislation suggest that both systems of laws should 'overlap and penetrate each other'.⁵⁹ From the above, it is also clear that the position of international human rights treaties within the domestic legal system of Kenya has also been significantly improved. International human rights treaties to which Kenya is a Party can now be directly applied by courts of law through the instrumentality of Article 2 (5) and (6) of the *Kenyan Constitution* 2010.

The primacy given to international law over domestic legislation under the new Kenyan Constitution would enable the provisions of international human rights instruments to have primacy over those of municipal legislation in Kenya. This is in line with views and contemporary developments around the world about the

⁵⁶ Ibid.

⁵⁷ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*. [2012] Supreme Court of Kenya, Advisory Opinion Application No 2 at para 11.1. See also, *AIDS Law Project v Attorney General & 3 Others* [2015] eKLR 1 at paras 54-62.; *VMK v CUEA* [2013] eKLR 1 at para 46; *Republic v The Permanent Secretary of Internal Security & Another* [2014] eKLR 1 at paras 18-19; and *Kituo Cha Sheria & 8 Others v Attorney General* [2013] eKLR 1 at paras 32, 38, 43, 44 and 52.

⁵⁸ *Joseph Njuguna Nwaura v Republic* [2013] eKLR 1.

⁵⁹ RR Ludwikowski, 'Supreme Law or Basic Law-The Decline of the Concept of Constitutional Supremacy' (2001) 9 *Cardozo Journal of International & Comparative Law* 253 at 254.

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significance of commitments to international human rights values at State levels,⁶⁰ and corresponds to the traditions and practices of the UN human rights treaty Monitoring Bodies discussed in Chapter Seven.⁶¹

As progressive as the constitutional changes in Kenya in relation to the relationship between international and Kenyan State law would appear, the changes have nonetheless been criticized for lack of clarity and constitutional safeguards as to how the provisions of Article 2 (5) and (6) should be interpreted by the courts of law.⁶² It has also been argued that such general incorporation of international law into the domestic legal system of a State raises concerns about State sovereignty in relation to international law.⁶³ The Kenyan CA expressed the sentiments about sovereignty in the more recent case of *Kenya Airports Authority v MITU-Bell Welfare Society and 2 Ors* where it noted that:

The external sovereignty of Kenya is not only political but legal and legislative and such sovereignty is internally subject to the Constitution of Kenya. **Neither the UN nor any international organization legislates for Kenya and it is impermissible to use Article 2 (5) of the Constitution as a basis to justify any and all**

⁶⁰ M Sepulveda, 'The Constitutional Court's Role in Addressing Social Injustice' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) at 145-146; VS Vereshchetin, 'New Constitutions and the Old Problem of the Relationship between International Law and National Law' (1996) 7 *European Journal of International Law* 29; A Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law' (2009) 3 *Vienna Online Journal on International Constitutional Law* 170; and GM Danilenko, 'Implementation of International Law in CIS States: Theory and Practice' (1999) 10 *European Journal of International Law* 51.

⁶¹ See for example, Committee on Economic Social and Cultural Rights (CESCR), *General Comment No 9: The Domestic Application of the Covenant*, 3 December, 1998. E/C12/1998/24 at para 4.

⁶² NW Orago, (n 7) above at 421.

⁶³ *Ibid*, at 421-422. See also, WM Gibson, 'International Law and Colombian Constitutionalism: A Note on Monism' (1942) 36 *The American Journal of International Law* 614; P Dubinsky, 'International Law in the Legal System of the United States' (2010) 58 *American Journal of Comparative Law* 455; and G Slyz, 'International Law in National Courts' (1995) 28 *New York University Journal of International Law & Policy* 65.

rules and principles of international law as part of the laws of Kenya. It is only general rules of international law that are part of the laws of Kenya.⁶⁴

It is argued that although such sentiments about State sovereignty do influence the attitude of certain courts towards adopting a cautious approach to international law that gives primacy to State law over international law as demonstrated by the statement of the Kenyan CA in the above case,⁶⁵ however, since States have given up parts of their sovereignty through membership of international organisations as well as signing and ratifying various international treaties, such general incorporation of international law into national law helps to strengthen democratic governance by ensuring that the State keeps up with its international commitments under international law.⁶⁶ In section 9.2 below, comparative analyses is made between Nigeria and Kenya in the context of their legal relationship with international law.

9.2. National and International Law in Nigeria and Kenya: A Comparative Perspective

The purpose of this section is to answer the research question: What are the differences and similarities in the approaches of Nigeria and Kenya towards international law? The answer to this question will help illustrate how Kenya has responded to the legal challenges in relation to the applicability of international law in its domestic jurisdiction, and how Nigeria can respond to similar challenges. Both Nigeria and Kenya have the common history of British colonial rule and

⁶⁴ *Airports Authority v MITU-Bell Welfare Society and 2 Ors* [2016] eKLR 1 at para 118. The emphasis is added.

⁶⁵ See for example the decision of the US Supreme Court in *Sosa v Alvarez Machain* [2004] 542 US 692.

⁶⁶ For general analyses of Kenya's new Constitution see E Kramon and DN Posner, 'Kenya's New Constitution' (2011) 22 *Journal of Democracy* 89.

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consequently both of them have historically and to some extent currently adopt common law approaches to the generality of their plural legal systems.⁶⁷ By virtue of the colonial encounter, both Nigeria and Kenya lost their pre-colonial sovereignties to colonial Britain.⁶⁸ Consequently, throughout the period of colonialism, Nigeria and Kenya disappeared from the international arena and lost the capacity to enter into international relations and participate in the development of and engagement with international law.⁶⁹

With the emergence of the UN in 1945 and the adoption by the UN General Assembly (UNGA) of a historic resolution – the *UN Declaration on the Granting of Independence to Colonial Countries and Peoples* (UN Declaration of Independence),⁷⁰ Nigeria and Kenya benefited from the UN Declaration of Independence by attaining political independence and regaining their

⁶⁷ For Kenya, see JB Ojwang, 'Constitutional Trends in Africa-The Kenya Case' (2000) 10 *Transnational Law & Contemporary Problems* 517; JS Fullerton, 'The Evolution of the Common Law: Legal Development in Kenya and India' (2006) 44 *Commonwealth & Comparative Politics* 190; and YP Ghai and P McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (Oxford University Press, 1970). For Nigeria see, TO Elias, *Groundwork of Nigerian Law* (Routledge & Kegan Paul, 1954); AO Obilade, *The Nigerian Legal System* (Sweet & Maxwell, 1979); and BO Nwabueze, *A Constitutional History of Nigeria* (Addison-Wesley Longman Ltd, 1982).

⁶⁸ B Davidson and J Hughes, *The Story of Africa* (Mitchell Beazley, 1984); B Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (Cambridge University Press, 1993); G Casely-Hayford, *The Lost Kingdoms of Africa* (Bantam Press, 2012); RJ Reid, *A History of Modern Africa: 1800 to the Present*, vol 7 (John Wiley & Sons, 2011).

⁶⁹ TO Elias and R Akinjide, *Africa and the Development of International Law* (Martinus Nijhoff Publishers, 1988) at 22; NL Bruce-Wallace, 'Africa and International Law—the Emergence to Statehood' (1985) 23 *The Journal of Modern African Studies* 575 at 578; OC Okafor, 'After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa' (2000) 41 *Harvard International Law Journal* 503; and JJG Syatauw, *Some Newly Established Asian States and the Development of International Law* (Springer Science & Business Media, 2013).

⁷⁰ Adopted by United Nations General Assembly (UNGA) Resolution 1514 (XV) of 14 December 1960.

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sovereignties in 1960 and 1963 respectively.⁷¹ Since attaining political independence, Nigeria and Kenya have remained Member States of the UN as Parties to the *UN Charter*, with rights and corresponding obligations under the *UN Charter*,⁷² as well as Members of the African Union (AU) and the British Commonwealth.

Following their membership of the UN and signing up to the *UN Charter*, Nigeria's and Kenya's engagement with international law continued with their incorporation of international human rights norms articulated under the *UN Charter* and the UDHR 1948 into their national Constitutions. As discussed in Chapter Eight⁷³ above, the post-colonial relationship between Nigeria's national laws and international law is illustrated by the incorporation into its *Independence Constitution* 1960 of international human rights norms articulated under the *UN Charter*,⁷⁴ the UDHR⁷⁵ 1948 and the European Convention on Human Rights (ECHR)⁷⁶ and since then all subsequent Nigerian constitutions have incorporated those rights.⁷⁷ Nigeria is also currently a Party to most international and regional

⁷¹ For Kenya, see JB Ojwang, (n 67) above; JS Fullerton, (n 67) above; and YP Ghai and P McAuslan, (n 67) above. For Nigeria see, TO Elias, (n 67) above; AO Obilade, (n 67) above; and BO Nwabueze, (n 67) above.

⁷² Nigeria became a UN Member State on 07 October 1960 and Kenya became a Member State of the UN on 16 December 1963. See, www.un.org/en/member-states/index.html, accessed 16 November 2016.

⁷³ See section 8.2.

⁷⁴ *UN Charter*. Supra.

⁷⁵ UDHR. Supra.

⁷⁶ ECHR. Supra

⁷⁷ TM Franck and AK Thiruvengadam, (n 11) above at 501-505; CN Okeke, *The Theory and Practice of International Law in Nigeria* (Fourth Dimension, 1986) at 328-337; and TO Elias, *New Horizons in International Law* (BRILL, 1980).

