UNDRIP AND HISTORIC TREATIES:  
The Moral Imperative To Legitimize The Human Rights Of  
Indigenous People To Self-Determination  

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Abstract: The United Nations Declaration on the Rights of Indigenous Peoples provides a reasonable template for remedying the perceived injustices indigenous groups assert that they face in post-colonial states. In certain cases, indigenous peoples have claimed that they entered into 'treaty relations' with European colonizing powers like the United Kingdom. Those 'treaties' or agreements gave them specific rights as a condition for the surrender of indigenous sovereignties to imperialists. The further argument is that the post-colonial state ought to recognize and preserve the rights encapsulated in those treaties. This article highlights some of these rights as enunciated by UNDRIP, especially the right of internal self-determination. It looks at the significance of 'historic treaties' especially highlighted in the case of Cameroon v Nigeria etc., a dispute decided by the International Court of Justice at The Hague. It looks at treaties made by traditional authorities in Southern Nigeria and cross-references those made by Native Americans of Canada. The British imperial Crown was at the centre of the jurisprudence of these historical treaties. The implication of those indigenous treaties and their current significance. It contends that the concept of indigenousness has been determined by European colonialism. The concept does not easily fit in with the African continent, especially south of the Sahara, where Africans see themselves as indigenous. To be Indigenous in the end will depend on degrees of indigeneity, identity, self-identification, and other factors. The indigenous rights people have received through UNDRIP presents a substantive case for their legitimation in the post-colonial state. To give effect to the right of internal self-determination of indigenous peoples, the Belgian Thesis and the repatriation proffered the measure of sovereign powers back to indigenous peoples and their traditional authorities – The Kings, Chiefs, and Elders that initially surrendered their sovereignties to the British imperial Crown. This is suggested as a way forward in such countries as Nigeria, where there are ongoing clamours for the constitutional restructuring of the country by non-state actors.  

Keywords: UNRIP, Historic Treaties, Legitimize The Human Rights, Indigenous People, Self-Determination


**Kata Kunci:** UNRIP, Perjanjian Bersejarah, Melegitimasi Hak Asasi Manusia, Masyarakat Adat, Penentuan Nasib Sendiri

I. INTRODUCTION

The aim of this article is several, firstly, taking into view the provisions of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)\(^1\) it tries to reconcile them with so called historic treaties, contending thereby that there is a moral obligation not only on signatories to the declaration, but all countries across the globe, with indigenous populations to legitimize the rights of indigenous peoples encapsulated in those treaties in the respective national jurisdictions. It looks more specifically at the right of self-determination outlined in the document and suggests that the document be a basis or a spring board for the articulation of this particular right in domestic constitutions or jurisdictions of concern. Under the principle of self-determination is the expression in the form of internal self-determination. Which it is argued, should be applied to indigenous peoples. Related to this if not contiguous with it are the jurisprudential arguments in favour of the continued importance of these treaties and the rights they engendered at the time they were entered into. The entry into force of UNDRIP, to some extent validates those rights. This topic is of importance to some indigenous people in relationship to the post-colonial state on questions of constitutional restructuring, the devolution of political and economic powers and sovereign relations between such indigenous peoples and the neo-colonial state. This particular matter for instance is being pursued by non-state actors championing the cause of indigenous people in such States as Nigeria.\(^2\)

In going about this narrative then, the first part of the discussion examines some of the relevant articles of UNDRIP including those on Self-determination. Secondly, the work attempts to identify indigenous people, a feat that is by no means easy to accomplish as UNDRIP does not define the term. Thirdly, the treatise then looks at some of the historic

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\(^2\) Movement for the Survival of the Ogoni People (MOSOP) and the Ogoni Bill of Rights *Movement for the Survival of the Ogoni People (MOSOP) and Ogoni News and Resources* @ www.mosop.org, The Ijaw Youths of the Niger Delta and the Kaiama Declaration @www.unitedijaw.com/kaiama.htm Kaiama Declaration (unitedijaw.com), Lower Niger Congress @Lower Niger Congress – A movement for self actualization of Low Niger people, Nigerian Indigenous Nationalities Alliance for Self-Determination @ About - (ninasffn.org), Indigenous People of Biafra (IPOB) @Indigenous People of Biafra – Indigenous People Of Biafra Government (ipobgovernment.org) (Outlawed by the present Federal Government of Nigeria) being examples.
treaties' entered by some of the African rulers and communities that became Southern Nigeria and Great Britain, the imperial power that colonized the territory, in the nineteenth and early twentieth centuries. The continued significance of these historical treaties and their relevance to date is emphasised in the light of the decision and observations made by the International Court of Justice in the Case of the Land and Maritime Boundary Between Cameroon and Nigeria [With Equatorial Guinea intervening]. The Belgian Thesis and its application to the notion of indigenous peoples’ self-determination then constitutes the final part of the article.

INTRODUCTION TO UNDRIP

In thinking about the rights of indigenous peoples the impact of European colonialism has not only influenced the promulgation of UNDRIP but also our understanding of who indigenous people are in international law. Western Imperialism and Colonialism meant the dispossession of the lands, territories and resources of indigenous people and thus depriving the latter not only of their way of life, but also from exercising the rights and aspirations outlined in the Declaration. By alluding to this history from the preamble, the Declaration reveals its character as essentially a remedial instrument.

Thus, for some authors when discussing UNDRIP they have seen it as a corrective treatise in that it attempts to remedy the historic injustices indigenous people have suffered as a result of Western Colonialism and the subsequent post-colonial states that emerged thereafter on the lands of indigenous people. That is, the new geographical boundaries indigenous peoples now find themselves hemmed in and constrained by. Similarly, other authors see indigenous rights outlined in the UN Declaration from a historical context or perspective as aspirations to correct and resolve grievances and alleged wrongs through corrective justice for instance. In summation the argument is to the effect that indigenous peoples rights encapsulated by UNDRIP is the consequence of population upheavals originated by European colonialism. Conquests, invasions, the loss of lives of indigenous inhabitants, the dispossession and displacement in such places as North and South America and Australia being examples.

International law having permitted the settler and post-colonial states to become fully operational, international attention should now re-focus on those groups that had become excluded from the main stream of public life and had been consigned to neglect in post-colonial states. When these groups initiated arguments for recognition and redress, they contended on the moral grounds of being first people who were dislodged by European subjugation and colonialism. Hence, the International effort for the recognition of indigenous rights has climaxed in the adoption by the United Nations of the United Nations Declaration on the Rights of Indigenous Peoples in September 2007. Although non-binding, it ‘has the look

5 S J Anaya and R J Williams, ‘Study on the International Law and Policy Relating to the Situation of Native Hawaiian People @https://law.arizona.edu/sites/default/files/oha_iplp.pdf, at i
7 F Viljoen, International Human Rights Law in Africa( 2nd edition, Oxford University Press 2012) at 228-229
8 ibid
9 ibid 229
and feel of hard treaty law.\textsuperscript{11} It was adopted by 144 member states voting in favour, 4 against and 11 abstentions.\textsuperscript{12} It is noted that Nigeria and Kenya were among the countries that abstained.\textsuperscript{13}

The preamble to UNDRIP sets the framework for equity and justice. It holds that among other things that indigenous peoples are equal to all other peoples, whilst recognizing the right of all peoples to be different, indigenous people are no exception in this regard and should be respected as such. It affirms too that all peoples contribute to the variety and wholesomeness of civilizations which form the common mosaic of humankind. It states that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, and morally condemnable and are socially unjust. Indeed, the Declaration can be seen as a charter or call for the equal treatment of all races and peoples regardless of differences and peculiarities.\textsuperscript{14}

The preamble engages the fact that the historic injustices indigenous peoples have suffered, has prevented them from exercising, in particular, their right to development in accordance with their own needs and interests. Furthermore, it recognizes the pressing need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.\textsuperscript{15}

It in addition, acknowledges the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive agreements with States. The preamble of UNDRIP calls for the respect of indigenous states 'historical treaties' and modern compacts.\textsuperscript{16} It peaks by acknowledging their right to self-determination that it is equally applicable to indigenous peoples, in whatever ways this concept is expressed under the United Nations Human Rights system.\textsuperscript{17}

**UNDIP and Self-Determination**

One of the rights advocated by UNDRIP is that of Self-Determination. In the light of Article 1, the Declaration, affirms the applicability of the rights of freedom, equality and nondiscrimination. It holds that, as a matter of equality, the right of self-determination is applicable to indigenous peoples as it is to all other peoples.\textsuperscript{18} It should be noted though, that this right has certain conditions to be met in international law. Thus, Article 3 claims for indigenous people the same rights of self-determination that is affirmed in the common article

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\textsuperscript{11} J. Hohmann and M. Weller (eds.), *The UN Declaration on the Rights of Indigenous People: A Commentary*. (Oxford University Press, 2018) at 1  
\textsuperscript{12} ibid  
\textsuperscript{13} See A Shuaibu Ogoni: Nigeria Opposes Indigenous Rights Declaration (2007) <https://unpo.org/article/6763>. Nigeria’s objection appears to be on the grounds discussed by this article – among others, the self-determination of indigenous people and that all Nigeria’s 371 tribes are indigenous.  
\textsuperscript{14} UNDRIP Preamble  
\textsuperscript{15} ibid  
\textsuperscript{17} ibid  
\textsuperscript{18} Articles 2, 3 and 4; D Keys (n) 4
of the widely ratified international human rights covenants that, as a right of all peoples it is also applicable to them.

Article 3 explains that Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. By Article 4 Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. By Article 5 Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

However, Anaya commenting on the right of Self-Determination as concerning indigenous peoples states that it is of a different genre. He argues that the international indigenous human rights regime stands apart from the regime of decolonization that exists on the basis of article 73 of the UN Charter, which pertains to “territories whose peoples have not yet attained a full measure of self- (iii) government.” That the two human rights regimes (that is of colonized peoples and indigenous peoples) are grounded in the right of self-determination, but the decolonization regime is concerned primarily with doing away with conditions of classical colonialism in the administration of entire territories that are deemed non self-governing, including, in general, all the inhabitants with substantial roots in the territory. Whereas the indigenous rights regime addresses the concerns of indigenous peoples in particular, independently of the decolonization procedures advanced by article 73 in regard to the territorial administrative units in which they live.

Similarly, the Nigerian Representative that critiqued and opposed the draft copy of UNDRIP had contended among other things that the principle of self-determination applies narrowly to peoples under colonial and foreign occupation. That the UN Trusteeship as propounded in Article 77 of the United Nations Charter and non-self-governing territories under Article 73 were evidence to this effect. That the Self-Determination provisions in UNDRIP can be seen as a blank cheque to clamour for self-determination or the secession of the 371 tribes of Nigeria, who are indigenous.

That: “The 371 indigenous tribes of Nigeria exercised their right of self-determination on Oct. 1, 1960 when the Federation of Nigeria was granted independence by the colonial power, Great Britain.”

