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Abuja Peoples of Nigeria as Indigenous Peoples in International Law

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Abstract

There is no agreed definition of indigenous peoples (IPs) as the international community has not agreed to any. However, an examination of international instruments and literature on the subject presents a picture. This article examines the definition of IPs and its relevance to Africa. The case study of Abuja, Nigeria is used as a vehicle to challenge the existing descriptions of IPs. It argues that international law should expand its definition of IPs to include collectives of peoples with diverse cultures in Africa. Analogical insights are drawn from international child rights law to advance the argument that international law on IPs' rights can learn from the evolution of international children's rights law.

Keywords

indigenous peoples (IPs) – definition – international law – Africa – Abuja – Nigeria – children's rights

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- * The supervision feedback of Professor Sue Farran and the signposting to international child rights law by Professor Raymond Athur are gratefully acknowledged. This article is gleaned from a chapter in this author's PhD thesis, Sylvanus Gbendazhi Barnabas, *Land Rights of Indigenous Peoples in International Law: The Case Study of Abuja Nigeria and a Comparative Analysis with Kenya* (PhD thesis, Northumbria University, 2017).

1 Introduction

Since the emergence of the United Nations (UN) in 1945, international human rights law has evolved from its initial focus on individual rights as exemplified by the UN General Assembly (UNGA) adoption of the Universal Declaration of Human Rights (UDHR) in 1948 to the contemporary era where collective rights of groups such as minorities and indigenous peoples (IPs) are protected as *sui generis* rights. For many victims of historical injustices, international law has expanded in order to protect them against violations of their rights.¹ Despite these positive developments in international law, a report commissioned by the UN demonstrates that: “Systematic discrimination, lack of indigenous peoples’ participation in decision-making, in particular ... legislative processes, the lack of land demarcation and titling ... are among the challenges faced by indigenous peoples worldwide”.² The idea of political independence associated with the struggle for political independence of colonial African societies was intended to restore freedom from colonialism for all Africans,³ this human equality goal was exemplified by the inclusion into the Nigerian Independence Constitution 1960 of the fundamental rights and freedoms for all as provided under the UDHR.⁴

This article will demonstrate through the case study of Abuja Nigeria, that the objectives of freedom and equality signalled by the attainment of political independence from colonial rule appear to have been dissipated in a post-colonial Nigeria. To build this introductory argument, it will be demonstrated later in Section 2 below, that through a combined effect of the Constitution of the Federal Republic of Nigeria 1999 (Nigerian Constitution), the Nigerian

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- 1 A. Cook and J. Sarkin, ‘Who Is Indigenous: Indigenous Rights Globally, in Africa, and among the San in Botswana’, 18 *Tulane Journal of International & Comparative Law* (2009) p. 93; T.T. Ankersen and T.K. Ruppert, ‘Defending the Polygon: The Emerging Human Right to Communal Property’, 59 *Oklahoma Law Review* (2006) p. 681.
 - 2 See United Nations Human Rights Committee (HRC), *Rights of indigenous peoples: Report of the United Nations High Commissioner for Human Rights*, May 2015–May 2016 adopted at the HRC Thirty-third session, 20 July 2016, (A/HRC/33/27).
 - 3 See M. Meredith, *The Fate of Africa: A History of the Continent Since Independence* (Public Affairs, New York, 2011); K. Nkrumah, *I Speak of Freedom: A Statement of African Ideology* (Praeger, New York, 1961); and I.M. Wallerstein, *Africa: The Politics of Independence and Unity* (University of Nebraska Press, Lincoln, 1961).
 - 4 See B.O. Nwabueze, *A Constitutional History of Nigeria* (Addison-Wesley Longman Ltd, London, 1982); T.O. Elias, *New Horizons in International Law* (Brill, Leiden, 1980); T.O. Elias, *Groundwork of Nigerian Law* (Routledge & Kegan Paul, London, 1954); A.O. Obilade, *The Nigerian Legal System* (Sweet & Maxwell, London, 1979).

Federal Capital Territory Act 1976 (FCT Act) and the Nigerian Land Use Act 1978 (LUA), Nigeria appears to have been unable to depart from its colonial past. In 1976, the Nigerian Government compulsorily acquired the ancestral lands of Abuja peoples of Nigeria without payment of compensation or resettlement. This is legitimised under Nigerian State laws and it has been affirmed as so by the decisions of the Nigerian Court of Appeal. This article is aimed at using the case study of Abuja, Nigeria to deconstruct the current definition IPs in existing literature and under international law. This will be done in two main ways.

Firstly, the article will introduce the case study of Abuja and in the process, demonstrate the need for a more expansive definition of IPs under international law that covers groups of peoples belonging to diverse ethnic groups. Secondly, the article will make analogical analyses between the definition of IPs and the definition of children under international law. The purpose is to illustrate how one branch of international human rights law has responded to the challenges of defining subjects of international law in negative terms and how the other branch may respond to similar challenges. Following this introductory Section 1, Section 2 will introduce the case study of Abuja, Nigeria. In Section 3, the emergence of the international human rights regime specifically on the rights of IPs will be examined and the debates on the definition of IPs in the existing literature will also be examined. The relevance of the concept of IPs in the African context will be critically analysed in Section 4 and the analysis will be applied to the case study of Abuja. In Section 5, there will be an analogical analysis between the definition of IPs and the definition of children under international law. Thereafter, the article shall conclude with Section 6.

2 The Case Study of Abuja, Nigeria

The territory of Abuja is currently the administrative capital of the Federal Republic of Nigeria.⁵ In the First Schedule to the Nigerian Federal Capital Territory Act 1976 (FCT Act)⁶ more specific geographical description is provided.⁷

5 See International Consortium of Planners, *The Abuja Master Plan* (International Planning Associates, Washington, DC, 1978).

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

7 See First Schedule, Part II of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), where specific geographical information defines the territory.

Abuja is at the geographical centre of Nigeria.⁸ The peoples of Abuja are minority ethnic groups in Nigeria and are predominantly members of the Gbagyi ethnic group but also there are the Koro, Gade, Bassa, Igbira, Amwamwa, Ajari Afo and Gwandara.⁹ In addition, people from all over Nigeria now reside in this territory given its status as the administrative capital of Nigeria. Anthropological and historical studies have demonstrated that the peoples of Abuja lived in and occupied this territory prior to British colonial rule in Nigeria.¹⁰ The Gbagyi constitute the largest of these ethnic groups.¹¹ These groups of peoples are farmers, hunters and fishermen.¹² They depend on the occupancy of their ancestral lands which they have held under customary law to practice their occupations.¹³ Rural and subsistence farming cut across all the various ethnic groups.¹⁴ However, they seem to have their respective specialties in different crafts.¹⁵

Problems in relation to their land rights began in 1976 when the then Nigerian military junta compulsorily acquired their ancestral lands for