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human rights treaties.⁷⁸ Most of the rights provided under the UDHR have been included under Chapter IV of the current *Nigerian Constitution* 1999.⁷⁹ Similarly, the 1960 amendment to the old Kenyan Constitution,⁸⁰ incorporated a bill of rights entitled 'Protection of Fundamental Rights and Freedom of Individuals' into its Articles 14–30 of the *Kenya Constitution* 1963.⁸¹ Kenya is also a Party to the African Charter and as demonstrated in Chapter Seven⁸² both Nigeria and Kenya have participated in proceedings before the African Commission with the Commission ruling against both of them in two different cases.⁸³

In terms of the general relationship between national and international law both countries inherited the dualist approach of Britain as demonstrated by the decisions in the Nigerian case of *Abacha and Ors v Fawehinmi (Abacha's case)*,⁸⁴ and the pre-2010 Kenyan Constitution case of *Rono v Rono (Rono's case)*.⁸⁵ While the decisions in *Abacha's case* and *Rono's case* are similar in the sense of

⁷⁸ Some of these are: The *International Covenant on Civil and Political Rights* (ICCPR) 1966, adopted by the United Nations General Assembly on 16 December 1966; The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 1966, adopted by the United Nations General Assembly on 16 December 1966; and the *African Charter on Human and Peoples Rights* 1981, adopted in Nairobi on 27 June 1981, entered into Force October 21, 1986 among other regional and international human rights instruments. See, <http://hrlibrary.umn.edu/research/ratification-nigeria.html>, accessed 10 November 2016.

⁷⁹ See sections 33-46 of the *Constitution of the Federal Republic of Nigeria*, 1999.

⁸⁰ Kenya (Constitution) (Amendment No 2) Order in Council of 1960

⁸¹ The Kenya Bill of Rights were included as Chapter V of the *Constitution of Kenya Act No 5* 1969.

⁸² See section 7.3 and sub-section 7.3.1.

⁸³ For Nigeria see, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*. Communication 155/96 and for Kenya see, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*. Communication 276/03.

⁸⁴ *Abacha & Ors v Fawehinmi* [2000] LPELR-14 (SC).

⁸⁵ *Supra*.

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establishing that international treaties domesticated into the national laws of both States were enforceable, they differ in the sense that while the decision in the Kenyan *Rono's* case included customary rules of international law, *Abacha's* case was silent on customary international law. There are also differences in relation to the hierarchical status of international law *vis-à-vis* national legislation. While *Abacha's* case established that once domesticated, international treaties attain a higher status than municipal legislation, in *Rono's* case it was held that when there is conflict between the two, domestic law shall prevail.

In Kenya, there is currently a remarkable departure from the purely and formerly dualist general approach towards international law articulated in the *Rono's* case above. The new provisions in the current Constitution of Kenya, particularly Section 2 (5) and (6), expressly make both international treaties ratified by Kenya as well as general principles of international law, such as customary rules of international law and general principles of international law, applicable and enforceable in Kenya.⁸⁶ Nigeria's current Constitution has no equivalent provision and this represents a fundamental difference between the contemporary approaches of both States in terms of the relationship between international and national law.

The point of convergence between Nigeria and Kenya appears to be that, based on the authority of the Nigerian SC decision in *Abacha's* case, international treaties domesticated into Nigerian law have a higher status *vis-a-vis* national laws, and this is also the case in Kenya, as the 2010 Constitution makes it expressly clear that international law 'shall form part of the law of Kenya under

⁸⁶ See the Kenyan *Treaty Making and Ratification Act No 45 2012*, which describes itself in the long title as 'AN ACT of Parliament to give effect to the provisions of Article 2 (6) of the Constitution and to provide the procedure for the making and ratification of treaties and connected purposes.'

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this Constitution.⁸⁷ In terms of the relationship between the constitutions of both States, there is also a point of convergence as both of them proclaim their supremacy over any other law, and that where there is inconsistency their provisions shall prevail over such inconsistent laws.

It is argued that the above supremacy clauses in both Constitutions includes international law. Implying that although the constitutions co-exist separately from international law, in the event of a conflict between the constitutions and international law, the former prevails. In the two countries,⁸⁸ there is no known case as at the time of writing in Kenya, Nigeria or at regional and international levels where the validity of the provision of the constitutions of both States have been challenged on the grounds of their conflict with or violation of international law. However, it has been argued that where an issue of inconsistency arises between the Constitution and international law within the domestic context of Kenya, the Constitution will prevail.⁸⁹ It is argued that this is the position in Nigeria as well.

Nevertheless, the legal position in relation to the supremacy of the constitutions of both States may be different if such issues arises before a regional or an international court or tribunal.⁹⁰ Indeed, it has been argued that at the international level, where there are inconsistencies between national and international law it has been the consistent position that international law prevails.⁹¹ Indeed, in the

⁸⁷ Section 2 (6). See the decisions in the following cases: *Re the Matter of Zipporah Wambui Mathara*, supra; *Wanjiku & Another v The Attorney-General & Another*, supra; and *David Njoroche Macharia v Republic of Kenya* (supra).

⁸⁸ See section 1 (1) and (3) of the *Nigerian Constitution* 1999 and section 2 (1) and (4) of the *Constitution of Kenya* 2010.

⁸⁹ T Kabau and C Njoroje, (n 11) above at 299.

⁹⁰ Ibid.

⁹¹ E Denza, 'The Relationship between International and National Law' in DE Malcolm (ed), *International Law* (Oxford University press, 2006). Art 27 of the *Vienna Convention on the Law*

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case of *Lohe Issa Kanote v Burkina Faso*,⁹² the African Court on Human and Peoples' Rights (African Court) held that the provisions of the Penal Codes of the State of Burkina Faso on defamation were in violation of Article 9 of the African Charter, Article 66 (2) (c) of the *Revised Economic Community of West African States (ECOWAS) Treaty* and Article 19 of the ICCPR.⁹³ The African Court consequently ordered the Respondent State to amend its defamation legislation to make it compliant with the provisions of Article 9 of the African Charter, Article 19 of the ICCPR and Article 66 (2) (c) of the revised ECOWAS Treaty.⁹⁴ Therefore, the validity of domestic law outside of Kenya and Nigeria does not depend on the constitutions of both countries but rather on the provision of international law.⁹⁵

It is argued that as States are expected to conform with their international obligations,⁹⁶ courts of law should likewise interpret the provisions of their national laws and, where there is room to interpret the constitutions of their States, in conformity with their international law obligations. It is further argued that when presented with issues of conflict between the constitutions of both Kenya and Nigeria on the one hand, and international law on other hand, the courts in Nigeria and Kenya should resolve such conflicts by references to ratified treaties, whether domesticated or not as well as resolutions, international case law, general

of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 provides that a State cannot rely on the provisions of its domestic law to violate its international treaty obligations.

⁹² *Lohe Issa Kanote v Burkina Faso*. Application No 004/2013.

⁹³ *Ibid*, at para 164.

⁹⁴ *Ibid*.

⁹⁵ T Kabau and C Njoroge, (n 11) above.

⁹⁶ H Kelsen, *Principles of International Law* (The Lawbook Exchange Ltd, 1952) at 564.

comments and advisory opinions of relevant international bodies.⁹⁷ This should be the best strategy to resolve cases of inconsistencies, conflicts and ambiguities in their constitutions, as well as harmonising international and national law particularly in the context of protecting human rights. In section 9.3 below, it will be demonstrated that this argument is in line with recent judicial developments in the United Kingdom (UK).

9.3. Viability between International and National Law in Nigeria

The aim here is to answer the research question: Do Nigeria and Kenya have anything to learn from each other in terms of the relationship between international and national law? Egede has rightly argued that it has become necessary for Nigeria to depart from its dualist approach to international law in the domestic jurisdiction of Nigeria so as to enable the direct and automatic enforceability of treaties ratified by Nigeria in Nigerian courts.⁹⁸ Okeke has also expressed similar views by arguing that Nigeria should discard its dualist approach towards international law so as to enable an uninhibited enforcement of international law by the domestic courts of law in Nigeria.⁹⁹

In line with the above argument, it is argued that it is important for the Nigerian Constitution to be amended, in particular Section 12 (1) of the *Constitution of Nigeria* 1999 should be redrafted in the model of Section 2 (5) and (6) of the *Constitution of the Republic of Kenya* 2010. Such amendment would enhance the automatic enforcement of international treaties ratified by Nigeria without

⁹⁷ See Y Shany, 'How Supreme is the Supreme Law of the Land? A Comparative Analysis of the Influence of International Human Rights Conventions upon the Interpretation of Constitutional Texts by Domestic Courts' (2006) 31 *Brooklyn Journal of International Law* 341.

⁹⁸ E Egede, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria' (2007) 51 *Journal of African Law* 249.

⁹⁹ CN Okeke, 'The Use of International Law in the Domestic Courts of Ghana and Nigeria,' (2015) 32 *Arizona Journal of International & Comparative Law* 371 at 428.

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undergoing the cumbersome processes of domestication which has already been criticised by the African Commission.¹⁰⁰

The above proposal for constitutional amendment would also provide a clear and unambiguous constitutional pathway, for the direct applicability and enforceability of general and customary rules of international law by Nigerian courts of law.¹⁰¹ At the moment, it appears it would be difficult if not impossible for Nigerian courts of law to enforce Nigeria's international human rights obligations under several international human rights treaties like the *International Covenant on Civil and Political Rights* 1966 (ICCPR),¹⁰² *International Convention on the Elimination of All Forms of Racial Discrimination* 1965 (ICERD)¹⁰³ and the *International Covenant on Economic Social and Cultural Rights* 1966 (ICESCR)¹⁰⁴ which Nigeria has ratified but has not domesticated.¹⁰⁵ The only inkling towards the enforceability of international human rights norms articulated under international

¹⁰⁰ See African Commission on Human and Peoples Rights (ACHPR), *Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011 – 2014)*, adopted at the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 04 to 18 November, 2015, in Banjul, Gambia at para 60 where the African Commission lamented about the 'prolonged procedures for domestication of international law under its legal architecture'.

¹⁰¹ DF Klein, 'A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts,' (1988) 13 *Yale Journal of International Law* 332.

¹⁰² *International Covenant on Civil and Political Rights* (1966), adopted and opened for signature, ratification and accession by UNGA Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with its Art 49.

¹⁰³ *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) 1965, adopted and opened for signature and ratification by UNGA Resolution 2106 (XX) of 21 December 1965, entered into force on 4 January 1969, in accordance with its Art 19.

¹⁰⁴ *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into Force 3 January 1976, in accordance with its Art 27.

¹⁰⁵ E Egede, (n 98) above and CN Okeke, (n 99) above at 428.

