THE COUNTER-HEGEMONIC POTENTIAL OF NON-STATE ACTORS AS CUSTOM-MAKERS IN INTERNATIONAL LAW

Thesis submitted in accordance with the requirements of

the University of Liverpool for the degree of Doctor of Philosophy

by

Joycelin Chinwe Okubuiro

February 2017

ACKNOWLEDGEMENT

I am most grateful to God, for His grace and mercy, without whom this work would not have been possible.

I owe a tremendous amount of gratitude to my supervisors, Dr Christine Schwobel-Patel and Professor Christian Henderson, whose constant guidance nurtured and sustained me throughout my PhD. I cannot emphasise enough how grateful I am to Dr Christine Schwobel-Patel, my primary supervisor. Her excellent approach to my supervision, thoroughness, enthusiasm, willingness, and availability saw to the success of this thesis. This journey through diverse terrain has been interesting and she has been with me all the way, guiding, motivating and mentoring me. A particularly interesting aspect of our relationship is her 'critique of my critique' which helped tremendously to shape this thesis. I have learnt so much from her and I am proud to have been her supervisee. Thank you very much for your unwavering interest and love for my benefit. I would also like to thank Professor Christian Henderson for his continued secondary supervisory relationship in spite of his external responsibilities.

I am immensely grateful to the University of Liverpool for providing me with this PhD opportunity. My appreciation goes to Dr Robert Knox, who shared his wealth of knowledge in TWAIL scholarship with me. His willingness to assist is unquantifiable. I must also thank Dr Thomas Horsely, Director of Postgraduate Research, Dr Michelle Farrell, Dr Gaetano Pentassuglia and Professor Nuno Ferreira for their support and encouragement. Also, my gratitude goes to the University library staff, particularly Lisa

Hawksworth, for her quick response to my book requests. I want to also say thank you to my numerous colleagues who have been supportive in various ways, especially Dr Ohiocheoya Omiunu, Dr Aminu Musa Audu, Dr Eghosa Osa Ekhator, and Wilson Wanjiku.

Again, I must thank Dr Vassilis Tzevelekos, one of my tutors. He provoked my interest in customary international law after giving me the opportunity to present on the subject in a classroom seminar at the University of Hull, UK. I am also greatly indebted to many other tutors and mentors. However, I would like to specifically thank Professor Francis Botchway, Hon. Justice E. Agbara (Rtd), Professor E. S. Nwauche and R. A. Wokocha Esq. You have all been great pillars and guides in my legal career. Thank you so much for your unwavering interest and support all the way.

I owe my postgraduate studies to my husband, Dr Eze O. Okubuiro, who generously funded my PhD. I would never have gotten better funding elsewhere. I am speechless, no word is enough to thank you. The love, patience, care, advice and all the resources you showered on me throughout this period are immeasurable. Your kind is rare, and I say thank you so much *di mu oma*. To our son, Daniel Eze, thank you so much for your care and patience. Your constant inquiry as to how I am doing is ever soothing. I dedicate this thesis to both of you. I am grateful to my parents, Mr and Mrs E. E. Alozie, who are my first mentors, friends and educators. I am also grateful to my parents-in-law, Mr and Mrs Iwueke G. Okubuiro for their kindness, patience and support.

I say thank you all for being there for me.

TABLE OF LEGISLATIONS

Constitution of the Federal Republic of Nigeria 1999.

Constitution of the Federal Republic of Nigeria 1979.

Constitution of the Federal Republic of Uganda, 1995.

Constitution of Zimbabwe 1985.

Statute of the International Court of Justice, 1946.

Statute of the Permanent Court of International Justice, 1920.

The Constitutive Act of the African Union 2001.

TABLE OF TREATIES

Geneva Conventions 1949.

Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24 1963.

The Geneva Prisoner of War Convention 1929.

Universal Declaration of Human Rights Atlantic Charter, 14 August 1941

Vienna Convention on Consular Relations, Apr. 24 1963.