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- 8 The latest census indicates that Abuja has a population of about 1,406,239. See National Population Commission, Federal Republic of Nigeria 2006 *2006 Population and Housing Census of the Federal Republic of Nigeria* (Volume 1) p. 1, available at: <www.population.gov.ng/images/Priority%20Tables%20Volume%201-update.pdf>, visited 1 January 2015.
- 9 See further anthropological details about these groups below.
- 10 For anthropological notes on the history, culture and geographical locations of these peoples in Nigeria, see generally, C.L. Temple, *Native Races and their Rulers: Sketches and Studies of Official Life and Administrative Problems in Nigeria* (Argus Printing & Publishing Company, Ltd and Way & Company Ltd, Cape Town, 1918) pp. 29–79; O.S. Temple and C.L. Temple, *Notes on the Tribes, Provinces, Emirates and States of the Northern Provinces of Nigeria* (2nd edn., CMS Bookshop, Lagos, 1922); H.D. Gunn and F. Conant, *Peoples of the Middle Niger Region: Northern Nigeria*, vol. 1 (International African Institute, London, 1960); C.K. Meek, *The Northern Tribes of Nigeria: An Ethnographical Account of the Northern Provinces of Nigeria together with a Report on the 1921 Decennial Census*, vol. 11 (Cambridge University Press, Cambridge, 1925).
- 11 Y. Adamu and A.E. Ichaba, *Abuja: Man and Society* (Abuja Council for Arts and Culture, Abuja, 1997) p. 2.
- 12 See S. Na'ibi, *The Gwari Tribe in Abuja Emirate* (Nigeria magazine special publications, Federal Govt. Print. Dept., Lagos, 1961) pp. 7–13. Also, see S. Na'ibi and A. Hassan, *The Gwari, Gade and Koro Tribes* (Ibadan University Press, Ibadan, 1969); and R. Blench, *Atlas of Nigerian Languages*, vol. III (Crozier & Blench, Dallas, 1992).
- 13 See Abuja Council of Arts and Culture, *A Socio-cultural Study of the Peoples of Abuja*, vol. 1 (Research & Documentation Unit, Abuja Council for Arts and Culture, Abuja, 1995) Ch. 1–5.
- 14 *Ibid.*
- 15 *Ibid.*

building a capital city.¹⁶ Presently, ownership and management of land in Nigeria is governed by the Land Use Act 1978 (LUA)¹⁷ which is not applicable in Abuja, Nigeria. It is the narrative of the Government of Nigeria that Abuja is a symbol of political unity of the Nigerian State as it is meant to be a modern city that represents the development of the Nigerian State.¹⁸ Consequently, the Federal Capital Territory Act, 1976 (FCT Act)¹⁹ vests all of Abuja lands 'exclusively' in the Federal Government.²⁰ As Abuja is not a State within the Nigerian federation, there is no Governor, hence, the non-applicability of the LUA. The effect is that the powers to administer and manage land in Abuja are vested in the President of Nigeria.²¹ This compulsory termination of customary land rights of Abuja peoples is given constitutional imprimatur under Section 279 (2) of the Nigerian Constitution. That section provides that: "The ownership of all lands comprised in the Federal Capital Territory, Abuja shall vest in the Government of the Federal Republic of Nigeria". Indeed, Section 1(3) of the FCT Act expressly states that:

The area contained in the Capital Territory ... shall thenceforth be governed and administered by or under the control of the Government of the Federation to the exclusion of any other person or authority whatsoever and the ownership of the lands comprised in the Federal Capital Territory shall likewise vest absolutely in the Government of the Federation.

However, in the case of the other 36 States that constitute the Nigerian federation, the LUA makes provision for two types of occupancy rights. First, there is what is known as the "statutory occupancy right"²² and secondly there is

16 Adamu and Ichaba, *supra* note 11.

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

18 See K.T. Imoro, *Federal Capital Territory Abuja: Centre of Unity = Territoire de la Capitale Federale Abuja: Centre d' Unite* (Episteme Global Concepts, 2006); S. Ago, *Federal Capital Territory Abuja, Nigeria: Report of Ministerial Committee for the Appraisal of Physical Planning and Development Issues in the Federal Capital Territory Abuja* (FCDA, Abuja, 1999); and Adamu and Ichaba, *supra*, note 11.

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

20 See Section 1.3.

21 He usually delegates these powers to the Minister.

22 Section 5.

what is called “customary right of occupancy”.²³ The Act makes it possible to obtain a statutory right of occupancy for urban and non-urban land. However, for customary rights of occupancy, the Act provides that Local Governments may grant customary rights of occupancy to land in any non-urban area to any person or organisation for agricultural, residential, and other purposes, including grazing and other customary purposes related to agricultural use in the other 36 States where the LUA is applicable.²⁴

Although the introduction of English law and the idea of the State managing land in Nigeria during colonial rule and the retention of this system in a post-colonial Nigeria have given rise to several difficulties that have affected the customary land rights of Nigerians in general,²⁵ the preservation of certain aspects of customary land tenure law within the LUA appears to imply the survival of some aspects of customary land tenure in those States, of which people indigenous to those States are beneficiaries.²⁶ Hence, some Nigerians have benefited from this hybrid land tenure system compared to Abuja peoples whose customary land rights are terminated by the domestic laws of Nigeria. For example, Nigerians indigenous to other States within the Nigerian federation who occupied land under customary tenure before the commencement of the LUA on 27 March 1978 are beneficiaries of Section 36 of LUA which provides that:

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

²³ Section 6.

²⁴ For further information on current Nigerian land law, see P.A.O. Oluyede, *Modern Nigerian Land Law* (Evans Brothers (Nigeria Publishers) Ltd, Lagos, 1989). See also the following cases: *Savannah Bank (Nigeria) v. Ajilo* [1989] All NLR p. 26 and *Ogunloye v. Oni* [1990] All NLR p. 341.

²⁵ See P.E. Oshio, ‘The Indigenous Land Tenure and Nationalization of Land in Nigeria,’ 10 *Boston College Third World Law Journal* (1990) pp. 44–49. Also, see I. Smith, ‘Effects of the Land Use Act on Customary Land Tenure System in Nigeria’ 2 *Journal of Contemporary Legal Problems* (1990) p. 19; F.A. Salamone, ‘The Clash between Indigenous, Islamic, Colonial and Post-Colonial Law in Nigeria,’ 15 *The Journal of Legal Pluralism and Unofficial Law* (1983) p. 15; and V.C. Uchendu, ‘State, Land, and Society in Nigeria: A critical Assessment of Land Use Decree (1978),’ 6 *Journal of African Studies* (1979) p. 62.

²⁶ Oshio, *supra* note 25, pp. 53–54. For example, Section 24 of the Act preserves the customary law rules governing devolution of property. Under Section 29 the holder or occupier entitled to compensation is a community and the governor is empowered to direct payment of the compensation either to the community or to its chief or leader to be disposed of by him for the benefit of the community in accordance with the applicable customary law.

- (2) Any occupier or holder of such land, whether under customary rights or otherwise howsoever, shall if that land was on the commencement of this Act being used for agricultural purposes continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder by the appropriate Local Government ...
- (4) Where the land is developed, the land shall continue to be held by the person to whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a customary right of occupancy issued by the Local Government ...

As noted above, the LUA is not applicable in Abuja. Indeed, the FCT Act, which was enacted in 1976 pre-dates the 1978 LUA. Therefore, the protection of land rights of occupiers of land under customary land tenure before the commencement of the LUA does not apply to holders or occupiers of land under customary land tenure in Abuja. The combined effects of the provisions of the Nigerian Constitution and the FCT Act essentially alienate Abuja peoples from their ancestral lands. Consequently, any rights to land that they are entitled to under customary tenancy is, under the Nigerian laws, void. The above legal situation in relation to customary land law in Abuja has been confirmed by the decisions of the Nigerian Court of Appeal (CA) in the only known case on the issue at the time of writing. In the case of *Ona v. Atenda*,²⁷ the Nigerian CA relied on the provisions of the aforementioned FCT Act and the Nigerian Constitution when it held per Akinta Justice of the Court of Appeal (JCA) (as he then was) that:

The law is settled that where land is acquired for public purposes under a statute, as in the instant case, the Government takes such land as of right and no implied contract by the Government to pay compensation can be inferred from the taking. Similarly, claims for compensation for lands acquired by the Government for public purposes under a statute are statutory: and no owner of land so expropriated by statute, is entitled to compensation unless he can establish a statutory right to such compensation.²⁸

Clearly, the express decision of the Nigerian CA in the above case implies that claims for payment of compensation for lands compulsorily acquired by the Government based upon customary law cannot be validly made, unless such

²⁷ *Ona v. Atenda* [2000] 5 NWLR p. 244.

²⁸ *Ibid.*, p. 268.

claims are based on a statutory right to such lands in Abuja. Effectively, customary land rights have been brutally terminated in Abuja.