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human rights treaties by courts in Nigeria is the preamble to the Nigerian *Fundamental Rights (Enforcement Procedure) Rules, 2009* which states that:

... the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions. Such bills include;

(i) The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system,

(ii) The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system ...¹⁰⁶

However, the above rules are merely procedural rules and do not constitute substantive law. The significance of constitutional amendment to the enforcement of human rights guaranteed under international law is illustrated by the decisions of the Kenyan courts in two cases. In the case of *Joseph Letuya and 21 Ors v Attorney General and Ors*,¹⁰⁷ the Applicants invoked the provisions of the new Kenyan Constitution to argue their case.¹⁰⁸

In considering whether members of the Ogiek Community were IPs and whether they had any recognisable rights arising from their historical and current occupation of East Mau Forests, the Court invoked Section 2 (6) of new *Constitution of the Republic of Kenya 2010*.¹⁰⁹ In so doing, it then relied on the

¹⁰⁶ Para 3 (b) of the Nigerian *Fundamental Rights (Enforcement Procedure) Rules, 2009*, enacted on 1 December 2009 by the Chief Justice of Nigerian pursuant to section 46 (3) of the *Constitution of the Federal Republic of Nigeria, 1999*.

¹⁰⁷ *Joseph Letuya and 21 Ors v Attorney General and 5 Ors* (ELC Civil Suit No. 821 of 2012 (OS)). The facts of this case have already been given in Chapter Five under sub-section 5.1.5 and will not be repeated here.

¹⁰⁸ *Ibid*, at 4-5.

¹⁰⁹ *Ibid*.

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provisions of international human rights instruments like ILO *Indigenous and Tribal Peoples Convention*, 1989 No 169 (ILO 169), the *International Covenant on Civil and Political Rights* and the *African Charter on Human and Peoples Rights* (African Charter)¹¹⁰ to affirm that the Ogiek were IPs and minorities under international law.¹¹¹

It should be noted that although this case was commenced in 1997, it was not until 2014 that the newly established ELC was able to give judgement in this matter. It is argued that had this case been decided before the coming into force of the 2010 Kenyan Constitution the ELC might have arrived at a different decision. Indeed, the ELC observed that although this case was initiated under the previous Constitution of Kenya, at the time of judgment it was the new Kenyan Constitution of 2010 that was applicable to the case.¹¹²

By contrast, in the pre-2010 Kenyan Constitution case of *Francis Kemei and Ors v Attorney General and Ors*,¹¹³ the Court was asked to determine the central issue in the case of whether the Ogieks of Kenya were IPs with rights as such.¹¹⁴ International law was never invoked by any of the Parties nor by the Court. It is argued that were the same case to be decided under the current 2010 Constitution of Kenya, the outcome may be different as the Court may have looked to international law to resolve the matter on the bases of the current

¹¹⁰ *African Charter on Human and Peoples Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

¹¹¹ *Ibid*, at 12-14.

¹¹² *Ibid*.

¹¹³ *Francis Kemei and 9 Ors v Attorney General and 3 Ors* (HCCA No. 238/99 and Appeal No. 98/2000). The facts of this case were also given in Chapter Five under sub-section 5.1.5 and will not be repeated here.

¹¹⁴ *Ibid*, at 1.

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Kenyan Constitution. This demonstrates the significance of constitutional reforms in the model of Section 2 (5) and (6) of the 2010 Constitution of Kenya.¹¹⁵

If Nigeria's Constitution is not amended as proposed above, another alternative is to invoke the interpretive role and powers of courts of law in Nigeria to enhance a progressive interpretation of the provisions of the Nigerian Constitution in a way that enhances the application and enforcement of international human rights instruments in Nigeria. Already, the *Fundamental Rights (Enforcement Procedure) Rules, 2009*,¹¹⁶ quoted above invites Nigerian courts to do so. In addition to the above rules, paragraph 4 of the *Bangalore Principles on the Domestic Application of International Human Rights Norms*,¹¹⁷ states that:

In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, **there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.**¹¹⁸

¹¹⁵ However, it is also possible that the unfriendly climate for the independence of the Kenyan judiciary may also have impacted on the negative attitudes of judges to land rights of IPs in pre-2010 Kenyan era. See M Mutua, 'Justice under Siege: The Rule of Law and Judicial Subsistence in Kenya' (2001) 23 (1) Human Rights Quarterly 96.

¹¹⁶ *Supra* preamble at para 3 (b).

¹¹⁷ The Bangalore Principles were released as a summary of principles adopted at an international judicial colloquium of Commonwealth judges on '*The Domestic Application of International Human Rights Norms*', held in Bangalore, India from 24-26 February 1988. They are reprinted in the *Commonwealth Secretariat Developing Human Rights Jurisprudence* vol 3 at 151 and in *1 African Journal of International and Comparative Law/RADIC* (1989) 345.

¹¹⁸ The emphasis is added. See also para 7 which states that: 'It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – **whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.**' The emphasis is added. For the significance of these principles on the relationship between international and national law, see M Kirby, 'Domestic Courts and International Human Rights Law-The Ongoing Judicial

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Therefore, it appears that there is a growing consensus among Commonwealth judges that international human rights norms articulated under international human rights instruments are applicable within the domestic jurisdiction of States irrespective of whether they have been domesticated into national law or not. Indeed, developments in the 'parent' jurisdiction of Anglophone African States which is the UK, the judicial attitude appears to be in this direction.

In the 2015 UK Supreme Court (UKSC) case of *Cameron Mathieson v Secretary of State for Work and Pensions*,¹¹⁹ the UKSC used the *United Nations Convention on the Rights of the Child* 1989 (UNCRC),¹²⁰ a treaty which the UK had ratified but not domesticated in the interpretation of domestic law.¹²¹ Similarly, in *R (on the application of SG) and Ors v Secretary of State for Work and Pensions*,¹²² Lady Hale stated that '[I]ikewise, our approach to both discrimination and justification in this case **may be illuminated by reference to other international instruments ... most notably the United Nations Convention on the Rights of the Child**.'¹²³ Therefore, the above judicial developments in the UK adds credence to the common law presumption that Parliament does not intend to violate international law. Additionally, there is also a corollary to this common law presumption that Parliament does not intend to violate international law. It is

Conversation' (2010) 6 Utrecht Law Review 168; M Kirby, 'International Law-The Impact on National Constitutions' (2005) 99 Proceedings of American Society of International Law 1; and LG Barnett, 'International Human Rights Norms and their Domestic Application: Judicial Methods and Mechanisms' (1999) 29 Revisita Instituto Interamericano De Derechos Humanos 11.

¹¹⁹ *Cameron Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47.

¹²⁰ *United Nations Convention on the Rights of the Child*, 1989 adopted on 20 November 1989, entered into force on 2 September 1990.

¹²¹ *Cameron Mathieson v Secretary of State for Work and Pensions* (supra) at paras 38-44.

¹²² *R (on the application of SG) and Others v Secretary of State for Work and Pensions* [2015] UKSC 16.

¹²³ *Ibid*, at para 213. The emphasis is added.

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argued that the way the courts in Nigeria approach the above common law presumption and principle of statutory interpretation will impact on the applicability and enforceability of international law in the domestic legal system of Nigeria.¹²⁴ Equally relevant to the above argument in the context of constitutional interpretation in cases where, as is the case in Nigeria, the constitution is the supreme law in the national legal system, is the doctrine of legitimate expectation which has the capacity to significantly diminish the common law general rule that unincorporated treaties cannot create rights and duties in domestic law.¹²⁵ Courts of law can on the basis of the doctrine of legitimate expectation resolve cases in which there are issues of conflict between the Nigerian Constitution and international law in favour of the latter.

Conclusion

Although Nigeria and Kenya have historically followed the British tradition of dualism, recent constitutional developments in Kenya demonstrate that Kenyan courts and litigants now look to international law to resolve several domestic legal issues before Kenyan courts of law.¹²⁶ As demonstrated in Chapters Eight and in this Chapter, in Nigeria, international law is rarely utilised by litigants with the courts applying and enforcing international law only occasionally with an unenthusiastic attitude.¹²⁷ This Chapter has undertaken comparative analyses of the relationship between national and international law in Nigeria and Kenya. It

¹²⁴ Ibid.

¹²⁵ RF Oppong, 'Re-imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa' (2006) 30 *Fordham International Law Journal* 296 at 314.

¹²⁶ See T Kabau and C Njoroge, 'The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonisation of the Legal System,' (2011) 44 *Comparative & International Law Journal of South Africa* 293.

¹²⁷ C Nwapi, 'International Treaties in Nigerian and Canadian Courts' (2011) 19 *African Journal of International & Comparative Law* 38.

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has demonstrated that, the implications of the changes effected in Kenya through the adoption of the 2010 Kenyan Constitution has enhanced greater and better enforcement of international law by the domestic law courts in Kenya. While this positive development does not imply that Kenya is now completely monist in its approach towards international law, the constitutional changes represents a remarkable departure from Kenya's previously and purely dualist approach towards international law.

Bearing in mind, Gordon Woodman's caution that '[i]t must not be assumed that lessons on law reform are easily transferable.'¹²⁸ It has been argued that for Nigerians to benefit effectively from the human rights protections provided under international law and for international law to be generally enforceable in Nigeria, it will be necessary to amend the Nigerian Constitution and adopt the model and approach of the 2010 Kenyan Constitution. If for any reason an amendment is not possible, the courts of law in Nigeria can use their inherent powers as well as take inspiration from other jurisdictions like the UK in terms of recent judicial developments in which the UKSC has demonstrated a willingness to use the provisions of international treaties to interpret domestic laws and policies, even when such treaties have not been domesticated into UK law.

Even though there are only a few cases in which the Nigerian courts have had recourse to international law, there is room to expect that Nigerian courts can rise above the effects of section 12 (1) of the Nigerian constitution to invoke international law in statutory and constitutional interpretation. Indeed, in a concurring opinion in *Abacha's* case, Ejinwumi JSC stated that international law may 'have an indirect effect upon the construction of statutes or might give rise to

¹²⁸ GR Woodman, 'Ghana: How Does State Law Accommodate Religious, Cultural, Linguistic and Ethnic Diversity?', in M-C Foblets, J-F Gaudreault-Desbiens and AD Renteln (eds), *Cultural Diversity and the Law: State Responses from Around the World* (Bruylant, Éditions Yvon Blais, 2010) 255-280 at 280.