These observations though interesting to note are not conclusive. It has been argued to the contrary by others. Higgins for instance states that with regards to self-determination and decolonization that self-determination has meant more than independence from colonial rule or other post-colonial status, that the concept has meant the free choice of peoples to

19 S J Anaya and R J Williams, ’Study on the International Law and Policy Relating to the Situation of Native Hawaiian People @https://law.arizona.edu/sites/default/files/oha_iplp.pdf, ii and iii
20 ibid
21 Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: https://www.refworld.org/docid/3ae6b3930.html
22 A Shuiabu (n 13)
23 ibid
determine their political status.24 That beyond decolonization the entitlement is also to ‘freely pursue their economic, social and cultural development’.25

But it can also be further contended, that with respect to self –determination and its application to indigenous peoples, all options outlined above for its attainment should be open to them also. For there are varieties of indigenous peoples, as we shall see, and not just those Anaya has in view: those in the former classic European Settler Colonies in North and South America, Australia, New Zealand or even the Hawaiian Islands. As Higgins points out with respect to self – determination it is a constant entitlement that requires that a free choice be afforded to people on a continuing basis, as to their system of government in order that they can determine their economic, social and cultural advancement.26 She cites Articles 1 and 25 of the International Covenant on Civil and Political Rights27 to buttress her point that both Articles are mutually contingent and should be read together.28

According to Daes, the restoration of indigenous self-determination entails a process: One through which indigenous peoples are able to join with all other peoples that make up the state on mutually –agreed upon terms, after many years of isolation and exclusion. This process does not require assimilation of individuals, as citizens like all others but the recognition and incorporation of distinct peoples in the fabric of the State on agreed terms.29

Note the United Nations documents affirm the fundamental significance of self-determination of all peoples.30 Self– determination, in this context does not impugn the principles of territorial integrity and sovereignty of States.31 In bringing this section to an end it is averred that because it is a resolution of the General Assembly and not a formal treaty, UNDRIP is itself not legally binding. It does however have legal significance since it represents an authoritative synthesis of the human rights norms found in various treaties, beginning with the UN Charter32 and their treatment of indigenous peoples.33

Of its main provisions, the Declaration may be interpreted as expressive of general principles of international law, State responsibility deriving from treaties and contributing to the crystallization of customary international law.34 These notions are apparent in the preamble as it is in the preliminary articles acceding to indigenous peoples all the rights attainable under international human rights law whether as a collective or as individuals.35 This collective/group and individual acknowledgement indicates the complexity of seeking to see

25 Ibid
26 Ibid 120
28 Article 1 of the Covenant is on Self – Determination Article 25 speaks of voting and participation in public affairs, for every citizen. Higgins (n 24), 120-21
30 Preamble to the UNDRIP 2007 Acknowledges the significance of Human rights instruments emanating from the UN as well as the Vienna Declaration and Programme of Action [A/CONF.157/24 (Part I), chap. III]
31 UNDRIP Articles’ 3,4,5 and 46
32 UN Charter United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI fn21
34 Anaya et al (n 19) at 4;
35 Article 1 UNDRIP
indigenous rights, as merely individual.\textsuperscript{36} UNDRIP does not directly confer indigenous status as stated hitherto but leaves it to the national domestic jurisdictions to carry through the legislative modalities. Thus, Article 38 encourages states to take the relevant measures, including legislative measures, to achieve indigenous status recognition\textsuperscript{37} and indigenous rights.\textsuperscript{38}

**MEANING OF INDIGENOUS PEOPLE**

There is no formal and universal legal definition adopted to conceptualize indigenous peoples. However, such terms as “native”, “tribes”, “aboriginal” are categories that might reflect indigenousness and are therefore of relevance to the discussion of the term “indigenous”. For instance, the term indigenous is taken from the Latin “indigena” meaning “born in a country or “native”.\textsuperscript{39} The Oxford English Dictionary defines indigenous as peoples or products produced naturally in a land or region; native or belonging naturally to the soil, region etc.\textsuperscript{40} It is used primarily to apply to Aboriginal inhabitants or natural products.\textsuperscript{41} Thus, the notion of indigenous is connected with “native”. The Oxford Reference Dictionary defines “native” as inborn, innate, and natural. Secondly, it connotes birth; belonging to one by right of birth. Thirdly, born in a particular place, indigenous: of the natives of a place. Furthermore, the term native is seen as derogatory and a throwback of the era of European imperial and colonial domination, a native in this particular context is a member of the non–European race or less civilized indigenous people; (in South Africa) a Black\textsuperscript{42} (African). The term aboriginal person, connotes an original, a native or indigenous person.\textsuperscript{43}

In a familiar vein Black’s Law Dictionary sees an ‘Aborigine’ or ‘Aboriginal in the context of being the descendant of the earliest –known indigenous inhabitants of a country.\textsuperscript{44} Aboriginal Person or Aborigine in Australia connotes in law a member of the aboriginal race of Australia, and an Aboriginal person in Canada is an original, a native or an indigenous person.\textsuperscript{45} The terms indigenous and indigenous rights have a particular connection to history, underlined by European colonial conquests.\textsuperscript{46} Thus, indigenous came to be defined in opposition to those who came later [second people] and who dislocated the first peoples through conquest and colonialism. Juxta-positioning the culture of settler societies with that of indigenous communities, the ‘primitive’ cultural distinctiveness of a particular group emerged as a further defining feature denoting indigeneity.\textsuperscript{47}

Thus, with the notions that the word “indigenous” conjures up translating indigeneity into legal concepts and rights has, according to Saul, proved daunting.\textsuperscript{48} That law is in the business

\textsuperscript{36} UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23
\textsuperscript{37} Article 33 UNDRIP
\textsuperscript{38} Article 38
\textsuperscript{40} Ibid ; Oxford English Dictionary 2003
\textsuperscript{41} Oxford English Dictionary <http://www.oed.com/view/Entry/94474?redirectedFrom=indigenous#eid>
\textsuperscript{44} B. A. Garner, (ed.) Black’s Law Dictionary (10th edition West Publishing, 2014)
\textsuperscript{45} Aboriginal and Torres Strait Islander Heritage Protection Act 1984, Section 3; DA Dukelow and B Nuse, (eds.) Dictionary of Canadian Law 2nd edition
\textsuperscript{46} F Viljoen (n, 7), 228-9
\textsuperscript{47} ibid
of conferring rights and obligations on people and other actors like governments, corporations and organizations. Legal definitions determine who is entitled to rights in critical resources such as land and water, the exercise of traditional knowledge, cultural practices etc. Recognizing who is indigenous can be of importance in assisting claimants of indigenous status to assert their rights.49

It is suggested too that the word "indigenous" is generic. Indigenous people are understood to be descendants of the populations that inhabited the country or a geographical region to which the country belongs at the time of conquest or colonization, or the establishment of present state boundaries.50 Furthermore, and irrespective of their legal status, indigenous peoples retain some or all of their own social, political, economic and cultural institutions. Among people known as "indigenous people" are the "Native" Americans of both North and South America, the Inuit, Sami and other groups who have settled in the Arctic regions from Alaska and Canada through Northern Scandinavia, Northern Russia and Siberia, the Australian Aborigines, and the Maori of New Zealand.

According to Bartlett, indigenous people is the expression used to connote the Aboriginal People of Australia, Tasmania and the Torres Strait Islanders.51 In this context, therefore, the term 'indigenous' comprises these various peoples in pre-colonial and post-colonial societies designated for instance as natives in the Americas and aborigines in Australia. Many indigenous people exist in Africa and in Asia, but there is disputation over the scope of the term as it applies to them.52 Even though Anaya, has identified the Masai of Kenya and Tanzania as example of indigenous people in Africa,53 there are important differences in the context, meaning, and the use of the concept of 'indigenous' in the Americas, Asia and in Africa. These differences have had significant bearing on the indigenous rights movement in Africa. But as a preliminary observation in Africa in a historical sense, under colonial rule the non-European native inhabitants of colonies were known as the indigenes or indigenous inhabitants or even natives.

Thus, it is reported for example, that when asked to sign the International Labour Convention (ILO Convention) 107 on Indigenous People, the Government of Botswana refused to sign claiming that everybody in the country is indigenous. The definition of indigenous involving terms like being in close relationship with the land, having distinct language and cultural identity, attached to Ancestral land, these being features of pre-colonial African societies most especially those south of the Sahara Desert. Kingsbury was of the view that:

The choice and evolution of an overarching self-conception to unify the international political movement of indigenous peoples has necessarily involved abstracting from a highly diverse range of self-understandings and political discourses among different groups.55

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49 Ibid 22-23
51 R J Bartlett, Native Title in Australia (3rd edition Lexis Nexis: 2014) 1
52 Ibid 43, 44
54 B Nkwae, ‘San Bushmen are not Forever” (n., 39) at 182
Thus, there is a wide variety of definitions in national laws. Moreover, despite various efforts, the international community has never agreed a comprehensive legal definition of indigenousness. The International Court of Justice (ICJ) has not considered the question, partly because it is technically difficult to agree on a definition which is neither under representative nor over inclusive. That is to say, too narrow so it excludes some groups that ought to be recognized or too wide that it is may be open to abuse or fail to provide meaningful differentiation.\(^6\)

Under international law, definitions are a problem where any common concept of indigenous must embrace the vast diversity of people worldwide holding out to be indigenous people. It is estimated that there are 370 million indigenous people in 90 countries speaking 4000 languages and comprising around 500 distinct groups.\(^5\)

About definitions, there is a consensus in international law and institutions, that the term “indigenous,” or similar terms such as “native” or “aboriginal” (as in the domestic legal regimes of many countries) has long been applied to a particular category of humanity that connote a particular set of experiences grounded in historical subjugation by colonialism, or something similar to colonialism.\(^5\) In the contemporary world, indigenous peoples are recognized and identify themselves as such, by averring to identities that pre-date their colonial domination by other groups and the resulting narratives that have challenged their cultural survival and self-determination as distinct people.\(^5\)

**Definitions under the ILO Conventions**

The International Labour Organization Convention 107 of 1957\(^6\) is of relevance in highlighting the interconnectivity of concepts discussed in the preceding section. Thereunder, indigenous and tribal people are classed together. Firstly, tribal people are referred to as members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community. Furthermore, their status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. With respect to the term ‘indigenous people’, the Convention sees them as members of tribal or semi-tribal populations 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.\(^6\) Moreover, irrespective of their legal status, indigenous people live more in conformity with the social, economic and cultural institutions of that time (that is pre-colonial) than with the institutions of the nation to which they now belong.\(^6\) What this Convention demonstrates is the close contiguity or interconnectedness of the terms “indigenous” and “tribal” or “semi-tribal” to the point that, from the wordings of the cited sections, indigenous populations were designated as being tribal people. Hence, all three categories of peoples were designated as the ‘population concerned’.\(^6\) This goes a long way in bringing out the historical affinity of the terms which, when this article considers their application to Africa in general and Nigeria in particular with regards to the multi-indigenous environment, the interconnectedness becomes evident.

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\(^5\) Saul (n. 48), 25
\(^5\) Ibid 23
\(^5\) ibid 13 - 14
\(^6\) ILO Indigenous and Tribal Populations Convention 107 of 1957 [No.107]
\(^6\) See Article 1 (a) (b) of Convention ILO 107
\(^6\) ibid
\(^6\) ibid Article 1(3)
However, for having assimilationist implications with majority populations, Convention 107 has been discredited. For instance, such Articles as 1(2), 4, and 5 speak of the progressive integration of the concerned groups into States. The Convention’s fundamental fault was that it mirrored the values prevalent at the time it was adopted, ignoring indigenous viewpoints in favour of integration and assimilation. ILO Convention (No. 169) of 1989 (hereafter referred to as ILO no.169) adopts a different approach to ILO Convention 107. It starts by demarcating indigenous people from tribal peoples. Concerning “indigenous peoples”, the Convention sees 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.