Upon the creation of the FCT, the rather erroneous view was that the territory did not belong to any ethnic group within Nigeria.²⁹ Hence, the recommendations of a Panel constituted for that purpose was accepted by the Nigerian Government which then promulgated the FCT Act establishing Abuja as the capital of Nigeria.³⁰ Consequently, Abuja began to operate officially as the new capital of Nigeria in 1991.³¹ It appears that the original intention of the Nigerian Government was to evacuate all the peoples of Abuja and resettle them at some suitable locations outside the territory at the expense of the Government.³² However, as the Government later admitted:

the need for optimum utilisation of ... scarce resources in the actual development of the new Federal Capital, the multiplicity of social, economic and administrative problems that wholesale uprooting and evacuation of local inhabitants could entail, and the constitutional guarantee of the freedom of choice of abode within the country for all citizens of Nigeria soon compelled a revision of the earlier decision.³³

Hence, the Nigerian Government decided that the peoples of Abuja should continue living in the FCT unless their lands were required for developmental purposes.³⁴ However, because the Government was still unsure about how to proceed, in May 1980 an ad-hoc Committee on the Resettlement of the Inhabitants of Abuja was set up by the President.³⁵ The Committee conducted an in-depth study into the problem and recommended that the Government should assume full responsibility for the resettlement of those compelled to leave Abuja as a result of developmental projects.³⁶ Such resettlements were meant to provide for planned housing, alternative farmlands, employment

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

30 F. Rodd *et al.*, *Around and About Abuja* (Spectrum Books, Ibadan, 2005) pp. 5–6.

31 *Ibid.*

32 *Ibid.*

33 M.J. Vatsa, *The Poetry of Abuja: Nigeria's Capital* (Cross Continent Press, Ibadan, 1983) p. xii; M.J. Vatsa, 'Abuja', *Okike-African Journal New Writ* (1981) p. 62.

34 Vatsa (1983), *supra* note 33, p. xii. There is no evidence that ever happened.

35 It was headed by Senator A.D. Rufa'i of the Senate Committee on the FCT.

36 Vatsa, (1983), *supra* note 33, p. xii.

areas and basic infrastructural facilities for the indigenous communities.³⁷ It was also recommended that the Government should render financial assistance (not compensation) to the indigenes who chose to leave the territory of their volition.³⁸ While the issue of resettlement remained unresolved, the President took over the administration of Abuja with effect from 1 January 1981.³⁹ Lamenting the human rights implications of this development, Frank Salamone wrote in 1983 that:

This scheme is affecting the Gbagyi ... The size alone is startling, 365,000 square miles. Significantly, the Hausa city of Abuja is not part of the resettlement. Significant, also, is the fact that the Gbagyi and related ethnic groups, long enemies of the Hausa-Fulani, are to be resettled ... There would be new laws regarding property holding, essentially taking away communal ownership of land and vesting it in the state ... ethnic leadership base would be disrupted ... New, and artificial, political units would be established which would nullify indigenous political leadership.⁴⁰

Therefore, in the remainder of this article, the case study of Abuja is used to illustrate the significance of the concept of IPs in the African context and the need for an expansive approach to the definition of IPs that covers collectives of peoples with diverse cultures such as Abuja peoples of Nigeria.

3 The Emergence of IPs in International Law

The literature on the rights of IPs under international law is dominated by debates about definition.⁴¹ Indeed, as Ken Coates notes the question remains, is it the smallness of a population that should be the main criteria for defining IPs, or could it be some other criteria, like ancestral connection to land, the length of time in a territory, or commitment to pre-industrial and pre-colonial

37 *Ibid.*

38 *Ibid.*, pp. xii–xiii.

39 *Ibid.*, p. xiv; also, see Rodd *et al.*, *supra* note 30 pp. 7–8.

40 F.A. Salamone, 'The Clash between Indigenous, Islamic, Colonial and Post-Colonial Law in Nigeria', 15 *The Journal of Legal Pluralism and Unofficial Law* (1983) p. 15, pp. 44–45.

41 See for example, K Lehmann, 'To Define or Not to Define-The Definitional Debate Revisited', 31 *American Indian Law Review* (2006) p. 509; J. Cornthassel, 'Who is Indigenous? "Peoplehood" and Ethnonationalist Approaches to Rearticulating Indigenous Identity', 9 *Nationalism and Ethnic Politics* (2003) p. 75.

culture?⁴² The controversy about definition of IPs is exemplified by the opposing views of two anthropologists – Adam Kuper on the one hand and Alan Barnard on the other. In a widely cited paper,⁴³ Kuper launches an argument against the concept of IPs by arguing that the concept is merely a “euphemism for what used to be termed ‘primitive’”.⁴⁴ He maintains that it is not possible to attach any cultural distinctiveness to IPs as farmers, hunters or nomadic herders given the various historical interactions with so-called IPs in several encounters between them and other groups of people. He therefore concludes that the ideas behind IPs “rely on obsolete anthropological notions and on a romantic and false ethnographic vision. Fostering essentialist ideologies of culture and identity, they may have dangerous political consequences”.⁴⁵

By contrast, Barnard argues that the notion of IPs is very important in the context of explaining the relationship between dominant groups or institutions and non-dominant groups.⁴⁶ To buttress his views Barnard gives the example of the Botswana Government that once threatened to change the Constitution of the country should some IPs living there succeed in claiming land rights against the Government in the courts.⁴⁷ His argument is that such exercise of State power by using its ability to make or change laws to the detriment of the rights of IPs illustrates the political and legal relevance of the concept, as this empowers them against the interests of the State.⁴⁸

It is no wonder then that the concept of IPs is even more problematic in the context of Africa and even a sympathiser of the concept like Barnard admits that there are problems in applying this concept to Africa.⁴⁹ Sidsel Saugestad recognises that there is an African context to the term,⁵⁰ and explains the

42 K. Coates, *A Global History of Indigenous Peoples: Struggle and Survival* (Springer, London, 2004) p. 1.

43 A. Kuper, ‘The Return of the Native’, 44 *Current Anthropology* (June 2003) p. 389.

44 *Ibid.*, p. 389.

45 *Ibid.*, p. 395. For other commentaries for and against Kuper’s views, see M. Guenther, *et al.*, ‘Discussion: The Concept of Indigeneity’, 14 *Social Anthropology* (2006) p. 17.

46 A. Barnard, ‘Kalahari Revisionism, Vienna and the ‘indigenous peoples’ Debate’, 14 *Social Anthropology* (2006) pp. 1–2.

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*, p. 8. For another author who makes a brilliant case about the need to support the concept of indigenous peoples for its political advantages to certain groups, see R.B. Lee, ‘Twenty-first Century Indigenism’, 6 *Anthropological Theory* (2006) p. 455.

50 See S. Saugestad, ‘Beyond the “Columbus Context”: New Challenges as the Indigenous Discourse is Applied to Africa’, in H. Minde (ed.), *Indigenous Peoples Self-determination, Knowledge, Indigeneity* (Eburon, Delft, 2008) p. 158.

process leading up to the production of the Martinez Report⁵¹ wherein the African conception of IPs was brought to focus but was rejected. James Anaya appears to consider the definition of IPs in relation to people who inhabited a place prior to invasion by colonisers.⁵² Anaya contends that within international law and international institutions the terms “indigenous”, “native” or “aboriginal” “[have] long been used to refer to a particular subset of humanity that represents a certain common set of experiences rooted in historical subjugation by colonialism, or something like colonialism”.⁵³

Although Anaya begins his analyses of the definition or description of IPs by placing a lot of emphasis on a history of “colonialism or something like colonialism”,⁵⁴ in a somewhat contradictory note he argues that presently IPs are identified as well as identify themselves in accordance with identities that “predate historical encroachments by other groups and the ensuing histories that have wrought, and continue to bring, oppression against their cultural survival and self-determination as distinct peoples”.⁵⁵ Anaya appears to introduce the criteria of self-identification in connection with “identities that predate encroachment”, “oppression against their cultural survival”, and “distinct peoples”.⁵⁶

Such descriptions of IPs also place a lot of emphasis on distinctiveness of culture as a key criterion for identifying them. In this respect, Julian Burger contends that the idea of belonging to a distinct culture is a central aspect of defining IPs.⁵⁷ In an attempt to be heterogeneous in defining IPs, Anaya acknowledges that:

many of the minority or non-dominant tribal peoples of Africa and Asia are generally regarded, and regard themselves, as indigenous ... because their ancestral roots are embedded in the lands in which they live, or would like to live.⁵⁸

51 M.J. Cobo, *Study of the Problem of Discrimination against Indigenous Populations* (United Nations, New York, 1987).

52 S.J. Anaya, *Indigenous Peoples in International Law* (Oxford University Press, Oxford, 2004) pp. 3–4.

53 *Ibid.*, p. 5.