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a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty'.¹²⁹

It is also argued that there is a significant role for practicing lawyers and legal academics to play in this regard in Nigeria. Research has demonstrated that lawyers' lack of knowledge and skills on how to use international law in legal arguments in courts have had a negative impact on the interpretive usage of international law by domestic courts in Canada.¹³⁰ In Nigeria, this could possibly be the case as well because of the small number of cases where international law has been used in litigation.¹³¹

Indeed, States in which litigants use international law and the decisions of international courts to argue their legal points before domestic courts, would exhibit higher usages of international law to decide and interpret the law than those States where only domestic laws are relied upon.¹³² The dearth of cases in which international law is applied in Nigeria would seem to suggest that the courts in Nigeria have less opportunity to apply and enforce international law, compared with States where lawyers use international law to argue cases before domestic

¹²⁹ Supra at 587. See also *Attorney-General of the Federation v Attorney-General of Abia State & Ors* (supra), where the Nigerian SC made references to international law in its decision. Also, see *Mojekwu v Ejikeme* [2000] 5 NWLR (Pt.657) at 402, where the Nigerian Court of Appeal invoked the provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women* adopted 18 December 1979, 19 ILM 33 (1980), to rule that a native law and custom was repugnant to natural justice, equity and good conscience.

¹³⁰ See AF Bayefsky, 'International Human Rights Law in Canadian Courts' in B Conforti and F Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff Publishers, 1997) at 303 and M Cohen and AF Bayefsky, 'The Canadian Charter of Rights and Freedoms and Public International Law' (1983) 61 Canadian Bar Review-*Revue du Barreau Canadien* 265 at 275.

¹³¹ C Nwapi, (n 127) above at 61.

¹³² Ibid. See also, M Killander, *International Law and Domestic Human Rights Litigation in Africa* (PULP, 2010) and P Kunig, 'The Protection of Human Rights by International Law in Africa' (1982) 25 *German Year Book of International Law* 138.

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courts of law, as is now the case in Kenya. There is however, no known study that explains why lawyers do not often use international law in domestic litigation in Nigeria. It is argued that more could be made of the potential significance of a viable relationship between the domestic legal system of Nigeria and international law.

CHAPTER TEN: GENERAL CONCLUSION

Introduction

The main research objective in this thesis has been to ascertain whether Abuja peoples of Nigeria are indigenous peoples (IPs) under international law and whether their customary land rights are protected or could be protected under international law as IPs. This objective has been achieved in two ways. In Volume 1, the historical background to the thesis was set out in Chapters Two and Three, while the case study of Abuja was introduced in Chapter Four, and comparative analyses between the case study and Ogiek peoples of Kenya was made in Chapter Five. Secondly, in Volume 2, the debates about definition of IPs in the literature and under international law were examined and applied to the case study in Chapter Six. The relevance of international human rights law to the protection of land rights of IPs was critically analysed in Chapter Seven. The relationship between the Nigerian legal system and international law was examined in Chapter Eight and comparative analyses of the relationship between international and national law in Nigeria and Kenya, was the focus in the penultimate Chapter Nine.

This concluding Chapter is sub-divided into four main parts. The research questions, objectives and theoretical frameworks that have informed this research will be summarised in section 10.1 below. In section 10.2, some concluding remarks on the relationship between IPs' customary law, State law and international law will be made. In section 10.3, certain proposals will be made towards a fair resolution of the legal challenges surrounding Abuja peoples' land rights. Thereafter, section 10.4 will conclude with statements about the original contributions to knowledge which this thesis has made.

10.1. Research Questions, Objectives and Theoretical Frameworks

In Chapter One¹ as well as in Chapters Two² and Three,³ it was demonstrated that legal pluralism helps in contextualising the relationship between and amongst different legal or normative orders in this thesis. In Chapters Two and Three, it was demonstrated that legal pluralism explains the monopolisation of law by States. The implications of this monopolisation of law by the colonial and post-colonial African States of Nigeria and Kenya on land rights of IPs have been illustrated in Chapters Four⁴ and Five.⁵ The literature on legal pluralism demonstrates the existence of different forms of law, and has also provided insights into the inherent conflict that such legal pluralism generates.⁶

This thesis has therefore used Nigeria as a 'semi-autonomous social field',⁷ to illustrate the human rights implications of the power of State law to terminate legal pluralism. This thesis contributes to the existing debates on legal pluralism by using the case study of Abuja to demonstrate that the ability of State law to extinguish other forms of law (with the exception of 'living' customary law) as is the case in Nigeria has negative implications on land rights of IPs under IPs' customary law and international law. Based on the comparative examination of

¹ See sub-section 1.2.3.

² See section 2.3.

³ See section 3.3.

⁴ See section 4.2.

⁵ See BZ Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Sydney Law Review 375 and J Griffiths, 'What is Legal Pluralism?' (1986) 18 The Journal of Legal Pluralism and Unofficial Law 1.

⁶ BZ Tamanaha, (n 5) above and J Griffiths, (n 5) above.

⁷ See SF Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (Summer 1973) Law and Society Review 719.

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Nigeria and Kenya in Chapter Five, it has been suggested that Nigeria should replicate the recent and on-going land law reforms in Kenya in relation to the protection and accommodation of customary land rights in relation to Abuja peoples.

The ideas of leading theorists in post-colonialism have also been examined and their significance to the thesis have been highlighted in Chapter Four.⁸ It was important to do this to demonstrate the continuous impact of colonialism in a post-colonial Nigeria. In line with this aim, in Chapter Four the theoretical ideas of writers on post-colonialism were critically examined. Such post-colonial theories contextualises the legal challenges which the case study of Abuja illustrates. The impact of these scholarly works demonstrates the hegemonic tendencies of colonialism through the control of knowledge and representation, and the implications of these in the post-colonial Nigerian context. The literature also demonstrates the colonial effects of destroying the organic evolution of indigenous African States.⁹

This thesis contributes to the existing debates on post-colonialism through using the case study of Abuja to explain that the idea of acquiring territories of land through the control and manipulation of knowledge and narration did not begin

⁸ See section 4.1.

⁹ See NL Bruce-Wallace, 'Africa and International Law—the Emergence to Statehood' (1985) 23 *The Journal of Modern African Studies* 575; OC Okafor, 'After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa' (2000) 41 *Harvard International Law Journal* 503; and LD King, 'State and Ethnicity in Precolonial Northern Nigeria' (2001) 36 *Journal of Asian and African Studies* 339. See also, A Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1; A Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (1999) 32 *New York University Journal of International Law & Policy* 243; A Anghie, *Imperialism, Sovereignty the Making of International Law* (Cambridge University Press, 2005); A Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 *Third World Quarterly* 739; A Anghie *et al*, *The Third World and International Order: Law, Politics, and Globalization* (Martinus Nijhoff, 2003); and A Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77.

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with European colonialism and certainly did not end with political independence of Nigeria in 1960. The continuous negative impacts of colonialism on land rights of Abuja peoples in a purportedly post-colonial Nigeria is evident in Chapters Four¹⁰ and Five.¹¹

After setting out the historical background to the thesis in Chapters Two and Three as well as the introduction of the case study in Chapter Four, together with the comparative study in Chapter Five, the first central research objective raised the following research questions. The first central research question was: 1. Are Abuja peoples of Nigeria IPs under international law and are their customary land rights protected under international law as IPs? To answer this question, the following sub-research questions were posed:

- 1) Who are IPs under international law?
- 2) Is the concept of IPs relevant in the African context?
- 3) Do Abuja peoples of Nigeria meet the criteria to qualify as IPs under international law?
- 4) How are children defined under international child rights law and are there any insights to be gleaned from this so that IPs may be defined in a more positive context?
- 5) How relevant is the general body of international human rights law to the protection of land rights of IPs and how does international law protect such rights?

As the case study is in Africa and as the African region has adopted its own regional human rights framework - *African Charter on Human and Peoples Rights* (African Charter),¹² as a human rights instrument written by Africans for Africans,

¹⁰ See section 4.2.

¹¹ See section 5.2.

¹² Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM. 58 (1982), entered into force 21 October 1986.

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it was significant to enquire about its relevance to the protection of land rights of IPs in Africa. Accordingly, the following sub-research question was posed and answered in Chapter Seven: 6) Are the land rights of IPs protected under the African Charter?

The above questions were answered affirmatively in Chapters Six¹³ and Seven.¹⁴ In line with the answers to sub-research questions 1), 2) and 3) in Chapter Six, since there are no universally acceptable criteria with which to determine if a particular group of people can be regarded as IPs, preference was accorded to the characteristics of IPs given by the African Commission,¹⁵ and African Court which claims to have taken the peculiarities of African societies into account.¹⁶ However, as the Abuja peoples are comprised of eight different ethnic groups, the original argument has been advanced that such ethnic groups of peoples should as a collective be considered as IPs for the purpose of legally advancing their collective land rights under international law. It has been demonstrated in Chapter Six,¹⁷ that there is a gap in the existing body of literature on whether collective of peoples with distinct cultures can satisfy the criteria of IPs under both international law and the African Charter.¹⁸

¹³ See sections 6.2-6.3.

¹⁴ See sections 7.1-7.4.

¹⁵ African Commission on Human and Peoples Rights (ACHPR) and International Work Group on Indigenous Affairs (IWGIA), *Report of the African Commission's Working Group on Indigenous Populations Communities*, (ACHPR and IWGIA, 2005); ACHPR and IWGIA, *Indigenous Peoples of Africa: The Forgotten Peoples? The African Commission's Work on Indigenous Peoples in Africa*, (ACHPR and IWGIA, 2006) at 8-14; and KN Bojosi and GM Wachira, 'Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 382 at 391-400.

¹⁶ ACHPR and IWGIA, (n 15) above at 5.