By the same Article 1, it is provided further that “tribal peoples” are those peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. Furthermore, with respect to the two terms, self-identification as indigenous or tribal is to be regarded as a fundamental criterion for ascertaining or determining the groups to which the provisions of the Convention apply. It should be borne in mind however, that “Peoples” in the Convention is not to be interpreted or seen as having any implications with regards the rights that may attach to the term under international law. These two terms – indigenous and tribal - by virtue of the ILO Convention 169 are not equivalent. For indigenous people the emphasis is on continuity from pre-colonial times and the retention of some or all of their social, economic, cultural and political institutions, regardless of their legal status in the post-colonial state. For tribal people, their post-colonial status is governed fully or partly by their own customs or traditions or by special laws or rules.

ILO Convention No. 169 has been explained as containing a statement of coverage for indigenous and tribal people. It concentrates on securing indigenous peoples cultural integrity, the protection of their rights to their lands, territories and resources. ILO requires States to ensure the participation of indigenous people in decision-making and to recognize their rights to their own customs, institutions and legal regimes as well as to education, language and culture. Convention 169 stopped short of giving formal recognition to their right to self-determination.

65 Ibid & Viljoen footnote (n.7), 229 at footnote 144
67 Convention 169 of 1989
68 Articles 1(a) and (b) ILO Convention 169 of 1989
69 Ibid as in Article 1
71 B. Tobin Indigenous Peoples, Customary Law and Human Rights; Why Living Law Matters (Routledge 2014) 34
72 Ibid
The lack of an international definition of 'indigenous' (though there are many national definitions), in addition to the vast differences between and within countries and regions in the situation involving indigenous peoples, makes it difficult to apply a one rule fits all approach concerning indigenous peoples. Within the context of countries that have ratified ILO Conventions Nos. 107 or 169, for example, the scope of applicability of these Conventions varies considerably. Whereas some indigenous or tribal peoples are defined by cultural characteristics such as language, etc., others are defined territorially, or by descent. The principle of self-identification also plays an important role in some states in deciding to whom relevant Conventions should apply.73

The two terms “indigenous peoples” and “tribal peoples” are separated in Convention 169 of 1989 because there are tribal people who are not “indigenous” in the literal sense in the countries in which they live, but who nonetheless, live in a similar situation. An example would be the Afro-descended tribal peoples in Central America or the tribal peoples in Africa such as the San or Masai who may have not lived in the region they inhabit longer than other population groups. Nevertheless, many of these peoples refer to themselves as “indigenous” in order to fall under discussions taking place at the United Nations. Both Conventions Nos. 107 and 169 also stipulate that the scope of the measures to be taken to give effect to them should be determined in a flexible manner, having regard to the conditions characteristic of each country.74

By article 1(3) of Convention 169, the term “people” should not be construed as having any implications as regards the rights which may attach to the term under international law. Implying to some extent that people’s rights can be exercised including that of self - determination75 being freely exercisable by indigenous people as long as the territorial integrity of the state is respected and “uti posseditis juris” complied with.76 However, only 20 States are party to the only binding treaty on indigenous rights, that is ILO Convention No.16977 discussed above, and is thus a glaring reminder that numerous states remain intransigent to take on binding legal obligations that stipulate rights for indigenous peoples.78

**Working Definition (Tentative) for indigenous peoples**

Martinez Cobo under the auspices of the United Nations79 provides elaboration on how these various points might be understood and validated. Cobo frames understanding of indigenous peoples’ status as being interconnected with colonial domination. His description is:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their

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73 Ibid p2-3
74 Ibid 3
75 See Article 3 and 4 of UNDRIP
78 Viljoen (n.) 7, 229
continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.\textsuperscript{80}

His view highlights \textit{inter-alia}, that indigenousness is associated with “communities”, “peoples” and “nations”. Apart from these, a number of other factors are regarded as relevant for comprehending indigenous peoples and identifying their historical continuity: historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

\begin{enumerate}
    \item Occupation of ancestral lands, or at least of part of them;
    \item Common ancestry with the original occupants of these lands;
    \item Culture in general, or in specific manifestations;
    \item Language;
    \item Residence in certain parts of the country, or in certain regions of the world;
    \item Other relevant factors.\textsuperscript{81}
\end{enumerate}

Self-identification as indigenous is also regarded as a fundamental element in his working definition, as it is in the earlier definitions discussed under such documents as International Labour (ILO) Conventions.\textsuperscript{82} On an individual basis, an indigenous person is one who belongs to these indigenous peoples through self-identification as indigenous (group consciousness) and is recognized and accepted by the group as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.\textsuperscript{83} The purpose of the foregoing has been to highlight the variety and diversity of people that the concept of indigenousness can be rightly applied to.

In concluding this section, it is queried/asked: whom did the British and other European imperialists find when they stepped on the shores of Africa, Australia, New Zealand and or the Americas? In addition, how did they, charged with the sacred mission of establishing outposts of ‘civilization’ in distant lands, make sense of them?\textsuperscript{84} Based on the evidence, it is undoubted that they interacted with indigenous peoples.\textsuperscript{85} The preamble to the Report of the House Commons Select Committee on Aboriginal Tribes speaks of “native inhabitants” and “tribes” and the protection of the rights of the aboriginal inhabitants.\textsuperscript{86} As a consequence it can be put forward that the peoples inhabiting most of Africa and Nigeria for example at the time of British arrival were “aboriginal” “indigenous” inhabitants and “natives” of that territory.

\textbf{HISTORIC TREATIES, SOUTHERN NIGERIA AND BRITISH IMPERIALISM}

This part of the narrative examines one of the types of treaties British colonialists made with indigenous Africans of Southern Nigeria. The colonizers in their process of acquiring and creating the colony and protectorate of Nigeria as part of the British Empire employed different methods and means of annexation. In some instances, Britain obtained land by


\textsuperscript{81}Ibid., J Martinez Cobo

\textsuperscript{82}Outlined in the preceding subsection

\textsuperscript{83}Ibid; Concept of Indigenousness at <www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc> paragraph 2


\textsuperscript{85}The House of Commons Select Committee Report on Aboriginal Peoples (British Settlements) 1836-1837<https://archive.org/details/reportparliamen00britgoog>

\textsuperscript{86}Ibid. “fellowmen” and “savages” were also paradoxically used in an attributive and secondary sense at 2-3

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means of military intervention.\textsuperscript{87} However, the most prominent way was through the entry into treaty relations between the British Crown and local inhabitants through their traditional rulers.\textsuperscript{88} However, it is a matter of disputation with respect to the nature and purport of these so called historic treaties. To understand what a treaty is, the Vienna Convention on the Law of Treaties\textsuperscript{89} defines a ‘treaty’ for the purpose of international law as:

‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. Treaties are commonly called 'agreements', 'conventions', 'protocols' or 'covenants' and less commonly 'exchanges of letters'.\textsuperscript{90}

For the purposes of this article/discussion it is posited that it is unlikely that the treaties referred to in the Vienna Convention are applicable to the ones being discussed here.\textsuperscript{91} Although the Convention does not detract from the validity of the customary law governing treaties concluded before its entry into force,\textsuperscript{92} it is the way the Convention applies to the Modern States that is problematic for treaties made between Colonizing Powers with indigenous chiefdoms and kingdoms. States, as defined in law under the Montevideo Convention,\textsuperscript{93} does not include tribal, indigenous and native states and communities that subsisted in Southern Nigeria prior to its colonization. Nonetheless, the essence of the treaties under discussion were the agreements between what can broadly be described as ‘nations’ inasmuch as they had populations, territory and a form of political system of government and the British Crown through its agents or representatives.

In the constitution of the United Kingdom, the power of making treaties lies with the Crown as part of its prerogative powers.\textsuperscript{94} In pre-colonial nineteenth century West Africa, African chiefs and rulers in places like southern Nigeria entered into various treaties on behalf of their communities with agents acting on behalf of the British Crown or other European colonial powers.\textsuperscript{95} The treaties used in the nineteenth century were of three types:

1. Anti-Slave Trade treaties
2. Commercial Treaties and
3. Treaties of protection, subjugation and or cession.\textsuperscript{96}

\textsuperscript{87} Elias, T.O. \textit{The British Commonwealth. The Development of its Laws and Constitutions: Nigeria}. (Stevens, 1967) 8

\textsuperscript{88} Ibid


\textsuperscript{90} At http://unimelb.libguides.com/internationallaw/treaties

\textsuperscript{91} The type of treaties discussed here will be expanded upon in the course of this essay. Treaties can also include the creation of rights for individuals – see Public International Law: Treaties cited above; E.W. Vierdag, ‘The Law Governing Treaty Relations Between Parties to the Vienna Convention on the Law of Treaties and States Not Party to the Convention’. The American Journal of International Law in (1982) Vol. 76 No.4 (Oct., 1982). 779-801 at 779

\textsuperscript{92} Ibid 779


\textsuperscript{95} Elias T.O., (n. 87), 8

The treaty was usually the forerunner of English law in the territory that was to be annexed, if not in the so-called settler colonies. Of relevance to this narrative were the so called treaties of protection, subjugation and cessation of territories. As mentioned above the question of the legal status of such treaties of protection in international law has however been the subject of much contention prior to the passage of the United Nations Declaration on the Rights of Indigenous people. However, what is deduced from the jurisprudence is that these treaties between colonisers and tribal chiefs are not part of international law to be treated on the same basis as treaties between states. International law did not accord African states and communities that status in the era of the scramble and partition of the continent. Indeed, positivist international law of the nineteenth century saw the African communities as too primitive to understand the concept of sovereignty to cede it by treaty; As a consequence, any claims to sovereignty based on such treaties were seen as invalid; cessions of territory by native tribes to European powers fell outside the law of Nations according to this school of thought.

Taking cognisance of these observations and limitations, the historic treaties needs further elaboration. In general the form of the treaties employed by agents of the British Crown (usually English Charter Companies) operating in Africa in relationship to African rulers. Concerning such treaties, they were made in form of agreements with African chiefs who were holders of sovereign titles to territory, and that these chiefs were capable of giving valid transfers of territory was not in any doubt. As the treaties transferred certain rights from the African to a European entity, whether territorial or other rights, it was important to ascertain that the African transferor was the holder of such rights and capable of transferring a valid title to the transferee. Rights transferred in this way could be public or private rights but it was indispensable that the traditional pre-colonial African kings and rulers had sovereign powers to transfer to the European Power. In reality this implied from the European as well as the African point of view, all round independence, internal and external. Both the European imperialist and African rulers were in approximate agreement as to their capacity of transferring and receiving sovereign rights and as to the nature of the transaction that conveyed a title according to the customary international law of that era.