54 *Ibid.*

55 *Ibid.*

56 See also, S.J. Anaya, ‘Indigenous Rights Norms in Contemporary International Law’, 81 *Arizona Journal of International & Comparative Law* (1991) pp. 1–4, where Anaya maintains that cultural distinctiveness and colonialism are key features of IPs.

57 J. Burger, *Report from the Frontier: The State of the World's Indigenous Peoples* (Cultural Survival Inc., London, 1987) p. 12.

58 Anaya, *supra* note 56 p. 3.

However, he is silent on whether such IPs of Africa are IPs for the purpose of international law. Alfred and Cornstassel argue that the literature on IPs has been dominated by “identity constructions that reflect the colonized political and legal contexts in which indigenous peoples are forced to live and operate”.⁵⁹ They note further that colonialism should not be allowed to be the only narrative of IPs as this limits their freedom and imposes an outcome that further feeds into the power dynamics that disempower them.⁶⁰ Indeed, it appears that a lot of the literature on IPs tends to define or describe them in the context of victimisation, as Coates argues IPs are defined in the context of powerlessness and exploitation by other dominant groups.⁶¹

The most widely cited definition is the one provided by Jose Martinez Cobo.⁶² Cobo’s study enumerates the elements of: traditional and ancestral lands; linkage to original inhabitants of a territory; and distinctiveness of culture.⁶³ However, as Coates argues, defining IPs in terms of victimisation is not only disempowering it also fails to acknowledge that some IPs have in the past also “exploited, defeated, ruled over, and dislocated other indigenous societies”.⁶⁴ Before examining the implications of defining IPs in such negative terms in further detail, it is important at this juncture to critically examine the approaches to the definition of IPs by international organisations and relevant international human rights instruments.

3.1 *The UN, International Labour Organisation (ILO) and Definition of IPs*

The ILO Indigenous and Tribal Populations Convention 1957 (ILO 107)⁶⁵ appears to be the first international instrument to define IPs⁶⁶ as it described

59 T. Alfred and J. Cornstassel, ‘Being Indigenous: Resurgences against Contemporary Colonialism’, 40 *Government and Opposition* (2005) pp. 597, 605; see also, J.N. Brown and P.M. Sant, *Indigeneity: Construction and Re/Presentation* (Nova Science Publishers, New York, 1999); and R.H. Barnes, A. Gray and B. Kingsbury, *Indigenous Peoples of Asia*, vol. 48 (Assn for Asian Studies Inc, Michigan, 1995).

60 Alfred and Cornstassel, *supra* note 59, p. 601.

61 Coates, *supra* note 42, p. 5.

62 See Cobo, *supra* note 51.

63 *Ibid.*

64 Coates, *supra* note 42, p. 9. See also, H. Minde, ‘The Destination and the Journey: Indigenous Peoples and the United Nations from the 1960s through 1985’, in H. Minde (ed.), *Indigenous Peoples: Self-determination, Knowledge, Indigeneity* (Eburon, Delft, 2008) pp. 56–57.

65 ILO Indigenous and Tribal Populations Convention 1957 (C107), adopted in Geneva, at the 40th ILC session on 26 June 1957, entered into force on 2 June 1959, it is currently an outdated instrument and it may be denounced between 2 June 2019 and 2 June 2020.

66 Under its Art. 1(b).

them similarly with the latter Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) 1987⁶⁷ which identifies them as:

peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.⁶⁸

It provides further that “self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply”.⁶⁹ It has been suggested that the definition of IPs in the latter ILO Convention differs from the former in emphasising *self-identification* by IPs as a criterion for identifying them.⁷⁰ Indeed, ILO 169 remains the only existing and binding international instrument that contains criteria for describing IPs. Although it is claimed that the UN has no definition for IPs, however, a reading of paragraph 6 of the preamble to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)⁷¹ suggests that IPs are those who “have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources ...”. So, even the UN appears to describe and identify IPs in the context of victimhood.

By contrast to the above preambular description, Article 9 of UNDRIP provides that “indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned”. Similarly, Article 33 (1) of UNDRIP provides that “indigenous peoples have the right to determine their

67 ILO, Convention concerning Indigenous and Tribal Peoples in Independent Countries, (C169), adopted in Geneva, at the 76th International Labour Congress session on 27 June 1989.

68 See Art. 1(b).

69 See Art. 1(2).

70 R.T. Ako and O. Oluduro, ‘Identifying Beneficiaries of the Un-Indigenous Peoples’ Partnership (UNIPP): The Case for the Indigenous of Nigeria’s Delta Region’, 22 *African Journal of International & Comparative Law* (2014) p. 369.

71 *UN Declaration on the Rights of Indigenous Peoples*, (A/RES/61/295,) adopted by the UN General Assembly on Thursday, 13 September 2007, by a majority of 144 States in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). Available at: <documents-dds-ny.un.org/doc/UNDOC/GEN/No6/512/07/PDF/No651207.pdf?OpenElement>, visited 17 March 2016.

own identity or membership in accordance with their customs and traditions". It is argued that the combined effects of Articles 9 and 33 of UNDRIP are that the identification or definition of IPs is to be determined by IPs themselves in accordance with "their own customs and traditions". It appears then that self-identification by any group as IPs is the key criterion. It is obvious therefore that the concept of IPs has transcended the discipline of anthropology as "the term has come to occupy wide currency in general as well as in the other social sciences literature".⁷² Indeed, IPs are today recognised as distinct international entities with rights as such under international law. However, as noted above there are practical problems with the application of this conventional definition of IPs in the context of Africa as demonstrated in Section 4 below.

4 Definition of IPs in the African Context

The relevance of the concept of IPs in the African context has been a subject of academic debates by scholars like James Woodburn who critically examines the political status of hunter-gatherers in Africa by demonstrating that because of their lack of political status and low numerical strength these peoples have very negligible political power and influence in countries where they live.⁷³ He argues that: "In most, but not all, Sub-Saharan African countries, hunter-gatherers are politically, to all intents and purposes, invisible they lack voting power, lobbying capacity and any significant form of representation even at local level".⁷⁴ He shows how there is a general recognition that these hunter-gatherers are the "first inhabitants of the countries in which they live".⁷⁵ Woodburn maintains that: "By far the most important problem facing hunter-gatherers and former hunter-gathers in Africa today is the theft of their

72 V. Xaxa, 'Tribes as Indigenous People of India', *Economic and Political Weekly* (1999) p. 3589, p. 3590. For further discussions on the definition of indigenous peoples, see M. Pelican, 'Complexities of Indigeneity and Autochthony: An African Example', 36 *American Ethnologist* (2009) p. 52; J.N. Brown and P.M. Sant, *Indigeneity: Construction and Representation* (Nova Science Publishers, New York, 1999); L. Hughes, *The No-nonsense Guide to Indigenous Peoples* (New Internationalist Verso, London, 2003) pp. 11–16; R. Stavenhagen, *The Emergence of Indigenous Peoples* (Springer Science & Business Media, Mexico City, 2012) pp. 46, 47, 48, 81–83.