ABSTRACT

Traditionally, customary international law is defined as comprising state practice and *opinio juris*. However, there is a current trend in legal argument by Third World Approaches to International Law (TWAIL) that challenges these state practices arguably dominated by Western ideologies. Based on these challenges, the purpose of this research is not to discard these trends; rather it interrogates the basic principle of international law that sees only state practice and *opinio juris* as constituting customary international law. This research adds a novel perspective to the on-going debate by investigating the role of the practices and opinions of non-state actors as a counter-hegemonic tool for equal participation, self-determination and emancipation of the Third World peoples who are arguably the victims of Western domination. This thesis explores the above arguments through Nigerian example. It demonstrates the tension between the Western state model and indigenous systems in Nigeria. Such conflict necessitates an 'inclusive system' that involves the participation of state and non-state actors in the development of customary international law.

TABLE OF CONTENTS

ACKNOWLEDGEMENT ii

TABLE OF LEGISLATIONS iv

TABLE OF TREATIES iv

ABSTRACT v

TABLE OF CONTENTS vi

INTRODUCTION 1

i. BACKGROUND 1

ii. RESEARCH QUESTIONS 7

iii. RESEARCH STRATEGY 9

iv. SIGNIFICANCE OF RESEARCH 11

v. BRIEF LITERATURE REVIEW 12

vi. STRUCTURE OF THESIS 14

vii. METHODOLOGY 17

viii. CONCLUSION 19

CHAPTER ONE 21

FOUNDATIONAL ISSUES – HEGEMONY AND COUNTER-HEGEMONY AS A THEORETICAL FRAME AND TWAIL AS METHODOLOGY 21

1. INTRODUCTION 21

2. CONCEPTUALISING HEGEMONY 25

3. HEGEMONY IN INTERNATIONAL LAW 28

4. HEGEMONY IN CUSTOMARY INTERNATIONAL LAW 36

5. HEGEMONY AND POLITICAL ECONOMY IN THE INTERNATIONAL SPHERE 47

a.) The Media 50

b.) Education 53

c.) The International Court of Justice 56

6. COUNTER-HEGEMONY 58

7. NON-STATE ACTORS AS AGENTS OF COUNTER-HEGEMONY 61

8. THE THIRD WORLD IN INTERNATIONAL LAW 64

9. METHODOLOGY OF TWAIL 66

10. CONCLUSION 73

CHAPTER TWO 75

INTRODUCING NIGERIA AS A CASE STUDY 75
1. INTRODUCTION 75
2. PRE-COLONIAL 'NIGERIA' 79
3. COLONISED NIGERIA 89
4. POST-COLONIAL NIGERIA 105
5. NIGERIA IN A GLOBALISED WORLD 109
6. CONCLUSION 115
CHAPTER THREE 118
EXAMINATION OF CUSTOMARY INTERNATIONAL LAW 118
1. INTRODUCTION 118
2. HISTORICAL DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW 122
3. ELEMENTS OF CUSTOM 128
4. UNIVERSALISATION, ACQUIESCENCE AND PERSISTENT OBJECTOR IN CUSTOMARY INTERNATIONAL LAW. 141
5. APPLICATION OF CUSTOMARY INTERNATIONAL LAW IN NIGERIA 146
6. CRITIQUE OF THE ELEMENTS OF CUSTOM 151
7. NON-STATE ACTORS AND CUSTOMARY INTERNATIONAL LAW 156
8. CONCLUSION 172
CHAPTER FOUR 175
THE LEGAL PERSONALITY OF NON-STATE ACTORS UNDER INTERNATIONAL LAW 175
1. INTRODUCTION 175
2. CONCEPTIONS OF LEGAL PERSONALITY IN INTERNATIONAL LAW 178
3. THE POSITION OF NON-STATE ACTORS IN THE EMERGING LAW OF NATIONS 187
4. RE-EMEREGENCE OF NON-STATE ACTORS AND THEIR CONTEMPORARY ROLES IN THE CREATION OF (CUSTOMARY) INTERNATIONAL LAW 192
5. SELF-DETERMINATION AS A TOOL FOR THE PARTICIPATION OF NON-STATE ACTORS IN THE INTERNATIONAL LEGAL SYSTEM 199
6. CONCEPTUALISING NON-STATE ACTORS FROM THIRD WORLD PERSPECTIVES 202
7. CONCLUSION 209
CHAPTER FIVE 212
ASSESSING THIRD WORLD RESISTANCE: EMERGING FRONTIERS OF CUSTOMARY INTERNATIONAL LAW? 212
1. INTRODUCTION 212
2. THIRD WORLD TOOLS OF RESISTANCE TO WESTERN HEGEMONY IN INTERNATIONAL LAW 216

a.) SOLIDARITY ... 219

b.) EDUCATION AS A TOOL OF RESISTANCE ... 225

c.) THE MEDIA (RADIO BIAFRA) ... 242

d.) SOCIAL MOVEMENTS ... 246

e.) INDIGENOUS SYSTEMS ... 252

3. ASSESSING RESISTANCE IN POST-COLONIAL STATES: A RE-EMERGENCE OF THIRD WORLD NON-STATE ACTORS IN THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW 263