Nwabueze, for his part has contended that it was ‘quite competent, for the British Courts to construe a [pre-colonial] treaty with a view to determining its meaning. Hence, the Treaty of Lagos that ceded the territory to the British Crown [in circa 1861] has come up for construction in several cases before the Nigerian courts and the Privy Council. Yet despite this position, it is generally accepted that as the authority to make treaties derives from the Crown by virtue of its prerogative powers, these Acts of State are not justiciable in the

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97 ibid,
98 Oyebode (n. 96), 18
101 Ibid30
102 Ibid 31
103 Ibid 32
municipal courts of England/UK. Therefore, in the British context the lack of municipal jurisdiction provided the means to legitimate territorial acquisition, which could not have been justified according to the principles that informed customary international law. It is submitted that the treaties concluded with African entities were primarily political – providing evidence of territorial claims against other European power and thereby allowing the partition of the continent including Nigeria which accrued to the UK, to take place.

In the course of this discussion, decisions of the Judicial Committee of the Privy Council attest the legal character of the transfer of sovereignty by treaties concluded with African chiefs. In Re: Southern Rhodesia counsel for the natives argued that whatever the transfer of title in public or private law, the European transferee must hold certain acquired rights as trustees for the community which retains the beneficial interest and the capacity of reversion to the enjoyment of these rights whenever European rule will come to an end.

During the scramble for territories in Africa in the nineteenth century, treaties of cession by the African authorities were recognized among the colonizing powers as conferring a valid title even without effective occupation and for this reason the interested colonizing powers all sought to base their titles on treaties. There was diplomatic contact between some kingdoms and the Republics inter se in Southern Nigeria and the United Kingdom and some other European powers externally: The towns of Calabar, are in fact, a number of republics, each with its own Chief and Council united by the Ekpo Fraternity...the British Foreign Office recorded that Henshaw Town and Duke Town “lived separately, each under its own laws and government.”

Based on these treaties, with respect to the rights of the indigenous peoples/tribes, the right of protest against aspects of the British colonial administration of Nigeria was manifested as far back as 1913 when it was reported as follows that:

A delegation of 40 Native rulers from Southern Nigeria is on its way to London to protest against the alleged infringements of ancient native rights. The advance party, including Prince Bassey Duke, the son of the last crowned native King of Calabar, Prince James Eyo Ita, Chief Richard Koko and Chief Inko Goodhead (all from indigenous minority tribes in southern Nigeria). Landed at Plymouth...Prince Bassey Duke declined to make any statement until the delegation appeared before the colonial secretary.

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106 R v Earl of Crewe, ex parte Sekgome (CA) [1910] 2KB 576
107 J. Castellino and S. Allen, Title to Territory in International Law; A Temporal Analysis (Dartmouth Publishing, 2003), 110
108 Ibid
109 Ibid 5, 126
110 [1919] A.C. 211
111 Ibid 215 -216. See further, United Kingdom; The Common Law Principle: Recognition of Pre-existing Rights and Customs United Kingdom, Basic Laws (hrcr.org) @www.hrcr.org/safrica/cultural_religious/uk_rights.html
112 Castellino et al (n 107) at 5
114 In the Niger Delta Region
115 Ibid., 1. (F O 84/1527)
In response to the meeting of this delegation with the colonial secretary, Lord Lugard, Nigeria’s first imperial Governor General was aware of it. He however, interpreted the mission of the native chiefs that set sail on May 12, 1913 as being one to give evidence before a committee set up by the colonial secretary to inquire into the question of Native Land Tenure and not as a protest against the colonial administration in Nigeria.\(^{117}\)

Many of these treaties of protection, subjugation and cession have been criticized as questionable. Akinjide for example states that:

\[\text{[T]he chiefs who signed treaties with... the British Consul...often did not understand that they were effectively surrendering their sovereignty to the British Crown. Sometimes their signatures or marks were forged or obtained under duress. Other times, the British simply lied to them}\(^{118}\)

(Both of which would void a treaty under the Vienna Convention on the Law of Treaties).

Despite the controversy, the International Court of Justice in the *Western Sahara Case*\(^{119}\) was of the view that:

Whatever difference as of opinion there have been among jurists, the State practice of the relevant period [1884] indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terra nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of terra nullius by original title but through agreements concluded with local rulers...such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of terrae nullius...\(^{120}\)

Abraham, without expanding further on the proposition of the consequence of refusing legal recognition to treaties negotiated between European Powers and the people of Africa, urges that pragmatism prevailed. By the time Africa was partitioned, international law had no choice but to give some measure of legal personality to the indigenous peoples.\(^{121}\) According to Allen and Castellino:

that the imperial powers agreed that treaties of cession had to be signed to legitimate transfer of territory in Africa suggests a greater respect for the existence of a people than was granted to Latin American indigenous peoples, even though in both cases the imperial powers ultimately achieved their end result- the acquisition of territory.\(^{122}\)

From the Berlin Act (1884-1885)\(^{123}\) certain notable facts are observable. It formed the legal mechanism of bringing the continent of Africa, including the peoples and territories of Nigeria, into the family of nations.\(^{124}\) The principles of international law then prevailing were

\(^{117}\) The Times of 29th May, 1913 page 7 column C.


\(^{120}\) The Western Sahara Case as above para 80


\(^{122}\) J. Castellino and S. Allen,( n 107), 25

\(^{123}\) The General Act of the Berlin Conference , 26 February 1885, C 4361 1885 (General Act ) in E Hertslet, *The Map of Africa in Treaty*, vol.2 3rd edition (HMSO,1909) 128,468:

\(^{124}\)C.H. Alexandrowicz, ( n. 100), 5-6
interpreted to favour European economic and political interests.\textsuperscript{125} The African communities whose territories were being partitioned were not represented at the Berlin Conference. On the contrary and subsequently, the Western Powers, the main conference participants assumed the role of "Official Guardian" of the African communities and in the process introduced the new legal principle: that of the sacred trust of civilization.\textsuperscript{126}

On the scramble for and the partition of Africa, Alexandrowicz, further contends that this process 'was in the first instance not a race for occupation of land by original title, but a race for obtaining derivative title deeds which the European Powers had to acquire according to the rule of international law relating to negotiation of treaties'.\textsuperscript{127} According to Judge Huber\textsuperscript{128} the agreements between 'native rulers' and 'chiefs of people' though:

[T]hey are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may in international law arise out of treaties. But, on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account.\textsuperscript{129}

This article agrees with the views expressed by Abraham and the Western Sahara Case. That for the indigenous Africans Chiefs and rulers at the time of the scramble and partition, international law had no choice but to accord them some measure of legal personality. This premise is urged, for then it logically follows too that treaty relations that were created in this milieu established rights, duties and obligations between the parties - in this case, between the colonizing powers and the indigenous inhabitants.

Alexandrowicz, contended in addition, that it cannot be denied that the African rulers and chiefs had the right to make the treaties and it was therefore imperative as much as possible to manage their rights and legitimate interests/expectations under the colonial legal order.\textsuperscript{130} African rulers entered in to treaty relations in the period in question on behalf of their communities and themselves, that these agreements were legally valid under international law was affirmed in the boundary dispute between Cameroon and Nigeria.\textsuperscript{131}

Adewoye, points out that to understand the expansionism of British colonialism in South Western Nigeria and in Africa generally, account has to be taken of the role played by law. That is to say that from one aspect through the treaties and agreements that were drawn up legal relations was created between the colonizers and African rulers.\textsuperscript{132} He too, questions the

\begin{itemize}
  \item \textsuperscript{125} Akinjide, footnote 106 at 9, and Matthew Craven, ‘Between law and history: The Berlin Conference of 1884-1885 and the logic of Free Trade’ in (2015) Volume 3, Issue 1 London Review of International Law., 31-59 < https://doi.org/10.1093/lrri/lrv002> at 32
  \item \textsuperscript{126} C.H. Alexandrowicz, ( n 100), 5-6
  \item \textsuperscript{128} Judge Huber in The Island of Palmas Case (1928) (Netherlands, USA) – Reports of International Arbitral Awards, 4 April 1928 Vol. II, 829-871 at 858 at http://legal.un.org/riaa/cases/vol_II/829-871.pdf
  \item \textsuperscript{129} Ibid at 858
  \item \textsuperscript{131} The ICJ case of The Land and Maritime Boundary between Cameroon and Nigeria, Fn. 3, 303 affirmed the legitimacy of treaties between the British and African Rulers and Chiefs of Old Calabar in international law.
\end{itemize}
validity of the treaties on the grounds of the linguistic complications and differing political outlooks between the contracting parties. According to him, the Europeans and Africans were not on equal footing or at par in their intentions. The other point he brings forth is that treaties were the harbingers of the introduction of English law and legal institutions.\textsuperscript{133}

In 1886, the British Administration in Lagos endeavoured to end the wars that had raged in Yoruba land in the nineteenth century. Key rulers and War chiefs signed a peace treaty, in which they undertook to cease from warfare, to facilitate trade and to abstain from manoeuvres likely to engender strife.\textsuperscript{134} In this role as mediator, the British Crown seized the moment to sign treaties and agreements with indigenous rulers. Hence, by an agreement signed with the King (or Oni) of Ife and the Emperor (or Alafin) of the once dominant Oyo Empire, in 1888, the two rulers and their titled courtiers and counsellors committed themselves to give prime place to British subjects in all trade relations. Moreover, there was to be no surrender of territory to any other European Powers without the consent of the Governor of Lagos, who was acting on behalf of 'Her Britannic Majesty'.\textsuperscript{135}

Until the end of the nineteenth century similar treaties were made with other native rulers. Thus, by a treaty 'of peace and friendship with the chiefs, elders and people of Addo on 8 August 1891, the colonialists secured for their subjects 'free access to all parts of the Kingdom of Addo',\textsuperscript{136} In January 1892, the Awujale (or paramount chief), Chiefs, Elders and People of Ijebu land agreed to 'keep open and free to traffic all roads and rivers passing through Jebu territory...to all people (Africans and Europeans) wishing to use them'.\textsuperscript{137}

Thus it should be noted that these treaties can be seen as continuing recognition of indigenous peoples rights even after the imposition of colonial rule in pre-independent Southern Nigeria. Lady Lugard,\textsuperscript{138} pointed out with respect to Nigeria, that the arrangements between the Royal Niger Company acting on behalf of the British Crown, and the African Rulers were really private agreements and not treaties in the international sense. However, it was the grant of the Royal Charter by the Crown [to the Charter Company – operating in the region] that transformed these agreements and arrangements from being indistinct and raising them to the level of international treaties or more appropriately, agreements.\textsuperscript{139}

Of note for the purposes of this article, is to demonstrate the subsistence of pre-existent rights of the African indigenous inhabitants, under the Royal Charter given to the Royal Niger Company on July 10 1887, relevant sections provided that:

> In the administration of justice by the Company to the peoples of the territories, or to any of the inhabitants thereof, careful regard shall always be had to the customs and laws of the class, or tribe, or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer and disposition of lands and goods and testate and intestate succession thereto, and marriage, divorce, and legitimacy, and other rights of property and personal rights.\textsuperscript{140}

Thus, the United Kingdom under Queen Victoria in the nineteenth century entered into some form of treaty relations with various communities in the Niger Delta Region as well. Her

\textsuperscript{133} ibid
\textsuperscript{134} NAI, CSO 5/1, XIII as noted in O. Adewoye in (n. 132), 608
\textsuperscript{135} NAI, CSO 5/1, XV, XVI. As in O. Adewoye in ( n. 132), 608
\textsuperscript{136} NAI, CSO 5/1, XVIII as in Adewoye, ( n. 132), 608
\textsuperscript{137} NAI, CSO 5/2, XV, XVI in Adewoye, ( n. 132), 609
\textsuperscript{138} The wife of Lord Lugard, Nigeria’s first Colonial Governor General
\textsuperscript{140} ibid
Britannic Majesty's consul for the Bights of Benin and Biafra acted on behalf of the Queen. In these treaties, the United Kingdom undertook to protect the territories and peoples covered thereunder.¹⁴¹

In summary, the issue of treaty relations with Nigerian tribes/indigenous people was by no means straightforward following a linear or predictable pattern, thus, the issue was quite complicated. Various treaties with some communities at that time virtually acknowledged their independence, while recognizing the right of the British Crown to place Commissioners in their territories.¹⁴² Nonetheless, it is fair to say that the treaties have significance for the determination of the target groups' status and their rights as outlined UNDRIP.