¹⁷ See sub-section 6.2.5.

¹⁸ For a survey of some of the recent literature on the definition of IPs, see S Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (Federation Press, 1998); R

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After establishing that Abuja peoples are IPs under international law in Chapter Six, in Chapter Seven the next objective was to answer the following sub-research questions: 5) How relevant is the general body of international human rights law to the protection of land rights of IPs and how does international law protect such rights? 6) Are the land rights of IPs protected under the African Charter? The answers to these sub-research questions in Chapter Seven¹⁹ was that the general body of international human rights law and the jurisprudence of UN human treaty-based Monitoring Bodies such as the UN Human Rights Committee (HRC), Committee on the Elimination of Racial Discrimination (CERD), Committee on Economic Social and Cultural Rights (CESCR) demonstrated that the *International Covenant on Civil and Political Rights* 1966 (ICCPR),²⁰ the *International Covenant on Economic, Social and Cultural Rights* 1966 (ICESCR)²¹ and the *International Convention on the Elimination of All Forms of Racial Discrimination* 1965 (ICERD)²² have substantive provisions which have and can be used to protect land rights of IPs.

It was argued that as Nigeria is a Party to all the three international human rights treaties enumerated above, it is bound by its obligations under them in relation to

Stavenhagen, *The Emergence of Indigenous Peoples* (Springer Science & Business Media, 2012); and A Gupta, *Human Rights of Indigenous People*, vol 1 (Gyan Publishing House, 2005). On the issue of definition of IPs in the specific context of Africa see, AK Barume, *Land Rights of Indigenous Peoples in Africa* (IWGIA, 2010).

¹⁹ See sub-sections 7.1.4-7.1.7.

²⁰ *International Covenant on Civil and Political Rights* (1966), adopted and opened for signature, ratification and accession by *UNGA Resolution 2200A (XXI)* of 16 December 1966, entered into force 23 March 1976, in accordance with its Art 49.

²¹ *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by *UNGA Resolution 2200A (XXI)* of 16 December 1966, entered into Force 3 January 1976, in accordance with its Art 27.

²² *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) 1965, adopted and opened for signature and ratification by *UNGA Resolution 2106 (XX)* of 21 December 1965, entered into force on 4 January 1969, in accordance with its Art 19.

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land rights of Abuja peoples. The relevance of specific international instruments such as the International Labour Organisation (ILO) *Convention No 107 1957 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO 107)²³ and ILO *Convention No 169 1989 Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO 169),²⁴ was also demonstrated in Chapter Seven.²⁵ It was argued that although few States have signed up to and ratified these instruments, their provisions still have legal impacts in States that have not ratified them.²⁶

Whilst demonstrating the importance of the *Universal Declaration of Human Rights 1948* (UDHR)²⁷ and the *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities 1993* (Minority Rights Declaration),²⁸ special attention was given to the *UN Declaration on the Rights of Indigenous Peoples 2007* (UNDRIP).²⁹ It was demonstrated that through

²³ ILO *Convention No 107 of 1957 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, adopted in Geneva, at the 40th ILC session held on 26 June 1957, entered into force on 02 June 1959.

²⁴ ILO *Convention No 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries*, adopted in Geneva, at the 76th ILC session held on 27 June 1989, entered into force on 05 September 1991.

²⁵ See sub-section 7.2.1 and 7.2.2.

²⁶ See ILO, *Convention on Indigenous and Tribal Peoples 1989 (No. 169): A Manual* (Dumas-Titoulet Imprimeurs 2003) at i. See also, the Australian case of *Police v Abdulla* [1999] 74 SASR 337.

²⁷ The *Universal Declaration of Human Rights* (UDHR), proclaimed by the UNGA in Paris on 10 December 1948 as UNGA Resolution 217(III) A, as a global bench-mark of achievements for all peoples and all nations.

²⁸ *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, UNGA Resolution 47/135, UNGA, 3rd Comm forty seventh session and ninety second plenary meeting, Annex, Agenda Item 97(b), UN Doc A/RES/47/135 3 February 1993.

²⁹ *UN Declaration on the Rights of Indigenous Peoples*, UNGA Resolution 61/295, adopted on 13 September 2007, adopted by a vote of 143 in favour to four against. (Australia, Canada, New

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synthesising and incorporating human rights norms which have already been established under both customary international law and international human rights treaty law, UNDRIP is of significant legal weight even though it is soft-law.³⁰ In particular, it was demonstrated that a general principle of international law in which land rights of IPs should be protected by States has emerged. Accordingly, Nigeria is bound by this general principle of international law in relation to land rights of Abuja peoples.³¹

In addition to the above, Chapter Seven³² also demonstrated that the *African Charter on Human and Peoples' Rights* (African Charter)³³ is relevant to the protection of land rights of IPs in Africa. Indeed, the jurisprudence of the African Commission and the African Court illustrate that the African Charter has been and can be utilised by the African Commission to protect land rights, as it was done with the land rights of Endorois peoples of Kenya, Ogoni peoples of Nigeria,³⁴ and more recently with the Ogiek peoples of Kenya at the African Court. After answering the above research questions in the affirmative in Chapters Six and Seven, the answers in turn raised the following second central research question:

Zealand and United States), with 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

³⁰ See SJ Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9, 11 August 2008 at para 40; A Boyle, 'Soft Law in International Law-Making' in M Evans (ed), *International Law* (2nd edn, 2006) at 141-158; A Di Robilant, 'Genealogies of Soft Law' (2006) *The American Journal of Comparative Law* 499; and CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International & Comparative Law Quarterly* 850 at 850-866.

³¹ See sub-section 7.2.3.

³² See section 7.3.

³³ Adopted 27 June 1981, Organization of African Unity (OAU) Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986.

³⁴ See *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, Application 276/03 and *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*. Application 155/96 respectively.

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What is the nature of the relationship between international and national law in post-colonial Africa? To answer this latter second central research question, the following sub-research questions were posed:

- 1) What are the differences in approach and how does this impact on the domestic application of international law?
- 2) What is the nature of the relationship between international and national law in post-colonial Nigeria?
- 3) What is the nature of the relationship between international and national law in post-colonial Kenya?
- 4) What are the differences and similarities in the approaches of Nigeria and Kenya towards international law?
- 5) Do either of the post-colonial African States of Nigeria and Kenya have anything to learn from each other in terms of the relationship between international and national law?

In answering the above research questions, in Chapter Eight³⁵ the specific relationship between Nigerian State law and international law was examined.³⁶ In Chapter Nine³⁷ there was comparative analyses of the relationship between international and national law in the two Anglophone African States of Nigeria and Kenya. The comparative examination revealed the common historical and constitutional challenges that Anglophone African States are typically presented with, in terms of the application of international law domestically. It was

³⁵ See section 8.2-8.3.

³⁶ See M Hunt, *Using Human Rights Law in English Courts* (Bloomsbury Publishing, 1997); HH Koh, 'How is International Human Rights Law Enforced' (1998) 74 *Indiana Law Journal* 1397; HH Koh, 'International Law as Part of our Law' (2004) 98 *The American Journal of International Law* 43; and R Bahdi, 'Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts' (2002) 34 *George Washington International Law Review* 555.

³⁷ See section 9.2.

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demonstrated in Chapter Nine³⁸ that Kenya has post-colonially responded to this challenge and the comparative exercise showed how Nigeria can improve its legal system and move on from its colonial legal heritage.³⁹ In particular, it was argued that while Nigeria and Kenya have historically followed the British tradition of dualism, recent constitutional developments in Kenya demonstrate that Kenyan courts and litigants now look to international law to resolve domestic legal issues.⁴⁰ It was also argued that by contrast in Nigeria, courts apply international law only occasionally.⁴¹

It was demonstrated also that the changes effected in Kenya through the adoption of the 2010 Kenyan Constitution has enhanced better enforcement of international law by the domestic law courts in Kenya. Accordingly, it is the conclusion in this thesis that for Nigerians to benefit from the provisions of international law and for international law to be generally enforceable in Nigeria, it will be necessary to amend the Nigerian Constitution by adopting the approach of the 2010 Kenyan Constitution. However, it has also been argued that if for any reason(s) an amendment to the Nigerian Constitution is not possible, the courts of law in Nigeria can do as the United Kingdom Supreme Court (UKSC) which has demonstrated a willingness to use the provisions of international treaties to

³⁸ See sub-sections 9.1.1 and 9.2.1 respectively.

³⁹ G Dannemann, 'Comparative Law: Study of Similarities or Differences?' in M Reimann and R Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006).

⁴⁰ See T Kabau and C Njoroge, 'The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the Harmonisation of the Legal System,' (2011) 44 *Comparative & International Law Journal of South Africa* 293.

⁴¹ C Nwapi, 'International Treaties in Nigerian and Canadian Courts' (2011) 19 *African Journal of International & Comparative Law* 38.

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interpret domestic laws and policies, even when such treaties have not been domesticated into UK law.⁴²

In Chapters Eight and Nine, it was also maintained that although there are only a few cases in which the Nigerian courts have had recourse to international law, there is room for optimism that Nigerian courts can rise above the effects of section 12 (1) of the Nigerian Constitution which requires the domestication of international treaties by way of national legislation before they are applicable in Nigeria. It supported this optimism with the concurring opinion of Ejinwumi Justice of the Supreme Court (JSC) in the Nigerian *locus classicus* case of *Abacha and Ors v Fawehinmi*,⁴³ where he stated that international law may influence the construction and interpretation of the law in Nigeria.⁴⁴ In section 10.2 below, some concluding observations are made on the relationship between IPs' customary land tenure, State law and international law.

10.2. Land Rights of IPs under IPs' Customary Law, State Law and International Law

Based on the conclusions in Chapter Seven,⁴⁵ it has been demonstrated that land rights of IPs under customary law are recognised under international human rights

⁴² See *Cameron Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 and *R (on the application of SG) and Others v Secretary of State for Work and Pensions* [2015] UKSC 16.

⁴³ *Abacha & Ors v Fawehinmi* (2000) LPELR-14 (SC).