4. CONCEPTUALISING CUSTOMARY INTERNATIONAL LAW FROM AN AFRICAN PERSPECTIVE ... 269

5. CONCLUSION ... 275

CONCLUSION ... 277

BIBLIOGRAPHY ... 283

DOCUMENTS ... 334

MEDIA PUBLICATIONS ... 337

INTRODUCTION

i. BACKGROUND

Customary international law is one of the main sources of international law. Traditionally, it is constituted from state practice and *opinio juris.*[1] This definition places the creation of custom solely on states. State practice is commonly understood as the objective element of custom, centred on generality and uniformity of practice, although it does not require every state to adopt a given practice.[2] Besides state practice, *opinio juris* is understood as the subjective (or psychological) element of custom based on the motive behind the behaviour of a state.[3] This subjective element rests on the expectation that a practice must be followed by a sense of legal obligation.[4] Despite persistent disputes over how the objective and subjective elements can be determined,[5] the classical international law has continued to define custom as a product of state practice and *opinio juris*. In this thesis, I will show how this classical definition was conceived by a few Western states in order to protect their interests – and continues to do so. Far from being defeatist about this bias and parochialism, the thesis goes on to show some possibilities which lie within the

---

[1]*North Sea Continental Shelf* ICJ Reports (1969) p. 3; *Military and Parliamentary Activities in and Against Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 97(para. 183,110 (para. 211); *Asylum case* ICJ Reports (1950) pp. 226, 276-277; *Right of Passage over India Territory*, ICJ Reports (1960) pp.6, 40; *Legality of the Threat or Use of Force*, ICJ Reports (1966) pp. 226, 253-255 (paras 65-73); Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971); Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999).

[2] Ian Brownlie, *Principles of Public International Law* (7th edn.) (Oxford: Oxford University Press, 2008).

[3] Ian Brownlie, *Principles of Public International Law* (7th edn.) (2008) see note 2; David P. Fidler, 'Challenging the Classical Concept of Custom: Perspective on the Future of Customary International Law' (1996) GYIL 39, p. 198.

[4] James Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012).

[5]Anthony D'Amato, *The Concept of Custom in International Law* (1971) see note 1 at p. 66; Malcolm N Shaw, International Law (6thh edn.) (Cambridge: Cambridge University Press, 2008).

principle of customary international law if reimagined. In particular, it will be shown how there may yet be a counter-hegemonic potential in customary international law through non-state actors that encourages a wider participation of diverse legal traditions.

Historically, the development of custom (and the entire present regime of international law) is attributed to European origins and experiences. Over the years, the expansion of this present regime of international law witnessed the inclusion of other non-European 'entities'.[6] The most notable were through the colonial encounter and the subsequent independence of non-European states. One might think that the process of decolonisation would provide opportunities for reflecting the practices and beliefs of these non-European states if customary international law is to be viewed from the viewpoint of states as classical international law claims. However, this was not the case, as non-European states were compelled to adopt the customary international law based on European ideologies, which were mostly formulated during the colonial era. This situation has continued to raise concerns over a lack of representation, non-participation and domination in custom-making in the Third World. However, non-European states have sought to change this imbalance but have been faced with stiff resistance, mostly from the few powerful states in the Global North. For example, 'new states' (often referred to as decolonised states) attach great

---

[6]During the periods of capitulation and colonialism in the late nineteenth and early twentieth century, non-European entities were not regarded as sovereign states. This situation excluded them from participating in international law making. Independence conferred on them sovereign statehood which ultimately is expected to put them on an equal level to their European counter-parts with full rights and privileges under international law. However, this has not been the case in terms of customary international law. See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP, 2005); J. Patrick Kelly, 'The Twilight of Customary International Law' (1999- 2000) 20 VA. J. INT'L L. 449.