73 J. Woodburn, 'The Political Status of Hunter-Gatherers in Present-Day and Future Africa', in A. Barnard and J. Kenrick (eds.), *Africa's Indigenous Peoples: First Peoples' or Marginalized Minorities?* (Centre of African Studies, University of Edinburgh, Edinburgh, 2001) p. 1.

74 *Ibid.*

75 *Ibid.*, p. 2.

land and the loss of their livelihood".⁷⁶ However, Woodburn concludes that because there is a general feeling in Africa that all Africans are IPs since almost all of them experienced colonialism, "more is likely to be gained by stressing that they are First Peoples" and not IPs.⁷⁷

Likewise, in an essay examining the status of the San⁷⁸ in southern Africa, Suzman examines the issue of identifying the San as IPs by arguing that given the problematic context of the term *indigenous* in Africa it is counter-productive to articulate the rights of the San through the indigenous rights framework.⁷⁹ Whilst he does not deny that the San of southern Africa can be legitimately categorised as IPs, Suzman concludes that it is better to regard them as a "marginalized minority rather than indigenous peoples".⁸⁰ It is argued that notwithstanding the arguments above, the concept of IPs is relevant to the protection of the rights of certain groups of people in Africa as demonstrated by the jurisprudence of African Commission on Human and Peoples Rights (African Commission) and more recently the African Court on Human Peoples Rights (African Court) in sub-section 4.1 below. Although Saugestad admits that "Africa and much of Asia represent special conceptual challenges"⁸¹ in terms of defining IPs, she rightly argues that to link the concept of IPs to only European colonial expansion "leaves us without a suitable concept for analysing the same type of internal relationships that have persisted after the liberation from colonial dominance".⁸²

4.1 *The African Commission, and the Definition of IPs*

In a Report,⁸³ the African Commission through its Working Group on Indigenous Populations/Communities found that:

⁷⁶ *Ibid.*, p. 8.

⁷⁷ *Ibid.*, p. 12.

⁷⁸ The Sans are a population of marginalised and minority people who live in Botswana, Namibia, South Africa, Zimbabwe, Angola and Zambia. See J. Suzman, *Things from the Bush: A Contemporary History of the Omaheke Bushmen* (PSB Publishing, Basel, 2000).

⁷⁹ J. Suzman, 'Indigenous Wrongs and Human Rights: National Policy, International Resolutions and the Status of the San of Southern Africa', in A. Barnard and J. Kenrick (eds.), *Africa's Indigenous Peoples: 'First Peoples' or 'Marginalized Minorities'?* (Centre of African Studies, University of Edinburgh, Edinburgh, 2001) pp. 274–275.

⁸⁰ *Ibid.*

⁸¹ S. Saugestad, 'Contested Images: "First Peoples" or "Marginalized Minorities" in Africa?', in A. Barnard and J. Kenrick (eds.), *Africa's Indigenous Peoples: 'First Peoples' or 'Marginalized Minorities'?* (Centre of African Studies, University of Edinburgh, Edinburgh, 2001) p. 303.

⁸² *Ibid.*, p. 304.

⁸³ African Commission on Human and Peoples Rights (ACHPR) and International Work Group on Indigenous Affairs (IWGIA), *Report of the African Commission's Working Group on Indigenous Populations Communities*, (ACHPR & IWGIA, Copenhagen, 2005).

The African peoples who are facing particular human rights violations, and who are applying the term 'indigenous' in their efforts to address their situation, cut across various economic systems and embrace hunter-gatherers, pastoralists as well as some small-scale farmers.⁸⁴

It provides a list of specific groups of peoples which it describes as IPs by using the examples of hunter-gatherers⁸⁵ and pastoralists⁸⁶ across the African continent including the Ogoni people of South-East Nigeria which it describes as "mostly farmers and fishermen".⁸⁷ The Report notes that the examples given are neither exhaustive nor comprehensive enough to cover all those that may qualify to be described as IPs in Africa.⁸⁸ Like the UN, the African Commission is also of the opinion that a strict definition of IPs is "neither necessary nor desirable".⁸⁹

However it has identified the characteristics of IPs in Africa.⁹⁰ According to the African Commission, IPs in Africa are vulnerable to the violations of their human rights,⁹¹ and are unable to participate in determining their own future and development.⁹² It is also worth noting that the African Commission expressly distinguishes between IPs and *minorities*, as it maintains that "the concept of indigenous peoples in its modern forms more adequately encapsulates the real situation of groups and communities concerned".⁹³ But it acknowledges that there are obvious overlaps between the concept of IPs and minorities under international law.⁹⁴

84 *Ibid.*, at p. 5.

85 *Ibid.*, pp. 6–8.

86 *Ibid.*, pp. 8–10.

87 *Ibid.*, p. 9. For an analysis of whether the people of the Niger-Delta, Nigeria meet the criteria to be recognised as IPs, see Ako and Oluduro, *supra* note 70 pp. 380–383.

88 ACHPR and IWGIA, *supra* note 83, p. 10.

89 *Ibid.*, p. 59.

90 *Ibid.*

91 *Ibid.*, p. 60.

92 *Ibid.* For further analyses of the African Commission's views on the definition and description of indigenous peoples, see ACHPR and IWGIA, *Indigenous Peoples of Africa: The Forgotten Peoples? The African Commission's Work on Indigenous Peoples in Africa* (ACHPR and IWGIA, Copenhagen, 2006) pp. 8–14 and K.N. Bojosi and G.M. Wachira, 'Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights', 6 *African Human Rights Law Journal* (2006) p. 382, pp. 391–400.

93 ACHPR and IWGIA, *supra* note 83, p. 64.

94 *Ibid.*

A key issue in relation to the concept of IPs in the African context is the opinion of the African Commission that:

Domination and colonisation has not exclusively been practised by white settlers and colonialists. In Africa, dominant groups have also after independence suppressed marginalised groups, and it is this sort of present-day internal suppression within African states that the contemporary indigenous movement seeks to address ... It is often being argued that all Africans are indigenous to Africa. Definitely all Africans are indigenous as compared to the European colonialists who left all of black Africa in a subordinate position ... However, if the concept of indigenous is exclusively linked with a colonial situation, it leaves us without a suitable concept for analysing internal structural relationships of inequality that have persisted after liberation from colonial dominance.⁹⁵

Equally, the African Commission maintains that the idea of first come or aboriginality should not be given too much priority and is not the only determinant of those who can be regarded as IPs in the African context and that it is more important to put emphasis on the criterion of self-identification.⁹⁶

In the case of *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria (Ogoni case)*,⁹⁷ the African Commission ruled that the rights of the Ogoni people of Nigeria (a minority ethnic group) were protected and enforceable against the Government of Nigeria under the African Charter even though it refrained from defining the word *peoples* in the African Charter.⁹⁸ In the more recent case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya (Endorois case)*,⁹⁹ the African Commission had to determine whether usage of the word *peoples* under the African Charter was inclusive of IPs. Although the African Commission admitted that there was no universally acceptable definition of IPs,¹⁰⁰ it nevertheless relied on the provisions of UNDRIP, ILO 169, and the decisions of the Inter-American Court

⁹⁵ *Ibid.*, at 65.

⁹⁶ *Ibid.*

⁹⁷ *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria* (Communication 155/96).

⁹⁸ *Ibid.*, paras. 62, 66 and 69.

⁹⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya* (Communication 276/03).