⁴⁴ *Supra* at 587. See also, *Attorney-General of the Federation v Attorney-General of Abia State & Ors* (*supra*), where the Nigerian SC made references to international law in its decision. Also, see *Mojekwu v Ejikeme* [2000] 5 NWLR (Pt.657), at 402, where the Nigerian Court of Appeal invoked the provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women* adopted 18 December 1979, 19 ILM 33 (1980), to rule that a native law and custom was repugnant to natural justice, equity and good conscience.

⁴⁵ See conclusion to Chapter Seven.

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law. It was also demonstrated in Chapters Four⁴⁶ and Five,⁴⁷ that at national levels land rights of IPs are often claimed based on customary laws, which have their foundations from the cultures of IPs which most of the international and regional instruments examined in this thesis aim to preserve as a matter of human rights. It has also been established that the idea that protecting IPs' land rights will achieve the purpose of protecting their identity and culture as defined by their cultural and spiritual attachment to ancestral lands are protected under Article 13 of ILO 169, Article 25 of UNDRIP; Article 27 of ICCPR, Article 15 (1) (a) of the ICESCR and Article 22 (1) of the African Charter.⁴⁸

It is the conclusion in this thesis that the above provisions represent protections in principle of an important aspect of IPs' land rights under international human rights law. In line with this, it has been argued that in principle Article 14 (1) of ILO 169 provides a protective approach based on the manner of land use, ownership and occupation in accordance with traditional or customary forms of use, ownership and occupation by IPs. Article 26 (2) of UNDRIP appears to follow a similar approach as it provides for the 'right to own, use, develop and control the lands, territories and resources that indigenous peoples possess due to traditional ownership or other traditional occupation or use'.

However, it is also the conclusion in this thesis that neither ILO 169 nor UNDRIP prioritises IPs' customary or traditional laws over national law, or regional and international law over national law in articulating IPs' land rights at national levels.⁴⁹ It is argued that the resolution of this legal problem is central to the protection of customary land rights of IPs in plural legal systems such as Nigeria

⁴⁶ See sub-section 4.1.1.

⁴⁷ See sub-section 5.1.4-5.1.5.

⁴⁸ See G Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 *European Journal of International Law* 165.

⁴⁹ *Ibid.*

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and Kenya. In this respect, there is need for further research to find better ways in which IPs' customary land rights can be protected without depending upon the whims and caprices of State law. In support of the above conclusion, it has been demonstrated that while it appears that the provisions of ILO 169 require that the national laws of a State should be the instrument through which these rights should be protected,⁵⁰ it 'does not dissociate international standards (or indeed indigenous customs and laws) from domestic State practice.'⁵¹ While Article 26 (3) of UNDRIP recognises that 'customs, traditions and land tenure systems' should be the basis of IPs' land rights, however, such protection of IPs' land rights under Article 26 (2) of UNDRIP seems to rely upon State law rather than international law. It is also observed that Article 21 of the African Charter which provides for the right to freely dispose of wealth and resources is completely silent on customary land tenure and its relevance to the protection of customary land rights of IPs at national levels.

In Chapter Seven, the objective was to find answers to the research question: How relevant is the general body of international human rights law to the protection of land rights of IPs and how does international law protect such rights? Whilst it was demonstrated in Chapter Seven that land rights of IPs under customary law are protected under international law, in theoretical terms, it is argued that the reliance on State law for the recognition of the customary land rights of IPs at State levels promotes legal pluralism in Griffiths' 'weak' sense⁵²

⁵⁰ L Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989,' (1990) 15 Oklahoma City University Law Review 677 at 696 and G Pentassuglia, (n 48) above at 168.

⁵¹ G Pentassuglia, (n 48) above at 168.

⁵² See J Griffiths, 'What is Legal Pluralism?' (1986) 18 The Journal of Legal Pluralism and Unofficial Law.

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and Woodman's 'state law pluralism'.⁵³ This situation leaves customary land rights of IPs at the mercy of State law. Gordon Woodman concludes that in such situations of 'plural laws' 'the field of deep legal pluralism ... would require both tolerance and inventiveness in the processes of law reform, not only by the state, but by other bodies which hold legal authority.'⁵⁴ Following Woodman's forgoing academic admonition, in section 10.3 below, some possible legal and non-legal pathways towards resolving the challenges of protecting the customary land rights of Abuja peoples are presented.

10.3. Towards a Fair Resolution of the Legal Challenges about Abuja Peoples' Land Rights

As at the time of writing, the provisions of Section 297 (2) of the *Constitution of the Federal Republic of Nigeria*, 1999 (Nigerian Constitution) and Section 1 (3) of the *Federal Capital Territory Act*, 1976 (FCT Act) are in *de jure* contravention of international law, in so far as compensation is not required to be paid to the IPs of Abuja or their resettlement undertaken by the Federal Government of Nigeria. Specifically, this constitutes violation of Article 27 (cultural rights) of the ICCPR, 1966; Articles 2 (obligation to eliminate racial discrimination) and 5 (prohibition of discrimination) of ICERD, 1965; and Articles 1 (right to economic, social and cultural development) and 15 (right not to be deprived of means of subsistence) of the ICESCR, 1966. Nigeria is a Party to all the three international human rights treaties mentioned above, even though none of the three have been domesticated into Nigerian law. However, on the authority of Article 27 of the *Vienna Convention*

⁵³ See GR Woodman, 'Legal Pluralism and the Search for Justice' (1996) 40 *Journal of African Law* 152.

⁵⁴ GR Woodman, 'Customary Land Laws within Legal Pluralism over the Generations', 4 *SADC Law Journal* 2014/15, 189-208 at 208.

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on the *Law of Treaties* 1969,⁵⁵ Nigeria cannot rely on the provisions of its domestic laws to violate international law as argued in Chapters Seven⁵⁶ and Nine.⁵⁷

Nigeria is also in violation of three other 'soft-law' international human rights instruments that have been adopted by the United Nations General Assembly (UNGA). In particular, Articles 2 (right not be discriminated against), 7 (right to equal protection of the law) and Article 17 (right to own property) of the UDHR, 1948; as well as Articles 3 (right of minority people against discrimination), and Articles 4 and 5 (obligations on States to create favourable conditions for minority people) of the UN Minority Rights Declaration, 1993; and Articles 1 (right of IPs to the enjoyment of their rights as collectives),⁵⁸ 23 (rights to traditional practices and natural resources, as well as rights to the development and management of lands), 25 (right to spiritual relationship to land) and 26 (right to own, occupy and use lands acquired traditionally) of UNDRIP, 2007.⁵⁹

There are also *de jure* violations of Articles 20 (right to existence), 21 (right to freely dispose of wealth and natural resources), and 22 (right to economic, social and cultural development) of the African Charter, 1981. For many IPs of Abuja living in several villages who are or were engaged in farming, hunting and fishing on their traditional lands, compensation remains unpaid. Indeed, with the decision of the Nigerian Court of Appeal in *Ona v Atenda*,⁶⁰ to the effect that compensation

⁵⁵ *Vienna Convention on the Law of Treaties*, 1969. Adopted 22 May 1969 in Vienna, signed 23 May 1969, came into force 27 January 1980.

⁵⁶ See sub-section 7.1.6.

⁵⁷ See sub-section 9.2.1.

⁵⁸ See Arts 1, 2, 6, 7, 8, 9, 14, 17, 24, 33, 35, 40 and 44 of UNDRIP.

⁵⁹ See also, Arts 6 (1) and 8 (1) of the *UN Declaration on the Right to Development*, adopted 4 December 1986 at 97th plenary meeting of UNGA Resolution /41/128.

⁶⁰ *Ona v Atenda* [2000] 5 NWLR 244.

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cannot be claimed unless such rights were founded upon a statute, any means of domestic legal remedy for the enforcement of the customary land rights of Abuja peoples are seemingly closed.

It is the closing argument in this thesis, that Nigeria remains bound by the emergent general principle of international law in which States are obligated to respect, promote and protect land rights of IPs. It is the contention in this thesis, that the combined legal effects of the provisions of the ICCPR, IESCR, ICERD, UNDHR, ILO 169, Minorities Rights Declaration, UNDRIP and the African Charter will, sooner rather than later, combine with current positive dispositions towards UNDRIP by States as well as the growing consensus among legal scholars; the jurisprudence of the African Commission, African Court on Human and Peoples Rights (African Court) and the Inter-American Court of Human Rights (IACHR) to provide the necessary *opinio juris* and State practice to metamorphose land rights of IPs into customary rules of international law at various regional levels.⁶¹

It is also the closing argument in this thesis, that the solution to the problem of land rights of Abuja peoples is provided under UNDRIP. Article 28 provides that where IPs have been dispossessed of such lands they are entitled to redress for the lands, territories and resources confiscated, taken, occupied, used or damaged without their free, prior and informed consent.⁶² Such redress must take the 'form of restitution or, where that is not possible, compensation in the form of equivalent lands, monetary redress, or other forms of appropriate redress, unless

⁶¹ BJ Richardson, S Imai and K McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009); M Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International & Comparative Law Quarterly* 957; and MJ Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2008) University of South Wales Australia (UNSW) Law Research Paper. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392569, accessed 07 October, 2016.

⁶² Art 28 (1).

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otherwise agreed'.⁶³ Since Nigeria has not been able to pay all the IPs of Abuja compensation in respect of their lands since 1976 – after over 40 years - the Nigerian Government has demonstrated that it is either incapable of paying such compensation or it has deliberately refused to so.

It is therefore the suggestion herein that Nigeria must immediately make restitution to the IPs of Abuja by amending the Nigerian Constitution and the FCT Act in a manner that expressly protects and recognises land rights of Abuja peoples to all farm lands and villages in the same way that Section 36 of the LUA, 1978 accommodates the customary land rights of other Nigerians indigenous to the 36 States that make up the Nigerian federation (see Chapter Four at 4.1.2). If restitution is not deemed appropriate for any reason, then they must be compensated and or resettled in compliance with the international human rights instruments examined in Chapter Seven.⁶⁴ In this respect, the guidelines of the Food and Agriculture Organization (FAO) of the UN is apposite as it prioritises customary law over State law in such instances even though it is not legally binding.⁶⁵

Although the post-colonial State-building interest in a capital city is a legitimate State interest, such interests can be sufficiently achieved by restricting the Governments' exclusive ownership of lands in the FCT to the Capital City (see Appendix 6 below). The Government has no legitimate interest in the *de jure* violations of customary land rights of Abuja peoples in relation to farm lands and villages which are very far from the Abuja city. The Nigerian Government is therefore called upon to amend the Nigerian Constitution and the FCT Act by re-

⁶³ Art 28 (2).