**IMPORTANCE OF HISTORICAL TREATIES IN SOUTHERN NIGERIA.**

With respect to English law and Britain's approach to its former colonies, it is not internationally authoritative, in the matter of these historic treaties so called, to claim that they are treaties of the kind covered by the Vienna Convention on the Law of Treaties. What these historic treaties show is the course of action the United Kingdom chose to secure the territories through treaties with indigenous peoples of what eventually became Nigeria.¹⁴³ But from the narrative it also shows the weight of expectations created through the treaties and the British colonial practice. Cases drawn from the Canadian jurisdiction involving treaties with colonizers and settlers and the indigenous inhabitants indicates that these treaties should be respected, and that they are special arrangements the nature of which is to be determined in the concerned jurisdictions.¹⁴⁴

This position is backed by Nigeria's eminent jurist Elias who stated that this phenomenon of treaty making can be overlooked as part of the process of consolidating colonial rule and British hegemony and once accomplished following on from this assertion the significance of these treaties ceases. Yet the fact that claims based on these treaties were being adjudicated upon in colonial Nigeria, portends that the said treaties cannot be simply ignored.¹⁴⁵

The facts of one such claim was a Petition of Right filed in the Supreme Court of Nigeria by the King [or Oba] of Ijebu Remo against the Attorney General of Nigeria claiming the sum of £3,200 as arrears of the annual subsidy of £100 from 1916 to 1947 under an Agreement dated August 4th 1894, made between:

The King, chiefs, elders and people of Ijebu Remo country and His Excellency Sir Gilbert Thomas Carter, Commander in Chief of the Colony of Lagos on behalf of Her Majesty the Queen of Great Britain and Ireland, Empress of India.¹⁴⁶

Under the Agreement the traditional ruler, on behalf of himself and his successors in title and the community too, undertook to carry out certain obligations. The colonizing power undertook to bring that region into the British Protectorate and to pay an annual remuneration to the King. It was failure to disburse the payment from 1916 to 1947 that led to the petition.¹⁴⁷ Elias' conclusion is that, with the proclamation of the Protectorate and Colony of Nigeria, in itself an Act of imperial Britain, this legally superseded claims that might have been based upon such agreements with the local African rulers and external colonizing

¹⁴² Elias ( n.139), 11
¹⁴³ Ibid. 11, 27, 28
¹⁴⁵ Elias (n 139) at 28-29
¹⁴⁶ ibid
¹⁴⁷The Daily Service (Newspaper) of Friday April 2, 1948 front page as recorded by Elias (n. 137),.29
Powers.\textsuperscript{148}

This view, that those treaties are superseded by events like the imposition of the colony and protectorate of the territory called Nigeria, or that the legal validity of these treaties are questionable, still remains contentious though. Indeed, among concerned local inhabitants of colonial Nigeria, the legal validity of treaties that they entered into with the British and the relationship created thereby with the British Crown had unquestionable legal and moral significance, which cannot not just be dismissed or wished away.

This pertinent issue was brought up when the Willink Commission was sitting in pre-independent Nigeria to look at minority groups fears in Nigeria over equal treatment within the country.\textsuperscript{149} The first point brought up by some of the Chiefs and people of the Niger Delta region were historical and legal arguments dating back to pre-colonial Nigeria. They argued that when the colonialists first came to the Niger Delta they had made treaties of trade and protection with the local chiefs. It was contended on their behalf, that these treaties were of a special nature and differed from the treaties made with other chiefs in the hinterland. There under, the British Crown undertook to provide protection and to deal with foreign powers on behalf of the indigenous inhabitants.\textsuperscript{150} That the treaties did not provide that the chiefs upon surrender to the British Government of their sovereignty, that the said sovereignty would then be transferred to another authority; in this case Nigeria under self-government. Furthermore, it was argued that if Her Majesty's Government saw fit to end the treaties, then the Chiefs of the Niger Delta were morally entitled to return to their original status. The Willink Commission did not tackle these questions head on as they did not feel qualified to form conclusions on any legal or moral obligations of Her Majesty's Government which might arise from these treaties.\textsuperscript{151}

It is also of importance that in the era preceding the independence of Nigeria from British colonial rule, that the political party known as the United National Independent Party (UNIP), a nationalist political party that emerged at the time of decolonization in Nigeria, made claims based on these treaties.\textsuperscript{152} It pointed out that the claim to Calabar, Ogoja and Rivers Region being formed out of the Eastern Region was based on the treaties of Protection and Friendship concluded between the British Crown and the ancestors of the present inhabitants of the Niger Delta regions including the Calabar, Ogoja and Rivers areas. It was contended that the eventual division of the Nigerian Federation based on the tripod of the three regions of North, West and East\textsuperscript{153} was a deliberate violation of the various treaties of friendship and protection executed by and between Her Majesty Queen Victoria of the United Kingdom and the Kings, Chiefs, Elders and Peoples of the concerned areas. Such a unilateral breach of the treaties was regarded by the people of the sub-region, descendants of the Kings, Chiefs, Elders and Peoples signatories to the said treaties as a gross breach of faith and trust by the British Government.\textsuperscript{154}

It was further contended that, by the terms of those treaties, Her Majesty (Queen Victoria) had entered in to a solemn obligation at once moral and legal to protect the Kings, Chiefs, Elders and Peoples of the different national kingdoms, chiefdoms and the dominions. This included the heirs and successors, and descendants of these kingdoms against any encroachments upon

\textsuperscript{148} ibid 28-29
\textsuperscript{149} The Willink Commission Cmnd 505, 1958
\textsuperscript{150} Ibid., 50
\textsuperscript{151} Ibid
\textsuperscript{152} Udo Udoma, History and Law of the Constitution of Nigeria. (Malthouse Press Ltd. 2007) 166-67
\textsuperscript{153} Brought in by the Richards Constitution of 1947
\textsuperscript{154} U Udoma (n. 152) at 166-67
their rights, not only by other European Powers, but also by other African potentates and interlopers.\textsuperscript{155}

In support of these contentions, reference was made to the Royal Instructions under the Royal Sign Manual and Signet issued to the Colonial Governors and Commanders – in – Chief of the Armed Forces of Nigeria as Representatives of the British Crown, reminding them of the existence of such treaties and urging them to treat the same with respect. A typical instruction was issued at the Court of St. James on 2 August, 1964.\textsuperscript{156} The instruction among other issues acknowledged that the treaties and the rights contained therein made with the Chiefs et al, including native rights, are to be respected by the post-colonial Nigeria state now exercising sovereign power and jurisdiction over that region of Southern Nigeria.\textsuperscript{157}

By the time, these Royal instructions where issued, the Dominion Monarchical Constitution of Nigeria, by which Her Majesty Queen Elizabeth II Queen of the United Kingdom was also Queen of Nigeria and under which Nigeria became independent,\textsuperscript{158} had been repealed.\textsuperscript{159} This seems to lend weight and credibility to these claims, which now, however, though no longer obligatory on the British Crown, have fallen on the neo colonial state of Nigeria.\textsuperscript{160} That this position is supposed to be subsisting, the said instructions were stated again word for word and published in the Nigerian Gazette of 1st January 1974 according to Nigeria’s former Supreme Court Judge, Udo Uduma.\textsuperscript{161}

It should therefore not be a matter of disputation, as Clinton suggests,\textsuperscript{162} ascertaining the nature of the treaty rights guaranteed to the pre-colonial indigenous groups and communities - inhabitants /peoples in the countries in which they find themselves located. It is however agreed with Clinton that the problem is: that in those states’ in which these communities dwell and who are making claims as indigenous inhabitants, whether the particular states are willing to respect their group rights to land, culture, religion and political autonomy.\textsuperscript{163}

That Nigeria would be the \textit{lex loci}\textsuperscript{164} for the determination of these matters was made clear in \textit{Manuel and Others v. Attorney General, England and Wale}.\textsuperscript{165} The plaintiffs, as representatives of the Indian Tribes of Canada, sought declarations in the Courts of England and Wales that the 1982 Act which provided for the independence of Canada was invalid. Dismissing the claims, the English Court [Chancery Division] held \textit{inter-alia}, that the Court of England had no jurisdiction to make a declaration as to the validity of the constitution of an independent sovereign state.\textsuperscript{166}

\textsuperscript{155} Ibid 167-168
\textsuperscript{156} ibid, 168
\textsuperscript{157} Ibid 168
\textsuperscript{159} The (Nigeria) Federal Republic (Constitutive) Act 1963
\textsuperscript{161} Udoma (n.152), 166-67
\textsuperscript{163} Ibid. 745
\textsuperscript{164} The law of the place were the contract was made or the litigation took effect <https://legal-dictionary.thefreedictionary.com/lex+loci> 
\textsuperscript{166} Manuel and others v. Attorney General as above and \textit{Noltcho and Others v. Attorney General} [1982] 3 All ER 786;< http://swarb.co.uk/manuel-and-others-v-hm-attorney-general-ca-30-jul-1982/>
More importantly with respect to the constitutional protection of Indian Minorities of Canada, the court held the claim would be dismissed because any obligation which the Crown had in respect of the Indian peoples of Canada were the responsibility of the of the Crown in Canada and were not the responsibility of the Crown in right of the United Kingdom. Accordingly, the Canadian Courts alone and not the English Courts had jurisdiction to determine what those obligations were. When sovereignty over Canada was transferred, the obligation to do sovereign acts in Canada could no longer remain with the British Crown of the United Kingdom because it no longer had sovereignty over Canada. A promise that treaty obligations would always bind the Crown of the United Kingdom did not prevent the Crown from transferring or altering sovereignty. Nor did it bind the British Crown in the UK to carry out obligations when it no longer had the power to do so.\textsuperscript{167}

Similarly in \textit{R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and Others}\textsuperscript{168} the question which came up for determination was whether treaty rights granted to Canadian Indians were enforceable against the British Crown and UK Government. In 1981, the Canadian Government proposed a Bill seeking the ‘repatriation’ of the Canadian Constitution; the bill was introduced in the United Kingdom Parliament. In addition, it proposed among other things, the amendment of the British North America Act of 1867 and the repeal of section 7(1) of the Statute of Westminster to provide for all future constitutional changes to be solely within the legislative competence of the Canadian Parliament.