¹⁰⁰ *Ibid.*, para. 147.

of Human Rights (IACHR) to find that the word *peoples* in the African Charter was applicable to IPs in Africa.¹⁰¹

It is argued that the conventional approach of presenting IPs in negative terms is counter-productive as the main objective of international attempts to protect them are aimed towards empowering them. Defining them as mere victims contributes to disempowering them by identifying them with factors that are responsible for their vulnerability in the first place.¹⁰² In the context of this article, IPs are hereby defined as any group of non-dominant peoples who have ancestral roots in the lands where they live and have lived prior to the introduction and emergence of modern statehood whether through colonialism or by the efforts of State-makers indigenous to such modern States.¹⁰³

4.2 *The Abuja Peoples of Nigeria – Are They IPs?*

There are two main points to consider in the determination of whether Abuja peoples are IPs. Firstly, since there are no universally acceptable criteria with which to determine if a particular group of people can be regarded as IPs, preference is accorded to the characteristics of IPs given by the African Commission,¹⁰⁴ which claims to have taken the peculiarities of African societies into account.¹⁰⁵ The second point is that Abuja peoples comprise eight different ethnic groups. In the *Endorois* case,¹⁰⁶ it was only one ethnic group (the Endorois) from Kenya that brought a claim before the African Commission. Likewise, in the *African Commission on Human and Peoples' Rights v. The Republic of Kenya (Ogiek case)*,¹⁰⁷ recently decided by the African Court concerns

101 *Ibid.*, paras. 142–162.

102 For critical analyses on the definition of IPs, see generally, R. Maaka and A. Fleras, *The Politics of Indigeneity: Challenging the State in Canada and Aotearoa New Zealand* (Otago University Press, Otago, 2005); and R. Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, Oakland, CA, 2003).

103 This model of definition is apparent from a critical reading and analysis of the following literature, see W. Adebawo, 'Terror, Territoriality and the Struggle for Indigeneity and Citizenship in Northern Nigeria', 13 *Citizenship Studies* (2009) p. 349; A. Sayne, *Rethinking Nigeria's Indigene-settler Conflicts* (US Institute of Peace, New York, 2012); A.O. Adesoji and A. Alao, 'Indigeneship and Citizenship in Nigeria: Myth and Reality', 2 *Journal of Pan African Studies* (2009) p. 151; V. Xaxa, 'Tribes as Indigenous People of India', *Economic and Political Weekly* (1999) p. 3589.

104 ACHPR and IWGIA, *supra* note 83 p. 60.

105 *Ibid.*

106 *Endorois* case, *supra* note 99.

107 *African Commission on Human and Peoples' Rights v. The Republic of Kenya* (Application 006/2012).

one ethnic group (the Ogiek) of Kenya who the Court recognised as IPs within the meaning of the concept under UNDRIP, ILO 169 and in the context of the African Charter.¹⁰⁸ There is no known case either before the African Commission or the African Court relating to the rights of IPs, in which different collectives of ethnic minorities have brought a claim. In addition, there is a gap in the existing body of literature on IPs on whether people belonging to different ethnic minority groups can qualify as IPs in Africa and under international law.¹⁰⁹

The first criterion that a group must meet to be considered as IPs according to the African Commission is that such group should have a distinct culture that differs from those of dominant groups of society and such culture should be under threat of extinction.¹¹⁰ The culture of each of the different groups of Abuja peoples of Nigeria differs from people from other parts of Nigeria in the sense that each of the different groups speak distinctly different languages from each other *inter se* as well as from other dominant ethnic groups in Nigeria.¹¹¹ However, a significant part of their culture in relation to farming, fishing and hunting have similarities and differences among them *inter se* and with other dominant ethnic populations in Nigeria.¹¹² It has been rightly argued that there is danger in attaching too much significance to the element of distinctiveness of culture as most ethnic communities in Africa have similar cultures.¹¹³ Therefore, there is far more importance in considering the extent to which the cultures of the various ethnic communities in Abuja are threatened by the national laws that have terminated their customary land rights. They are farmers, hunters and fishermen and like IPs elsewhere, land is intrinsically connected to Abuja peoples' cultural survival as farmers, hunters and fishermen.¹¹⁴ For similar reasons, they also satisfy the second criterion which

108 *Ibid.*, paras. 103–215.

109 For a survey of some of the recent literature on the definition of IPs, see S. Pritchard (ed.), *Indigenous Peoples, the United Nations and Human Rights* (Federation Press, Sydney, 1998); and A. Gupta, *Human Rights of Indigenous People*, vol. 1 (Gyan Publishing House, Delhi, 2005). On the specific context of Africa, see A.K. Barume, *Land Rights of Indigenous Peoples in Africa* (IWGIA, Copenhagen, 2010).

110 *Ibid.*

111 See Abuja Council of Arts and Culture, *supra* note 13, Ch. 1–5; Na'ibi and Hassan, *supra* note 12, pp. 7–13.

112 See Hassan, *supra* note 12; Na'ibi and Hassan, *supra* note 12; Abuja Council of Arts and Culture, *supra* note 13.

113 Ako and Oluduro, *supra* note 70, p. 380.

114 W. Adebani, 'Abuja', in S. Bekker and G. Therborn (eds.), *Capital Cities in Africa: Power and Powerlessness* (HSRC Press and CODESRIA, Cape Town, 2012) pp. 84–102.

requires that their survival should be dependent on access to and control of traditional lands.¹¹⁵ The second point in respect to how their cultures are under threat, relates to their languages. Some researchers have concluded that their languages are currently under threat of extinction.¹¹⁶

The third criterion requires that they suffer from discrimination from the State and other dominant ethnic groups. While this requirement appears to suggest that such groups are minorities rather than IPs, it is argued that this requirement combines with the other characteristics identified by the African Commission to create the distinction between IPs and minorities. Since the late eighteenth century the peoples of Abuja were engulfed by the Islamic jihad of the dominant Hausa and Fulani ethnic groups led by Uthman Dan Fodio, bringing them under the political hegemony of the now defunct Zaria Emirate.¹¹⁷ State-based discrimination can be said to have begun in 1976 when the then military junta promulgated a military Decree¹¹⁸ designating their ancestral lands as lands belonging exclusively to the Federal Government of Nigeria without first resettling or paying compensation to all the IPs living there. Evidence that no adequate compensation has been paid nor have all the peoples been resettled is illustrated by a Bill currently before the Nigerian Senate.¹¹⁹ Such discrimination from the State becomes even more apparent when one considers that Section 36 of the LUA 1978¹²⁰ accommodates customary land rights of other Nigerians indigenous to the other 36 States that make up the Nigerian Federation, but its application in Abuja is made impossible by its Section 49, together with Section 1 (3) of the Federal Capital Territory

115 ACHPR and IWGIA, *supra* note 83, p. 60.

116 R. Blench, 'The Status of the Languages of Central Nigeria', in M. Brenzinger (ed.), *Endangered Languages in Africa* (Rüdiger Köppe, Cologne, 1998) pp. 187–205; O. Yusuf, 'Disappearing Languages of the Middle Belt: Steps to Safeguard', in L. Ihezue and O.E. Osuji (eds.), *Proceedings of the National Workshop on Best Practices to Safeguard Endangered Nigerian Languages* (UNESCO, Cologne, 2007) pp. 67–81.

117 See G. Thomas-Emeagwali, 'Notes on the History of Abuja, Central Nigeria', *African Study Monographs* 9, No. 4 (1989) pp. 191–196; D.C. Tambo, 'The Sokoto Caliphate Slave Trade in the Nineteenth Century', 9 *The International Journal of African Historical Studies* (1976) p. 187.

118 Decree No. 6 1976, now known as the Federal Capital Territory Act, Cap L F4, *Laws of the Federation of Nigeria*, 2004. Available at: <lawnigeria.com/LawsoftheFederation/FEDERAL-CAPITAL-TERRITORY-ACT.html>, visited 23 October 2016.

119 See the *FCT Resettlement, Integration and Development Commission and For Related Matters Bill 2016* (HB 513) sponsored by Hon. Zaphania Jisalo, available at: <www.nassnig.org/document/download/8074>, visited 23 October 2016.

120 Land Use Act (LUA) 1978. Available at: <lawnigeria.com/LawsoftheFederation/LAND-USE-ACT.html>, visited 23 October 2016.