⁶⁴ See sections 7.1-7.3.

⁶⁵ See Food and Agricultural Organization (FAO) and Committee on World Food Security(CFS) *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (FAO & CFS, 2012) at para 8.5.

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defining the boundaries of the lands in the FCT through restricting its exclusive ownership of lands to the Capital City. Otherwise, Nigeria remains in violation of its human rights obligations as a Member State of the UN, under the UN Charter and as a Member State of the African Union under the *Constitutive Act of the African Union*, 2001.⁶⁶

However, constitutional and legislative reforms in Nigeria are political processes undertaken by career politicians in the Nigerian Parliament. Abuja peoples have only three parliamentary representatives in the Nigerian Parliament, one in the Senate out of 103⁶⁷ and two in the House of Representatives out of 348.⁶⁸ As politics is a game of numbers which the IPs of Abuja do not have, the likelihood of securing sufficient numbers of votes to adopt the kind of law reforms proposed herein are low. This then raises the need for the conclusive proposal in this thesis. It is the conclusion of this thesis, that if no political solution to this problem can be achieved, the Nigerian judiciary is herein called upon to interpret Section 297 (2) and Section 1 (3) of the FCT Act in the context of the provisions of the international human rights instruments examined in Chapter Seven. The Nigerian Courts can do this whenever the opportunity presents itself by upholding the customary land rights of Abuja peoples in accordance with Nigeria's human rights obligations under international law. It was demonstrated in the penultimate Chapter Nine⁶⁹ that the Kenyan courts now look to international law for the interpretation of their domestic laws just as is the case in the United Kingdom.

⁶⁶ *Constitutive Act of the African Union*, signed 11 July 2000 at Lomé, Togo, came into force on 26 May 2001.

⁶⁷ See www.nassnig.org/mp/senate, accessed 26 November 2016.

⁶⁸ See www.nassnig.org/mp/house, accessed 26 November 2016.

⁶⁹ See sub-section 9.1.1.

10.4. Originality and Contribution to Knowledge

This thesis has made original contributions to knowledge in three main ways. Firstly, the case of Abuja has not been previously studied in the context of the rights of IPs under international law. In this context, in Chapter Six⁷⁰ the case study has been used as a vehicle through which to illustrate the need for a more expansive approach to the definition of IPs under international law to cover peoples with different cultures and belonging to different ethnic groups in an African context. There is no known literature at the time of writing which has advanced this argument. In addition to this, the application of theories of legal pluralism and post-colonialism to this particular case study has also not been academically examined by any known literature about the rights of IPs. Therefore, this thesis makes original contributions to the existing body of literature on the rights of IPs by introducing the case study of Abuja to the existing debates on IPs through the theoretical lenses of legal pluralism and post-colonialism.

Secondly, based on the conclusions and proposals made in Chapter Six,⁷¹ the original argument has been advanced that the existing attempts at defining and empowering IPs need to adopt the contemporary approach used by international law towards protecting the rights of children. It was demonstrated in Chapter Six that previously children were presented as citizens in waiting.⁷² Consequently, children were not viewed as individuals fully ready to participate in a world

⁷⁰ See sub-section 6.2.5.

⁷¹ See section 6.3.

⁷² See R Lister, 'Why Citizenship: Where, When and How Children?' (2007) 8 *Theoretical Inquiries in Law* 693. For an example of the literature that justified this approach, see TH Marshall, *Citizenship and Social Class* (Cambridge University Press, 1950) and R Lister *et al*, 'Young People and Citizenship' in M Barry (ed), *Youth Policy and Social Inclusion*, vol 33 (Routledge, 2005).

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dominated by adults.⁷³ It was also shown that they were presented as innocent and frail, thereby removing them from any discussion in relation to work, politics and sexuality.⁷⁴ Likewise, it was demonstrated in Chapter Six that they were presented as uncompleted human beings.⁷⁵ This attitude justified a lack of formal recognition of children as citizens.⁷⁶ References were made to the 1924 League of Nations *Declaration on the Rights of the Child*,⁷⁷ and the 1959 *UN Declaration on the Rights of the Child*.⁷⁸ It was then argued that under these two previous international instruments on the rights of children, there was no recognition of the rights of children as autonomous people like their adult counterparts.⁷⁹

After demonstrating the above previous approach to children's rights, it was then shown that by contrast the 1989 *UN Convention on the Rights of the Child*, (UNCRC),⁸⁰ adopts a completely different approach by empowering them with the capacity of being legal subjects in their own right including decision-making powers.⁸¹ It is the conclusive argument in this thesis, that there are significant analogical lessons to be learned from the transformation of children's rights under

⁷³ R Lister, (n 72) above at 693.

⁷⁴ P Aries, *Centuries of Childhood; a Social History of Family Life*. Translated from the French by Robert Baldick (Knopf, 1962) and KLF Calvert, *Children in the House: The Material Culture of Early Childhood 1600-1900* (Northeastern University Press, 1992).

⁷⁵ C Jenks, 'Sociological Perspectives and Media Representations of Childhood' in J Fionda (ed), *Legal Concepts of Childhood* (Hart Publishing, 2001) at 23-33.

⁷⁶ See O O'Neill, 'Children's Rights and Children's Lives' (1992) 6 *International Journal of Law & Family* 24.

⁷⁷ *Supra*.

⁷⁸ *Supra*.

⁷⁹ MD Freeman, *The Moral Status of Children: Essays on the Rights of the Children* (Martinus Nijhoff Publishers, 1997) at 50.

⁸⁰ *Supra*.

⁸¹ D Stasiulis, 'The Active Child Citizen: Lessons from Canadian Policy and the Children's Movement' (2002) 6 *Citizenship Studies* 507.

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international law that could be transplanted towards international law on the rights of IPs. It is argued that IPs are easily presented as victims, like the previous approach towards children's citizenship rights *vis-à-vis* adults' citizenship rights, which created a binary situation. The argument is advanced that the way IPs are presented in international law appears to replicate this binary situation between 'victims' IPs' citizenship rights on the one hand, and the citizenship rights of 'other non-victims' citizens on the other hand. Therefore, it has been suggested that it is now time to adopt a new and more progressive approach towards articulating the rights of IPs under international law more positively.

The third and final point about originality and contribution to knowledge is in relation to the comparative examination of the relationship between State law and IPs' customary law in Chapter Five⁸² as well as the comparative study of the relationship between international and national law in Nigeria and Kenya made in Chapter Nine.⁸³ As at the time of writing, no such comparative study between Nigeria and Kenya on the afore-mentioned subjects has been made. In this modest way, this thesis makes original contributions to the existing body of knowledge about the relationship between State law on the one hand, and IPs' customary law as well as international law on other hand. In this way, such original contributions to the existing body of knowledge succeeds in pointing out ways in which the success of law and constitutional reforms in Kenya could be transplanted to resolve similar legal challenges such as those which the case study of Abuja demonstrates in Nigeria.

⁸² See section 5.2.

⁸³ See section 9.2.

APPENDICES

APPENDIX 1: Map showing all States in Nigeria and Abuja



Source : National Population Commission (NPC), 2006.

APPENDIX 2: Map Showing Six Local Government Areas of Abuja (FCT)



Source: NPC, 2006.

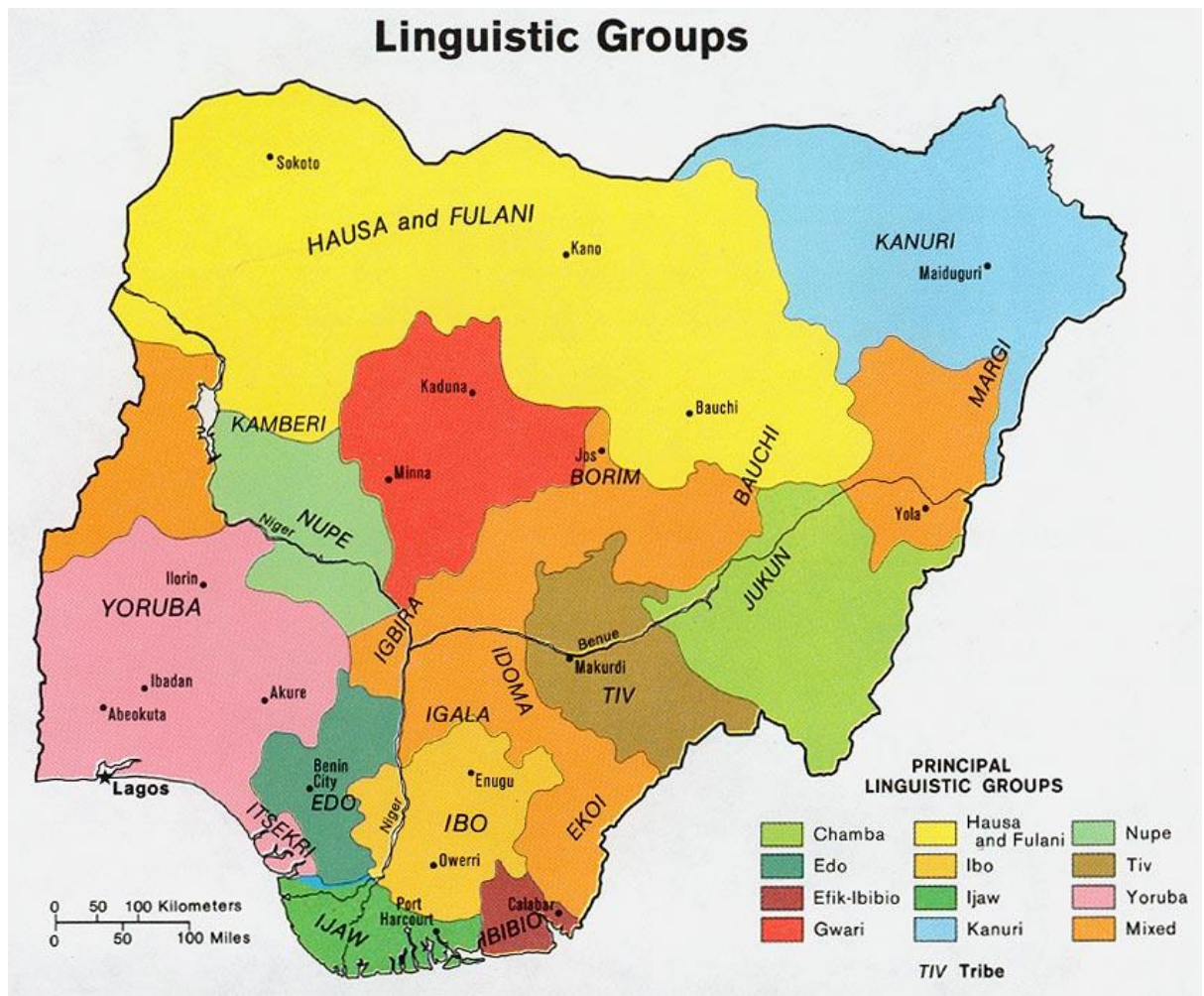
**APPENDIX 3: Table showing States including Abuja by Land Size
in Square Kilometers**