Various Indian Associations in Canada opposed the Bill fearing that the special rights granted to Indians under the Royal Proclamation of 1763 and the treaties made between 1693 and 1906 would be in danger of being reduced or extinguished if the Bill were passed. There followed representations by the association to the United Kingdom Government. The Foreign and Commonwealth Office stated in a Memorandum to the Foreign Affairs Committee of the House of Commons that all relevant treaty obligations as far as they still subsist became the responsibility of the Government of Canada with the attainment of Independence and at the latest following the passage of the Statute of Westminster 1931.

The Indian Association of Alberta, together with other Indian associations in New Brunswick and Alberta applied to the divisional court of the Queen’s Bench Division. They sought for a declaration that the statement was wrong in law and that obligations entered into by the Crown under various treaty and statutory provisions were owed the Indian people by Her Majesty in Right of the UK Government. The application was dismissed.

The applicants appealed contending among other grounds, (1) that under the royal proclamation of 1763 and the treaties, whether made before or after the 1867 Act, the Crown assumed obligations to the Indian peoples and those obligations still subsisted against the Crown of the United Kingdom because they had never been transferred to the Federal or Provincial Governments of Canada. That the British Crown retained a degree of sovereignty over the Canadian Constitution based on sections 55 to 57 of the Canada Act 1867. In addition, section 7 of the Statute of Westminster and with it some obligation to the Indian People of Canada by virtue of Royal Proclamations and Treaties made which will continue until total independence was achieved by Canada. The Court of Appeal held that such obligations, under the royal proclamation of 1763 and under the Indian treaties as had the force of law were owed by the Crown in Right of Canada and not in right of the United Kingdom.

\textsuperscript{167} Ibid.
\textsuperscript{168} [1982] 2 All ER 118
Kingdom. Accordingly, the matters raised by the applicants were justiciable in the courts of Canada and not those of the United Kingdom.\footnote{\textsuperscript{169}}

From these cases, it can be reasoned that upon the attainment of Independence treaty obligations of the British Crown devolved on the Independent territories of the British Commonwealth. Hence, it is reiterated as pointed out above that the constitutional protection of indigenous minorities devolved upon Independent Nigeria. Under the Dominion Constitution of Nigeria \{1960 -1963\} the Queen, Elizabeth the Second, was Head of State of Nigeria by virtue of Her Nigeria Crown. The Governor General represented her in the Country.\footnote{\textsuperscript{170}} However, in 1963, Nigeria became a Republic within the Commonwealth of States.\footnote{\textsuperscript{171}}

At this juncture, it is suggested that with the coming of de-colonization in the twentieth century, the former European colonial Powers in Africa had insisted that the newly emerging States in Africa adhere to the doctrine on the universal succession of treaties.\footnote{\textsuperscript{172}} For the post Second World War development of granting independence on a large scale to former colonies had emphasised the importance of ensuring the continued operation of the international treaties entered in to by the Predecessor State on behalf of its former colonies. As a result, the practice emerged of concluding inheritance or devolution agreements between the departing colonial power and the former colony before the grant of full political independence.\footnote{\textsuperscript{173}} The practice originated with the Independence of Iraq in 1930.\footnote{\textsuperscript{174}} The text of the devolutionary agreement was applied with minor modifications for subsequent agreements with other new Commonwealth countries.\footnote{\textsuperscript{175}} Ghana, which became independent in March 1957 was the first African Commonwealth country to sign an inheritance and devolution agreement with Britain.\footnote{\textsuperscript{176}} The devolution agreement between Nigeria and the United Kingdom was to follow in 1960.\footnote{\textsuperscript{177}}

By this agreement, the outgoing colonial government devolved to Nigeria the rights and obligations arising from treaties and other international agreements that were contracted or applied to Nigeria before independence.\footnote{\textsuperscript{178}} Thus, by this agreement, the withdrawing Colonial administration bequeathed to the Federation of Nigeria, rights and obligations arising from treaties that were in force or applied to the country before Independence.\footnote{\textsuperscript{179}} That there was a ring of finality can be gathered from the tone of the Nigeria Independence Act. It provided, among other things, that no Act of the British Parliament passed on or after that date should extend or be deemed to extend to Nigeria or any part of it and that the British Government ceased to have any obligation for the government of Nigeria or any part of it. However, by

\footnotesize{\textsuperscript{169} Ibid, 119  \\
\textsuperscript{170} B Nwabueze,(n 104), 77-78; Nigeria became a Federal Republic in 1963  \\
\textsuperscript{173} U.K.T.S., No.15, (1931); Cmd 3799  \\
\textsuperscript{174} O. Udokang, ( n. 173) at 135.  \\
\textsuperscript{175} Cmd No. 345; 287 U.N.TS. 233  \\
\textsuperscript{176} Nigeria (Cmd.1214) for Sierra Leone (Cmd1464)  \\
\textsuperscript{177} Akinrinade (n. 172) at 453  \\
\textsuperscript{178} Ibid; See also The Land Maritime Bounding Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening) Judgment of 10 Oct 2002, ICJ Rep 2002 (n.3)
section 1(2) there was a saving of all existing laws that formed part of the law of Nigeria on 1st October, 1960.180

Prior to Nigeria’s independence, 78 multilateral and 222 bilateral treaties concluded by Britain affected it. Accordingly, it entered into a devolution agreement with the UK regarding the inheritance of the obligations arising under those treaties. This agreement was communicated to the United Nations Secretary General on June 23 1961. Some of the multilateral treaties involve for instance, the International Monetary Fund (IMF), and the International Bank for Reconstruction and Development (IBRD) to which succession is not possible except in conformity with the express provisions of their respective constituent instruments.181

The above information does not however disclose whether the treaties made with African rulers of Southern Nigeria were included. Moreover, it would be futile to make the assumption that it does. Succession of international treaties implies compliance with international law. Accordingly, further clarification is required. To Costellino and Allen,182 international law is premised on the sovereignty of independent states and international legal regimes remain consensual in nature mostly.183 Under customary international law (even at the time of the scramble and partition of the continent of Africa)184 in the provinces of treaties, Pacta Sunt Servanda, implying good faith must be observed at the time of the conclusion and throughout the existence of a given treaty.185

**HISTORIC TREATIES IN THE CASE OF CAMEROON V. NIGERIA**

The significance of these ‘historic treaties’ was to a significant extent seen in the decision of the International Court of Justice in *The Land Maritime Bounding Between Cameroon and Nigeria*.186 In that case as earlier noted it was stated that ‘the principle of inter temporal law requires that the legal consequences of treaties concluded at that time [of European colonial incursion in Africa] be given effect today’.187

The court in the case elucidated that, as regards Nigeria’s land boundary between it and Cameroon, the matter falls within an historical framework marked initially, in the nineteenth and early twentieth centuries, by the action of European Powers with a view to partitioning Africa. This is followed by changes in the status of the relevant territories under the League of Nations Mandate system, then the United Nations trusteeships, and finally by the territories ascension to independence.188 This history is mirrored in a number of conventions and treaties, diplomatic exchanges, certain administrative instruments, maps of the period and various documents, which were provided to the Court by the Parties. The court confirmed the legal validity of the various agreements concluded between Germany, France and Great Britain to delimit the boundaries of their respective colonial territories. These included the Anglo German Agreements of 1913, the Milner Simon Declaration of 1919 and the Thomson Marchand Declaration of 1929.189

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180 T.O. Elias, Nigeria: *The Development of its Laws and Constitution* (n. 87), 117
181 Akinrinade, *(n 172)* at 454
182 *(n 107)*, 108
183 *Ibid* 108
184 Added by the writer
185 *(n 107)*, 108
186 *(n 3)*
187 *Ibid* para.205
188 *Ibid* para 31
189 *Ibid* para 33,38
With respect to ‘historic treaties’ the court confirmed that on 10 September 1884 Great Britain and the Kings and Chiefs of Old Calabar concluded a Treaty of Protection. Under the Treaties, Great Britain undertook to extend its protection to these Kings and Chiefs, who in turn agreed and promised among other things to refrain from entering into any agreements or treaties with foreign nations or powers without the prior approval of the British Government.190

In this case, the International Court of Justice noted that, during the era of the Berlin Conference, the European Powers entered into many treaties with local rulers. Great Britain concluded some 350 treaties with local chiefs of the Niger Delta. Some of them with notable personages and it is clear from the fact that these treaties were concluded by the consul, expressly as the representative of Queen Victoria, and the British undertakings of "gracious favour and protection" were those of Her Majesty Queen Victoria of Great Britain and Ireland.191

The Court then went on to expound that the international legal status of a "Treaty of Protection" entered into under the law obtaining at that time cannot be deduced from its title alone. Some treaties of protection were entered into with entities which retained thereunder a previously existing sovereignty under international law.192 This was the case whether the protected party was henceforth termed "protectorate" (as in the case of Morocco, Tunisia, and Madagascar in their treaty relation with France) or "a protected State" (as in the case of Bahrain and Qatar in their treaty relations with Great Britain). In sub-Saharan Africa, however, treaties termed "treaties of protection" were entered into not with States, but rather with important indigenous rulers exercising local sovereign rule over identifiable areas of territory.193 With respect to this kind of Treaty, it was highlighted under Judge Huber’s judgement in the Island of Palmas Case194 that such a treaty:

is not an agreement between equals; it is rather a form of internal organization of a colonial territory, on the basis of autonomy of the natives...And this suzerainty over the natives States becomes the basis of territorial sovereignty as towards other members of the community of nations.195

The court also pointed out that these concepts also found expression in the Western Sahara Advisory Opinion. There the Court stated that, in territories that were not terra-nullius but were inhabited by tribes or people having a social and political organization, 'agreements concluded with local rulers...regarded as derivative roots of title',196 Thus, even if this mode of acquisition does not reflect current international law, the principle of intertemporal law requires that the legal consequences of the treaties concluded at that time in the Niger Delta be given effect today197 (in the present dispute).198 The choice of a protectorate treaty by Great Britain was a question of the preferred manner of rule. Elsewhere, and specifically in the Lagos region, treaties for cession of land were being entered into with local rulers. It was precisely a reflection of those differences that within Nigeria there was the Colony of Lagos and the Niger Coast Protectorate, later to become the Protectorate of Southern Nigeria.199

190 Para. 37 (a), 229
191 Ibid. 304
192 Ibid 304 - 305
193 Ibid
194 Island of Palmas case (Netherlands, USA) 4 April 1928 VOLUME II pp. 829-871
196 (Western Sahara, Advisory Opinion, ICJ Reports, 1975 39, para 80)
197 Emboldened for emphasis
198 (n 3), at 305 para 205
199 Ibid., 306
The ICJ pointed out that the treaty signed with the Kings of Old Calabar did not establish an international protectorate, it was one of the multitude in a region where the local rulers were not regarded as States. The United Kingdom regarded itself as the administering power and not just a Protector. The fact that a delegation was sent to London by the Kings and Chiefs of Old Calabar in 1913 to discuss land tenure cannot be considered as implying international personality. It simply confirms the UK administration of Indirect Rule over the territory.