(FCT) Act¹²¹ and Section 297 (2) of the Constitution of the Federal Republic of Nigeria,¹²² to the effect that the entire lands in the FCT are owned exclusively by the Federal Government of Nigeria.

The final criterion requires that such groups should be living in isolated areas of society as a result of marginalisation.¹²³ While a few Abuja peoples now live close to the city of the FCT as a result of the increasing development and expansion of the Capital Territory, the majority of them still live in villages and rural areas located in the six Local Government Councils of the FCT with no accessible roads, hospitals and other social amenities.¹²⁴ In any case, it appears the criteria identified by the African Commission are not conjunctive, implying that a group is not required to meet all the criteria to be considered IPs. Indeed, in the *Endorois* case,¹²⁵ the African Commission relied only on three criteria¹²⁶ to rule that the Endorois of Kenya were IPs. A similar approach was adopted by the African Court in the more recent *Ogiek* case¹²⁷ in relation to the Ogiek of Kenya. Therefore, based on the authority of the *Endorois* case and the *Ogiek* case, Abuja peoples satisfy a substantial number of the characteristics identified by the African Commission as elements for identifying them as IPs in Africa.

Even if Abuja peoples are subjected to the further key test of self-identification under UNDRIP¹²⁸ and the requirement that their “social, economic, cultural and political institutions” under ILO 169¹²⁹ should distinguish them from other dominant sections of the society, the conclusion is not different. The various ethnic groups in Abuja self-identify as distinct ethnic groups and as IPs, including their identification by others as such.¹³⁰ They are also peoples who

121 FCT Act, *supra*, note 19.

122 *Constitution of the Federal Republic of Nigeria* 1999 (as amended), available at: <www.lawnigeria.com/CONSTITUTIONHUB/Constitution.html>, visited 23 October 2016.

123 ACHPR and IWGIA, *supra* note 83, p. 60.

124 S. Gusah, ‘Community Land Trusts: A Model for Integrating Abuja’s Urban Villages within the City Master Plan’, in L.E. Herzer (ed.), *Changing Cities: Climate, Youth, and Land Markets in Urban Areas* (Wilson Centre Comparative Urban Study Project, Washington, DC, 2011) pp. 141–159.

125 *Endorois* case, *supra* note 99, paras. 142–162.

126 Distinctiveness of culture and the cultures being under threat of extinction; survival dependent on access to and control of traditional lands; and self-identification.

127 *Ogiek* case, *supra* note 107.

128 Art. 33 (1) of UNDRIP.

129 Art. 1 (1) (b) of ILO 169.

130 See Gusah, *supra* note 124, pp. 141–159; and Adebani, *supra* note 114, pp. 93–94. See also Ago, *supra* note 18.

descended from those who “inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries”.¹³¹ The peoples of Abuja inhabited the territory now designated as the Federal Capital Territory of Nigeria, prior to the commencement of British colonial rule in Nigeria and were forcefully brought into Nigeria through the amalgamation of the Northern and Southern Protectorates of Nigeria in 1914 by the British colonial administration.¹³² The logical conclusion from the above analyses is that each of the various ethnic groups of Abuja of themselves and together as a collective satisfy the requirement to be regarded as IPs. Consequently, it is argued that any such collective of different ethnic groups in Africa that satisfy the characteristics of IPs identified by the African Commission, UNDRIP and ILO 169, are entitled to the rights attached to such groups in international law, including the right to ownership, control and use of traditional lands as well as natural resources.¹³³ However, the definition of IPs through the lens of victimhood needs to be re-examined as argued further in Section 5 below.

5 Definition of IPs: Lessons from the UN Convention on the Rights of the Child

It is the argument advanced in this article that the existing academic, international and regional attempts at defining and empowering IPs need to adopt the approach used by contemporary international law towards protecting the rights of children. Traditionally, children were conceived as citizens in waiting.¹³⁴ The idea of conceiving children as citizens-in-waiting represented a future-oriented approach towards defining children as potential citizens of the future.¹³⁵ Children were not viewed as individuals fully ready to engage, live and participate in an adult-dominated world.¹³⁶ They were also portrayed as innocent and frail, thereby removing children from any discussion about

131 Art. 1 (1) (b) and Art. 1 (2).

132 See O. Ikimi, ‘Nigerian Reaction to The Imposition of British Colonial, 1885–1918’, in S. Förster, W.J. Mommsen and R.E. Robinson (eds.), *Bismarck, Europe and Africa: The Berlin Africa Conference 1884–1885 and the Onset of Partition* (Oxford University Press, Oxford, 1988) pp. 454–467.

133 Ako and Oluduro, *supra* note 70, p. 383.

134 See R. Lister, ‘Why Citizenship: Where, When and How Children?’, 8 *Theoretical Inquiries in Law* (2007) p. 693.

135 *Ibid.*

136 *Ibid.*

work, politics and sexuality.¹³⁷ Rather they were presented as underdeveloped or uncompleted human beings or *human-becoming*.¹³⁸ The idea that children were citizens in development and in need of protection was rightly subjected to academic criticisms for allowing children to be presented as objects of intervention rather than as legal subjects with rights as such.¹³⁹ This attitude towards children promoted and enhanced the justification for a lack of formal recognition of children as citizens and consequently their exclusion from acquiring citizenship rights.¹⁴⁰

For example, the 1924 League of Nation's Declaration on the Rights of the Child¹⁴¹ made merely passing provisions about the future citizenship responsibilities of children by providing that: "The child must be brought up in consciousness that its best qualities are to be used in the service of its fellow men".¹⁴² Indeed, children were referred to as *it* in the entire document thereby objectifying children and denying them the right to be assigned a gender.¹⁴³ Although the 1959 UN Declaration on the Rights of the Child¹⁴⁴ went beyond the aforementioned Declaration by making provisions for more range of rights for children,¹⁴⁵ there was no recognition of the rights of children as autonomous people like adults and their participatory rights in decision matters that affected them were not protected.¹⁴⁶ It has been rightly argued that the

137 P. Ariès, *Centuries of Childhood; a Social History of Family Life*. Translated from the French by Robert Baldick (Knopf, New York, 1962).

138 C. Jenks, 'Sociological Perspectives and Media Representations of Childhood', in J. Fionda (ed.), *Legal Concepts of Childhood* (Hart Publishing, Oxford, 2001) pp. 23–33.

139 See for example, M.D. Freeman, 'Taking Children's Rights More Seriously', 6 *International Journal of Law, Policy and the Family* (1992) p. 54.

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

141 1924 League of Nation's Declaration on the Rights of the Child, adopted 26 September 1924 in Geneva, Switzerland. Available at: <www.un-documents.net/gdrc1924.htm>, visited 26 November 2016.

142 *Ibid.*, last para.

143 C. Goddard and B. Saunders, 'Journalists as Agents and Language as an Instrument of Social Control: A Child Protection Case Study', 26 *Children Australia* (2001) p. 26.

144 1959 UN Declaration of the Rights of the Child, proclaimed by UNGA (Resolution 1386(XIV)) of 20 November 1959. This informed the adoption of the latter UN Convention on the Rights of the Child (Resolution 44/25), adopted by the UNGA 30 years later 20 November 1989. The Convention on the Rights of the Child, entered into force on 2 September 1990.

145 See for example, Principles 1–10.

146 M.D. Freeman, *The Moral Status of Children: Essays on the Rights of the Children* (Martinus Nijhoff Publishers, New York, 1997) p. 50.

strategies of presenting children as *future-beings* “conceal a more fundamental set of closed-mind attitudes that acts as a barrier to young people who want to get involved in civic life and contribute to policy-making”.¹⁴⁷

In contradistinction to the above conventional approaches of defining and presenting children as *future-adults* which created a binary situation in terms of citizenship rights between children and adults, the 1989 UN Convention on the Rights of the Child (UNCRC),¹⁴⁸ promotes the idea of children as full citizens in their own right and as independent bearers of such rights as well as empowering them with the capacity of being legal subjects in their own right including decision-making powers.¹⁴⁹ The UNCRC promotes the view that children are no longer merely *pre-citizens* or *potential-adults* or *becoming*,¹⁵⁰ instead, children are now presented and characterised as full human beings who are invested with important social and citizenship rights.