States	Land Size Square KM	No., of LGAs
ABIA	4,902.238	17
ABUJA-FCT	7,753.853	6
ADAMAWA	38,823.307	21
AKWA-IBOM	6,772.089	31
ANAMBRA	4,816.214	21
BAUCHI	49,933.873	20
BAYELSA	9,415.756	8
BENUE	31,276.709	23
BORNO	75480.907	25
CROSSRIVER	21,636.596	18
DELTA	17,239.240	25
EBONYI	6,421.230	13
EDO	19,819.277	18
EKITI	5,887.890	16
ENUGU	7,660.166	17
GOMBE	17,982.034	11
IMO	5,182.818	27
JIGAWA	24,515.620	27
KADUNA	45,711.188	23
KANO	21,276.872	44
KATSINA	24,971.215	34
KEBBI	37,727.965	21
KOGI	29,581.885	21
KWARA	34,467.536	16

LAGOS	3,496.449	20
NASARAWA	27,271.497	13
NIGER	74,108.580	27
OGUN	16,980.550	20
ONDO	15,195.177	18
OSUN	8,699.836	30
OYO	28,245.264	33
PLATEAU	27,216.948	17
RIVERS	10,432.281	23
SOKOTO	33,776.886	23
TARABA	60,291.820	16
YOBE	46,909.760	17
ZAMFARA	35,170.629	14

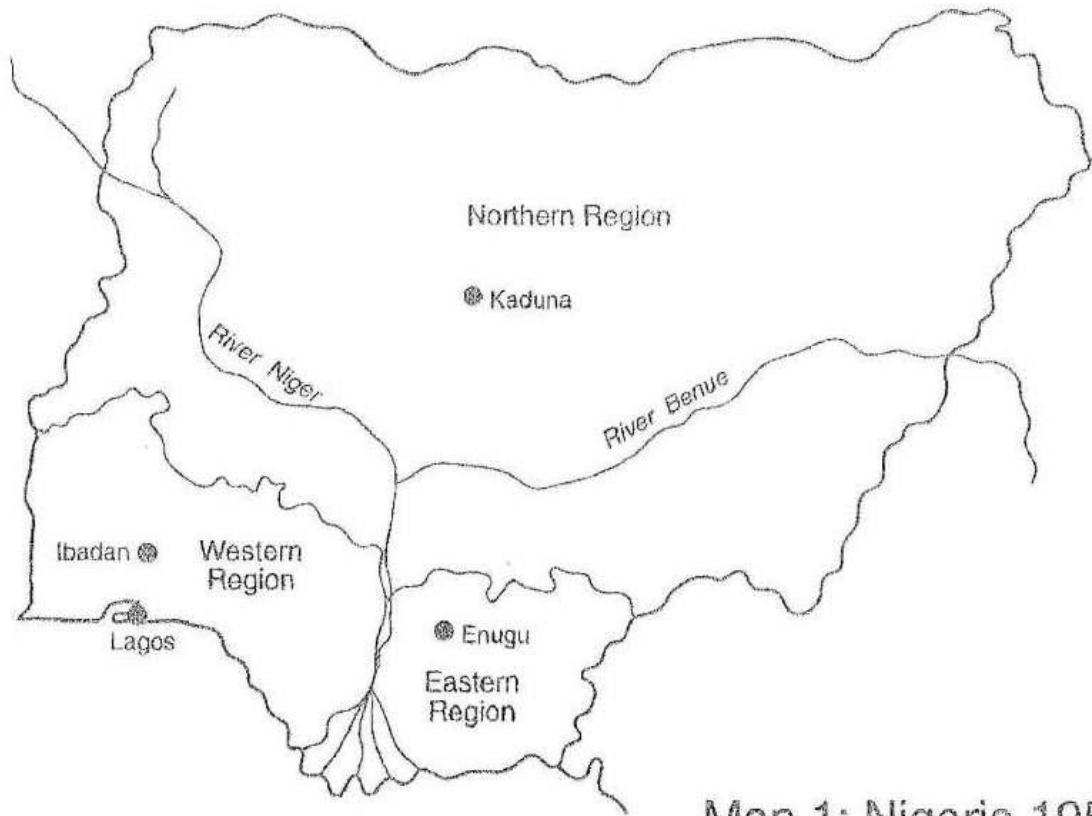
Source: NPC, 2006.

APPENDIX 4: A Linguistic Map of Nigeria



Source: Central Intelligence Agency, 1979.

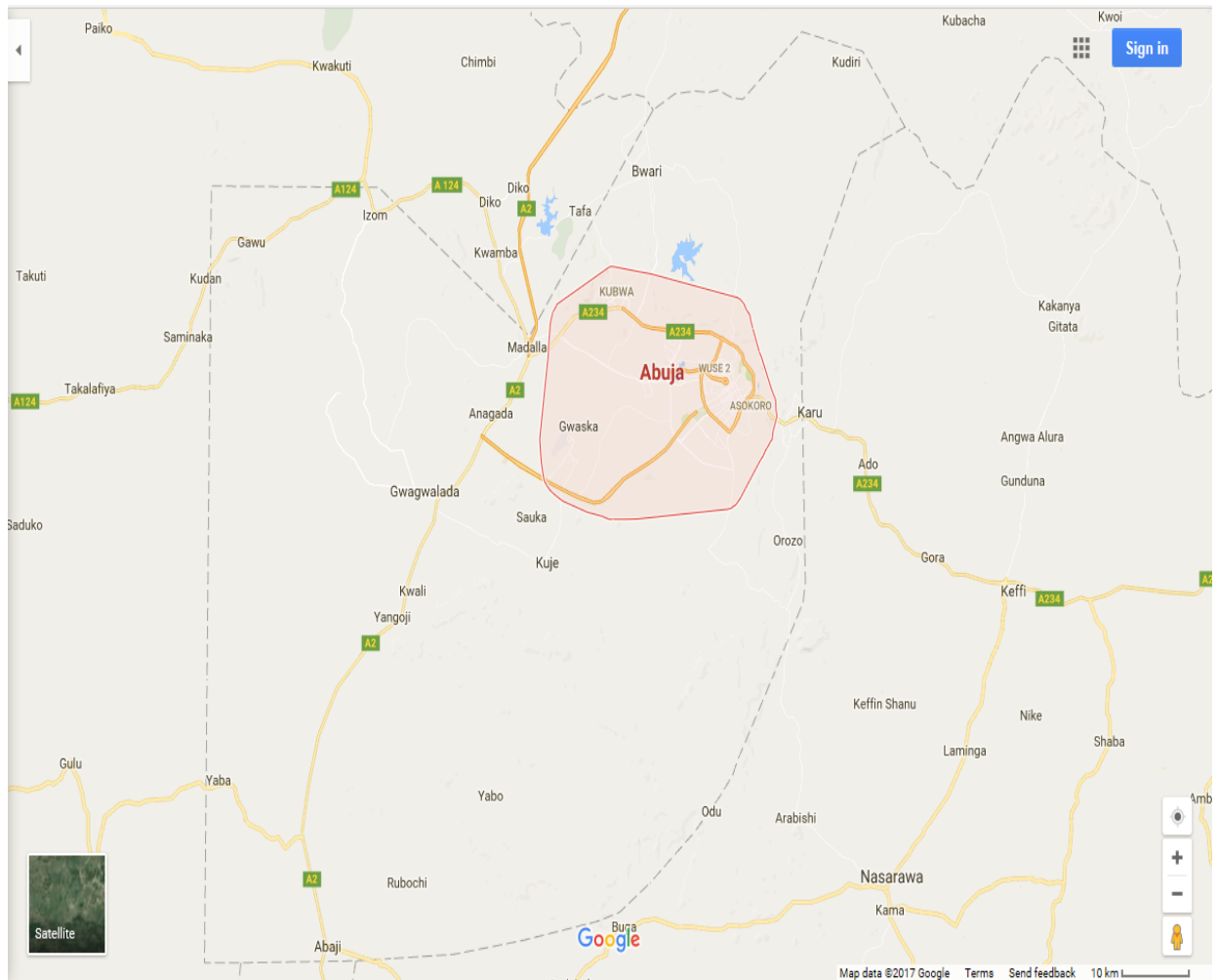
APPENDIX 5: A Historical Map of Nigeria Showing Three Regions created by British Colonial Administration (1954)



Map 1: Nigeria 1954

Source: Wilberforce Conference on Nigerian Federalism 1997.

APPENDIX 6: Map Showing the Capital City in the FCT Shaded Red



Source: Google Maps (June, 2017).

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