It was observed further that Nigeria itself has been unable to point to any role in matters relevant to the present case, played by the Kings and Chiefs of Old Calabar after the conclusion of the 1884 Treaty. In responding to the question of a Member of the Court, Nigeria stated: ‘It is not possible to say with clarity and certainty what happened to the international legal personality of the Kings and Chiefs of Old Calabar after 1885’. And as to when the Kings and Chiefs ceased to exist as a separate entity, Nigeria told the court it ‘is not a question susceptible of a clear-cut answer’.

THE MORAL CASE

However, it is clear that these quasi-treaties were binding on the UK and other former colonial powers at least in a moral obligatory sense. These ‘historic treaties’ of protection may not be treaties strictly speaking in international law, though significant in the political context and in the evolution of the Family of Nations. It is submitted that the treaties concluded with African entities were primarily political – providing evidence of territorial claims against other European power and thereby allowing the partition of the continent including Nigeria which accrued to the United Kingdom.

What is also clear is that international society in the nineteenth and early twentieth centuries sanctioned the Berlin Final Act and other aquisitory practices while ignoring the legal rights of African peoples who lacked the political might to challenge these mechanisms by other means. Thus, evidently international society was not concerned with these historic treaties beyond their validity within the European arena.

It is argued further among other things that the African rulers (signatories to the treaties) where not signatories nor present at the Berlin Conference. That the provisions of the Berlin Final Act could have been invalidated under the rule of pacta tertiis nec nocent nec prosunt. This principle of Roman law asserts that where a treaty purports to impose an obligation on a third party without its consent, the offending provisions are liable to be rendered null and void. Castellino and Allen set out other reasons apart from these. Concerning the doctrine of intertemporal law, judge Huber in the Island of Palmas case, pointed out two points that:

'A judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be
settled’.210... (Secondly) 'The existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of the law' 211

Considerable analysis of these propositions has taken place; the first point has long been uncontroversial. Any doctrine of the law of territory that wishes to avoid chaos has to be predicated on a presumption of stability and an approach that seeks to apply current law to past situations, with the potential consequence of voiding titles that had been accepted being likely to provoke considerable upheaval.212 This aspect of inter temporal law has been underlined by case law. The International Court of Justice (ICJ) for instance in Cameroon v Nigeria213 stated that 'the principle of inter-temporal law requires that the legal consequences of treaties concluded at that time be given effect today'.214 If the ICJ came to this position, then it is urged that there is at the very least a moral and equitable obligation upon the neo-colonial state to act in good faith with respect to the rights of indigenous people.

Another point made by Judge Huber was his point by way of illustration, conquest today cannot sustain a valid title to territory, but to make void any title established at a time when it was a legal mode of acquiring territory plus, other titles obtained through it could have serious consequences indeed. It is to be noted that the Declaration of Principles of International Law Concerning Friendly Relations Resolution 2625 (xxv) 1970, provides that the notion of non-acquisition of lands through force was not to be affected inter alia by any international agreement made before the UN Charter and valid international law.215 It is also feasible to interpret the second proposition of Judge Huber in a manner so that it does not have such an impact; namely to declare that a title valid at the time it was created has to be consistently abided by.216

For their part, Hobbs and Williams217 view historical treaties as indispensable legal instruments used around the world to settle disputes between indigenous peoples and those who have colonized their lands, that even the post-colonial African State is not exempt. Reference was made to the Western Sahara Case,218 and again to the case between Nigeria and Cameroon219 where in a recent judgment the International Court of Justice220 was of the position that any boundary dispute between the independent states of Cameroon and Nigeria; Falls within an historical framework’ including the partition by European powers in the 19th and early 20th centuries, League of Nations Mandates, UN Trusteeships and finally by the territories accession to independence221.

210 ibid 845
211 ibid
213 Nigeria v Cameroon n3
214 ICJ Reports 2002 para.205
215 M Shaw n. 212, xi – xxxv at xxi
216 ibid at xxi footnote 80 therein
219 fn3
220 Cameroon v Nigeria; Equatorial Guinea Intervening, ICJ Reports 2002, at 303, (n.3)
221 ibid 330
Hobbs et al also mention that the treaties made with indigenous inhabitants in the era were utilized in the United States of America, and the Aoteawa/ New Zealand Treaty of Waitangi; signed 6 February, 1840 negotiated between the British Crown and Maori Chiefs.\textsuperscript{222}

Though they, like some other writers, rightly express view that the Vienna Convention on the law of Treaties, does not include those treaties made between European colonizers and indigenous communities,\textsuperscript{223} this position should be balanced by the compelling arguments that have preceded above. However, they rightly recognize that the definition adopted by the Vienna Convention is expressly limited for the purposes of the present Convention and is not determinative or final of the understanding of political agreements more broadly, nor for defining negotiated settlements between indigenous peoples and the State.\textsuperscript{224}

Again, they point out what the special rapporteur on the Sub Commission on Prevention of Discrimination and Protection of Minorities noted in a 1997 report on Treaties with Indigenous People. That, in establishing formal legal relationships with peoples overseas, the European Parties were clearly aware that they were entering into contractual relations and negotiating with sovereign nations, with all the international legal implications of that term during the period under consideration.\textsuperscript{225} By entering formal agreements with the native indigenous populations, the European colonizers acknowledged the legal capacity of those indigenous people to make such treaties; even if today's indigenous people do not constitute states.

Thus, post-colonial States like Nigeria and others in Africa, firstly, like all European and European created post-colonial States, like Canada, needs to acknowledge that indigenous peoples were prior owners and occupiers of the land the post-colonial state is now exercising sovereign jurisdiction. This will entail recognizing that in the absence of a treaty or formal acknowledgement, that the legitimacy of such a state’s authority can be disputed by the indigenous peoples that made agreements with the former colonial powers.\textsuperscript{226} As part of this component, the state typically accepts the deep injustices of colonization and that under the post-colonial State's development that these injustice continues till date.\textsuperscript{227}

Schulte-Tenckhoff, urges the recognition of indigeneity based on historical treaty relations between indigenous people and State parties, be they earlier colonial powers or their present day post-colonial territorial successors.\textsuperscript{228} That, for instance, the importance of treaties is not only recognized by indigenous peoples, who see it as a testament of their nation to nation relationship with the states that they now inhabit but it is furthermore confirmed in the constitutional law of countries such as Canada and New Zealand.\textsuperscript{229} Moreover, it has made inroads into the United Nations Declaration on the rights of Indigenous Peoples which infuse the importance of pre-colonial treaties and the consequences thereof involving indigenous

\begin{footnotes}
\item[H\textsuperscript{222}]
Henry Hobbs and George Williams, \textit{(n 217) at 1}
\item[H\textsuperscript{223}]
ibid 1-4
\item[H\textsuperscript{224}]
ibid 4-5
\item[H\textsuperscript{225}]
ibid at 5 also Miguel Alfonso Martinez, Special Rapporteur. \textit{Studies on Treaties Agreements and Other Constructive Agreements between States and Indigenous Populations- UN Doc. E/CN.4/Sub2/1999/20 (22nd June 1999)18 [110]}
\item[H\textsuperscript{226}]
Hobbs et al \textit{n 217 at 5}
\item[H\textsuperscript{227}]
ibid 5
\item[H\textsuperscript{228}]
Schulte Tenchoff, ‘\textit{Treaties, Peoplehood and Self-Determination: Understanding the Language of Indigenous Rights}’ as in \textit{(E Pulitano editor) Indigenous Rights in the Age of the UN Declaration}. \textit{( Cambridge University Press, 2012), 64-65}
\item[H\textsuperscript{229}]
ibid
\end{footnotes}
people and the colonizers.\textsuperscript{230}

State recognition of treaty rights can be for important reasons. For example, in Canada these agreements with the original inhabitants are called upon to make a case for the legitimate acquisition of the territory. It is impossible to understand how Canada can argue the legitimate acquiring of sovereign rights without admitting in some form the capacity of the native peoples of Canada to give away such rights. The "founding dilemma" of Canada and other neo-colonial (European created) states rests on this paradox.\textsuperscript{231}

For the purposes of this article, Miguel Alfonso Martinez's study, already noted,\textsuperscript{232} pointed out the situation of indigenous peoples not party to any treaty at the time of colonization that it is still the same as those that had entered into treaty relations with colonizing European Powers. At issue here is this principle: under international law, all peoples have the right of self-determination (internally or externally). While treaties are witness to this right, they do not create it. Hence, indigenous peoples not party to international treaties or agreements do not have their status as peoples diminished thereby. The burden to prove otherwise resting on the party contesting that status\textsuperscript{233}. If this is established – the right to self-determination here being in the context of ILO Convention 169 and UNDRIP 2007. While mainstream legal discourse has gone to considerable lengths to qualify treaties involving indigenous peoples as \textit{sui generis}, according to Schulte Tenchhoff, the UN Special Rapporteur on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations, found that the international status of such treaties\textsuperscript{234} remains 'if only because the 'legitimation' of their colonization and trade interests made it imperative for European powers to recognize indigenous nations as sovereign entities.'\textsuperscript{235}

Arguments in favour of historic treaties that have already been put forward by the views of writers on this issue like Hobbs et al, Schultze and Miguel Alfonso Martinez already discussed, show the importance in principle even if not in law. With what has been indicated about the significance of the internal treaties/agreements made by the colonizing powers with chiefs and kings in Africa and elsewhere, it cannot be safely held that such treaties are none issues in international law. The very fact among others, that such pillars of international law like the maintenance of colonial boundaries of African States following independence \textit{(Uti Possidetis juris)} and the territorial integrity of states in Africa are based in part on these treaties lends weight to their importance.\textsuperscript{236}

These treaties were signed with kings and rulers, recognising both structured political communities and sources of local authority. Land title was also a feature of some of these treaties. Furthermore, the colonizing power as part of its policies \textit{inter alia} allowed the perpetuation of pre-colonial authorities and institutions, and a measure of internal autonomy among other things in accordance with the classical exposition of the protectorate, acceding to the colonized populations at least some measure of internal autonomy.

\textsuperscript{230} UNDRIP Article 37 (1) (2)
\textsuperscript{231} Schulte Tenchhoff (n 228) at 65
\textsuperscript{232} Ibid 66-67 summarises it.
\textsuperscript{233} Ibid 67-68
\textsuperscript{234} Ibid
\textsuperscript{235} A. Martinez 1999: para111. As in I S Tenckhoff (n. 228) at 67.
THE BELGIAN THESIS AND THE DEVOLUTION OF SOVEREIGN POWERS TO INDIGENOUS PEOPLES

At issue here is this principle: under international law, all peoples have the right of self-determination (internally or externally). While treaties are witness to this right, they do not create it. And what is specifically at issue here is internal self-determination. This particular right of self–determination as well as the return of sovereign powers to the indigenous peoples, Kings and Chiefs had been advocated by the 'Belgian Thesis' in the era of European decolonization in the second half of the twentieth century. With respect to self-determination the Belgian Thesis seems to offer a form of panacea.

In 1952, the United Nations had passed the Resolution 637 on the Rights of People and Nations to Self-Determination. There under, it provided that this right of self-determination attached to people and nations was fundamental, the basis of or prerequisite for the enjoyment of all other human rights. The declaration provided inter alia that: The States Members of the United Nations shall uphold the principle of self-determination of all peoples and nations. It also stipulated that:

\[\text{Considering} \] that one of the conditions necessary to facilitate United Nations action to promote respect for the right of self-determination of peoples and nations, in particular with regard to the peoples of Non-Self-Governing Territories, is that the competent organs of the United Nations should be in possession of official information on the government of these Territories.