For example, Article 1 of the UNCRC defines a child as “every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier”. It also provides that: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”.¹⁵¹ In addition, the UNCRC requires that in all judicial and administrative proceedings affecting any child, “the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child ...”.¹⁵² Indeed, the UNCRC makes provisions for civil and political rights enjoyable by adults and makes them enjoyable by children. Such rights include: the right

147 P. Haid, E.C. Marques and J. Brown, *Re-focusing the Lens: Assessing the Challenge of Youth Involvement in Public Policy* (The Ontario Secondary School Students' Association & The Institute on Governance, Ottawa, 1999) p. 56.

148 UNCRC, *supra* note 144.

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

150 A. James, 'To be (come) or not to be (come): Understanding Children's Citizenship', 633 *The Annals of the American Academy of Political and Social Science* (2011) p. 167.

151 Art. 12 (1).

152 Art. 12(2). See L. Lundy, L. McEvoy and B. Byrne, 'Working with Young Children as Co-researchers: An Approach informed by the United Nations Convention on the Rights of the Child', 22 *Early Education & Development* (2011) p. 714; and L. Lundy, 'United Nations Convention on the Rights of the Child and Child Well-Being', in A. Ben-Arieh, F. Casas, I. Frønes, and J.E. Korbin (eds.), *Handbook of Child Well-Being* (Springer, Dordrecht, 2014) pp. 2439–2462.

to freedom of expression;¹⁵³ the right to freedom of thought, conscience and religion;¹⁵⁴ as well as the right to freedom of peaceful assembly.¹⁵⁵

There are significant lessons from the above analyses for the international and regional regimes on the rights of IPs. IPs are easily presented as victims. Like the previous approach towards children's citizenship rights *vis-à-vis* adults' citizenship rights, this creates a binary situation. The way IPs are presented in international law appears to replicate this binary situation between citizenship rights of *victimised* IPs on the one hand and the citizenship rights of other *non-victimised* citizens on the other hand. This conventional approach of defining IPs as victims of colonialism or domination by others must now give way to a more progressive and positive definition. Like children, IPs have emerged as distinct legal subjects under international law but the way they are presented ought to deviate from further propagating the negative narratives that have historically disempowered them. One possible solution to this problem is for the UN to adopt a new Convention on the Rights of IPs. The four States which voted against UNDRIP have adopted positive reactions to it.¹⁵⁶ This illustrates that there is now near universal acceptance of its provision by States all over the world. Accordingly, this article invites the UN to commence actions towards following the tradition it adopted in respect of the 1989 UNCRC. Such a process will present the opportunity for the international community to re-articulate the description of IPs in a more positive way as was done in the case of the definition of children's rights under the current UNCRC.

Although there is power in victimhood in terms of its potency in eliciting remedial actions for victims of injustice,¹⁵⁷ it is argued that the narrative of victimhood in the context of IPs has achieved its purpose and has now outlived its usefulness. The narrative of victimhood has been useful in adopting the UNDRIP. It has also been helpful in the creation of the United Nations Permanent Forum on Indigenous Issues (UNPFII). Indeed, there have been a lot of positive legal developments in relation to the jurisprudence of the

153 Art. 13.

154 Art. 14.

155 Art. 15.

156 See W. Genugten, 'The African Move Towards the Adoption of the 2007 Declaration on the Rights of Indigenous Peoples: The Substantive Arguments Behind the Procedures', 104 *The American Journal of International Law* (2010) p. 29.

157 For critical discussions on the potency of victimhood, see M. Lazar, (ed.) *Feminist Critical Discourse Analysis: Gender, Power and Ideology in Discourse* (Springer, Dordrecht, 2005); N. Renwick and C. Qing, 'China's Political Discourse Towards the 21st Century: Victimhood, Identity, and Political Power', 17:4 *East Asia* (1999) p. 111.

Inter-American Court of Human Rights on the rights of IPs in the Americas.¹⁵⁸ In the context of Africa, the African Court's decision in the *Ogiek* case¹⁵⁹ demonstrates that IPs rights are germane human rights issues in the context of the African Charter and the African continent.

Identifying IPs in negative terms comes with the risk that IPs' identities would be perennially linked only with the negative experiences that they have encountered in the past, thereby stigmatising and tagging IPs with identity constructions that obfuscate the many positive and more empowering narratives associated with IPs in the past and in the present.¹⁶⁰ An example of the danger with presenting IPs in negative terms is illustrated by the justification for colonialism. In this context, at the onset of colonialism and in the context of the relationship between Europeans and Africans at the time, all Africans were to all intent and purposes IPs. The Berlin Conference of 1884–1885 and the resultant partitioning of Africa was facilitated by a very negative narrative on Africans as uncivilised, barbaric, eccentric, without States and needing protection from slavery as opposed to the civilised, rational and the diametric opposite of the West.¹⁶¹ For instance, the main purpose of the Berlin Conference of 1884–1885 was highlighted by the opening statements of the President to the Conference, Prince Bismarck of Prussia, who remarked that:

In convoking the Conference, the Imperial Government was guided by the conviction that all the Governments invited share the wish to bring the natives of Africa within the pale of civilization by opening up the interior of that continent to commerce ... by encouraging missions and enterprises calculated to spread useful knowledge, and by preparing the way for the suppression of slavery ...¹⁶²

Armed with such negative narratives on Africans as helpless and in need of help and protection, the European powers easily justified the civilising mission and the complete subjugation of Africans through colonialism from the nineteenth century to the twentieth century. Presenting IPs in such similarly

158 See S.J. Anaya and W.A. Robert, 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System', 14 *Harvard Human Rights Journal* (2001) p. 33.

159 *Supra*.

160 Alfred and Corntassel, *supra* note 59, p. 605.

161 See E. Said, *Orientalism* (Pantheon, New York, 1978).

162 See 'Protocol No. 1 – Meeting of 16 November 1884', reprinted in R.J. Gavin and J. Betley, *The Scramble for Africa: Documents on the Berlin West African Conference and Related Subjects, 1884/1885* (Ibadan University Press, Ibadan, 1973) p. 129. The emphasis is added.

negative context comes with the risk that in some States dominant groups could capitalise on such negative narratives as justificatory grounds to marginalise and discriminate against IPs.

6 Conclusion

This article has demonstrated that Abuja peoples of Nigeria satisfy a substantial number of the characteristics of IPs identified by the African Commission and the African Court. It has also been demonstrated that even if the criteria of distinctiveness of culture under ILO 169 and self-identification under UNDRIP are applied to Abuja peoples, similar conclusions are reached that they satisfy the criteria to be identified as IPs under international law. In line with this conclusion, the arguments have been advanced that whenever any collective of different ethnic minority peoples claims any rights as IPs in Africa, they should be recognised as such once they satisfy the criteria identified by the African Commission.

The idea of arguing for a new definition is not meant to entirely supplant the current IPs' rights framework in international law. Rather the point being made is that IPs should be defined without reference to the negative narratives responsible for their subjugation in the first place. It has been argued that the international human rights regime on IPs can learn from the departure from the previous approach where children were presented as future beings in international law. The argument has been advanced that it is time to depart from the current ways of presenting IPs as victims of domination by others to a more positive and progressive approach. In relation to Abuja peoples of Nigeria, the argument is that yes, they qualify for recognition as IPs under the existing definitions, but Abuja peoples along with other IPs elsewhere will benefit more from a new definition that does not define them in negative terms. The argument is not that Abuja peoples cannot benefit from the current definition. In fact, they do meet the criteria to be recognised as such. Rather, they demonstrate the need for a more expressly expansive definition that goes beyond the conventional criteria of *distinctiveness* of culture as a solitary group of ethnic peoples.