Thus, as initially thought out, the right to self-determination was to be applied to people and nations. But as the decolonization process was implemented the received orthodoxy was to apply the concept to people under colonial domination – people in this context meant all the people of an erstwhile colonial territory. This being done at the expense of ‘nations’ also cited in Resolution 637. Hence, as originally thought out the principle of self-determination included not only ‘peoples’ but also ‘nations’. A nation according to Black’s Law Dictionary:

A people, or aggregation of men, existing in the form of an organized jural society, inhabiting a distinct portion of the earth, speaking the same language, using the same customs, possessing historic continuity, and distinguished from other like groups by their racial origin and characteristics, and generally, but not necessarily, living under the same government and sovereignty.

A pertinent question to raise is did the nations and in this case indigenous peoples, that came under colonial rule cease to be nations or indigenous peoples by reason of the imposition imperial rule? Did the Yoruba nation of what has come to be called South Western Nigeria, come to an end by reason of British imperialism in Nigeria? The same question is raised with respect to other indigenous communities in southern Nigeria? For the indigenous people/nations of the African Continent, especially from the Sahara and Southwards, they were not it must be asserted divested of their nationhood or indigenousness though now contained within the artificial boundaries created for the convenience of the former European colonizers.

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237 UN General Assembly, The right of peoples and nations to self-determination, 16 December 1952, A/RES/637, available at: https://www.refworld.org/docid/3b00f0791c.html
238 ibid
239 https://thelawdictionary.org/nation/ title="NATION">NATION</a> also @ https://thelawdictionary.org/search2/?cx=partner-pub-2225482417208543%3A5634069718&cof=FORID%3A11&ie=UTF-8&q=nation&x=12&y=10
Another contention arising in the post-colonial state of Nigeria for example, is that indigenous peoples like the Ogoni are distinctly claiming disadvantage and neglect in relation to the majority ethnic groups in Nigeria. This is one of the features that strengthen their claim as being an indigenous people. As well as the actual position of the Ogoni and similar groups, those representing larger indigenous peoples/ethnic groups like the Indigenous people of Biafra share a similar platform of discontentment and alienation in post-colonial Nigeria. The Belgian Thesis suggests a number of things one of which is that certain rights including that of self-determination can be applied to indigenous peoples. The thesis contends that a number of States were administering within their own frontiers territories which were not governed by the ordinary law; territories with well-defined limits, inhabited by homogenous peoples differing from the rest of the population in race, language and culture. These populations were disenfranchised; they took no part in national life: they do not enjoy self-government in any sense of the word.

At the point of Independence, the devolution of the sovereign powers of government and the State by the Colonizing Power was to the elites of indigenous majorities in such countries like Nigeria viz the Hausa-Fulani, the Yoruba and the Igbo. During de-colonization and the subsequent independence there was a failure to address the concerns of indigenous sub groups that were also minorities. As the Willink Commission clearly shows through its establishment, mandate and findings; The pre-independence quest for more states or regions within Nigeria among campaigners did not for instance address the problem that such a process would create fresh minorities. Capturing the heart of the matter with regards to indigenous inhabitants in this situation are the notions the Belgian Thesis encapsulates. Following World War 2, the former colonial powers were at pains to justify the continuance of their overseas empires at home before their citizenry and abroad before international community organizations like the United Nations. It is reputed for instance that Winston Churchill, Prime Minister of Great Britain in November 1942, had said "I have not become the King’s First Minister in order to preside over the liquidation of the British Empire".

As the colonial powers came up against the UN’s evolving role in supervising colonial territories, colonial administrators and diplomats did what they could to re-define the terms of the debate. They did this by quering what they saw as the UN Charter’s inherent bias against formal overseas empires and its failure to protect dependent populations in independent territories. The Belgian delegation refused to continue its participation in the UN Special Committee on Non Self Governing Territories, claiming a desire to demonstrate the hypocrisy of the UN’s approach to dependent populations. British and French colonial administrators supported the Belgian position.

240 Ogoni Bill of Rights, 4 point4
244 n 149
247 ibid
The British colonial administrator Sir Alan Burns denounced not only the new post-World War Two forms of imperialism both in the Soviet and the US forms, but also what he called ‘internal colonialism’ in places like Africa wherein, an educated minority...controls the indigenous population. The Ogoni Bill of Rights identifies these educated minorities as the leadership of the Nigerian majority ethnic groups. They refer also to 'indigenous colonialism' that replaced British imperialism. The Belgian thesis was propounded against the background of UN Resolution 637 (VII). This provided:

The States Members of the United Nations responsible for the administration of Non-Self-Governing and Trust Territories shall take practical steps, pending the realization of the right of self-determination and in preparation thereof, to ensure the direct participation of the indigenous populations in the legislative and executive organs of government of those Territories, and to prepare them for complete self-government or independence.

Belgium, when giving up its colony, the Congo, advanced the thesis that if terms like decolonization and self-determination were to have meaning, the various ‘tribal’ peoples whose homelands it (and other European colonial powers) had forcibly incorporated into its colony would each have to be accorded the right to resume independent existence. Otherwise, the Belgians argued, colonialism would simply be continued in another form, with the indigenous peoples involved arbitrarily subordinated to a centralized authority presiding over a territorial dominion created not by Africans but by Belgium itself. As well the other colonizing [European] powers.

Belgium in giving up its colonial dominions attempted furthermore to move the United States to "decolonize" American Indian Nations by permitting self-determination to be applied to these native peoples. The United States representatives countered by pushing the "blue water rule" thereby sidestepping the Belgian proposal. The US got the support from many UN Member states that had indigenous peoples “inside” their boundaries and gained General Assembly approval. Under UN Resolution 637 VII member states of the United Nations agreed that nations or sub-groups located inside UN member states may not seek or obtain independence through self-determination.

Africa reverted to independent sovereignty in less than a century following the Berlin Conference which had marked a crucial turning point in the history of the continent. However, the return to independence, came not in terms of individual reversion of sovereignty to the original state entities – the Rulers and Kings and communities that existed prior to colonial annexation.

248 Ibid, see further Sir A. Burns, In Defence of Colonies: British Colonial Territories in International Affairs (George Allen and Unwin Ltd., 1957) 16-17, 29.
250 UN General Assembly, The right of peoples and nations to self-determination, 16 December 1952, A/RES/637, <https://www.refworld.org/docid/3b00f0791c.html>
251 Ibid
253 R C Ryser, 21, September 2017 The Blue water rule And the Self-Determination of Nations < https://intercontinentalcry.org/blue-water-rule-self-determination-nations/> accessed on 11/12/18
254 Alexandrowicz, (n.100), 127-128
It is the Belgian Thesis that in one way or another expresses the plight of indigenous tribes like the Ogoni, and other indigenous peoples in Nigeria because of the way it critiques the devolution of political power and sovereignty to the post-colonial state; that is, these, being in the hands of select elites usually from the dominant indigenous ethnic/majority groups. A commentator urges that there are many nations (indigenous) that did not consent to be governed by the State that surrounds them. That the United Nations, with the United States’ backing, in 1952 pushed to permanently prevent such nations from separating from the unhappy situation in which they found themselves within the post-colonial states that they are now part of.

Decolonization meant the handing over of sovereignty to indigenous elites, the nationalists from the major ethnic groups. As such, self-government and independence based on the Western liberal institutions of Government seemed to have disempowered minority indigenous tribes. Thus, the Ogoni, as stated in their ‘Bill of Rights’ call for the splitting of sovereignty between the Ogoni and other indigenous ethnic groups that constitute the Federation of Nigeria and the Federal Government of Nigeria. They advocate for the right to manage their own internal affairs – a form of internal self-government.

The position espoused in the Ogoni Bill of Rights on sovereignty finds a measure of confirmation in the current 1999 Constitution of the Federal Republic of Nigeria. The relevant section provides: ‘Sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority’. The Ogoni call for the repatriation of a measure of sovereign powers to the indigenous peoples and ethnic groups in Nigeria does not go as far as what has been described as ‘post-modern tribalism’ which for its part according to Franck:

[S]eeks to promote both a political and a legal environment conducive to the breakup of existing sovereign states. This particular notion promotes the transfer of defined parts of the populations and territories of existing multinational or multicultural states in order to constitute new uni-national and uni-cultural entities – that is, post modern – tribal states.

On the contrary, the Ogoni people, through the Ogoni Bill of Rights have expressed a desire to remain within a re-constituted Federation of Nigeria. In holding thus, they bring their aspirations within the purposes of the UNDRIP which for its part reiterates the well-worn phrase that:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

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255 The year when the UN Resolution on the Right of People and Nations to Self-Determination was passed
256 R C Ryser (n. 253)
257 The Ogoni Bill of Rights (n. 249)
258 ibid
259 Chapter 2, Section 14 (2) (a) 1999 Constitution of Nigeria
261 The Ogoni Bill of Rights (n.249)
262 See the preamble of the same
263 UNDRIP Article 46 (1)
CONCLUSION

As the ICJ has shown in the case involving Nigeria and Cameroon, the treaties are not insignificant and mere historical relics and should be given legal effect where appropriate. Moreover, the United Nations Declaration on the Rights of Indigenous Peoples, in the preamble and body of the treatise is littered with statements affirming the significance of historic treaties made between colonial powers with indigenous people in the age of imperialism, and their continued significance thereafter.

The recognition of indigenous peoples rights especially the right to self-determination and to their own legal regimes and institutions is clearly set out in international instruments such as International Labour Organization Convention 169\textsuperscript{264} and the United Nations Declaration on the Rights of Indigenous Peoples.\textsuperscript{265} UNDRIP as a human rights instrument affirms the equal application of the right of self - determination to indigenous peoples. It extrapolates the significance historic treaties indigenous peoples made in a bygone era. That the rights should be respected by post-colonial states.

Implicit in such respect is not just a corresponding respect for the substantive nature of the treaties, but also with the inherent and continuing authority of the indigenous rulers, chiefs and kings and other traditional leaders as representatives of peoples where the group has continuity with its historical, political, cultural and special features. Hence, the call for the devolution of a measure of sovereign powers to indigenous peoples. This does not necessarily elevate the historic treaties to a level over and above national laws or Constitutions. But it does require of the post-colonial State that it ensures that it is both aware of the nature of the agreements made by the indigenous peoples through these treaties and that it makes every effort to not only to accommodate their terms but also to repatriate a measure of sovereign powers through internal self - determination in the first instance back to those indigenous peoples and institutions that had originally entered into 'historic treaties' with former colonial powers.

This has been advocated by UNDRIP. Thus, honouring historic treaties is a central feature of respecting indigenous peoples rights, at least at a moral level. Hence, the moral imperative upon states with indigenous peoples to legitimize their rights especially that of internal self-determination highlighted by UNDRIP. The burden rests upon the affected post-colonial States to take into consideration the rights contained in historic treaties. And then to effect measures that would give them concrete legitimacy as advocated by the United Nations Declaration on the Rights of Indigenous people.