importance to the United Nations General Assembly's one-state-one-vote system as a means of developing customary international law and a convenient approach to introducing legal content to political and economic decisions to promote their national interests.[7] However, the few powerful states in the Global North and their jurists have expressed concerns over the numerical strength of non-European states, as well as emphasising the lack of force of law emanating from the General Assembly.[8]

Recently, there has been a rapid growth of literature from Third World scholars, both individually and collectively, through the organisation of Third World Approaches to International Law (referred to as TWAIL throughout this thesis); resisting these hegemonic tendencies in the international legal system. This body of scholarship insists that the system reproduces and sustains the plunder and subordination of the Third World by the West.[9] TWAIL scholarship particularly sees the Western model of statehood that is traditionally recognised as the sole creator of custom as detrimental to Third World peoples.[10] Third World states are seen as continuations of colonial state power and those in power are often considered as agents of Western hegemony. Arguably, these states were formed on 'a false model of unitary nation' that excludes and oppresses minorities, women, peasants and other groups in the Third World.[11]

---

[7] Felix Chuks Okoye, *International Law and the New African States* (London: Sweet & Maxwell, 1972).

[8] Karol Wolfke, 'Some Persistent Controversies Regarding Customary International Law' (1993) 24 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW, p. 1; Stephen Schwebel, 'United Nations Resolutions, Recent Arbitral Awards and Customary International Law', *in* Adriaan Bos and Hugo Siblesz (eds.), *Realism in Law-Making: Essays on International Law in Honour of Willem Riphagen* (Dordrecht: Martinus Nijhoff, 1986) 203; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999) see note 1, at pp. 40-43.

[9] Makau Mutua, 'What is TWAIL?' (2000) 2 ASIL Proceedings, p. 31.

[10] Makau Mutua, 'Why Redraw the map of Africa: A Moral and Legal Inquiry' (1995) MICHIGAN JOURNAL OF INTERNATIONAL LAW, VOL. 16, p. 1113.

[11] Makau Mutua, 'Why Redraw the map of Africa: A Moral and Legal Inquiry' (1995), see note 10.

Consequently, solutions to daily needs are sought outside of the state apparatus.[12] Both the hegemonic nature of international law as well as the practice of seeking alternative solutions to daily problems with legal purchase outside of the state questions the idea of the state as the sole actor in control of both national and international affairs in law-making from the Third World perspective.

TWAIL scholars have been revisiting international law-making with the intent to understand, deconstruct and unpack the uses of international law which creates the subordination of non-Europeans to the Europeans; create alternative legal norms for international governance; and eradicate the conditions of underdevelopment in the Third World through scholarship, policy and politics for the benefit of those in the Third World.[13] These TWAIL objectives address concerns mostly in the areas of the history of international law, human rights and globalisation. However, research is limited in the area of the practices and opinions of Third World non-state actors that influence international custom-making. Such research would have revealed whether there are possibilities of prior, continuing or (re)emerging legal capacity to make international custom by Third World non-state actors. Rather, there is an abundance of literature expressing the hegemonic nature of practices in this area. Consequently, there is a paucity of information on the counter-hegemonic potentials of Third World non-state actors to determine their fate in the pursuit of self-determination and

---

[12] Robert W Cox, 'Civil Society at the turn of the millennium: Prospects for an alternative world order' *in* Louise Amoore (ed) *The Global Resistance Reader*, (London and New York: Routledge, 2005) p.103

[13] Makau Mutua, 'What is TWAIL?' (2000) see note 9 at p. 31; BS Chimni, 'Third World Approaches to International Law: A Manifesto', (2006) INTERNATIONAL COMMUNITY LAW REVIEW, 8: 3-27; J Ravenhill, 'The North-South Balance of Power', (1990) 66:4 INTERNATIONAL AFFAIRS, 66:4, 731; M Berger, 'The End of the ''Third World''?' 15:2 (1994) THIRD WORLD QUARTERLY, 15:2. Pp. 257–275; SN Macfarlane, 'Taking Stock: The Third World and the End of the Cold War', in L Fawcett and Y Sayigh (Eds.), *The Third World Beyond the Cold War: Continuity and Change* (Oxford: Oxford University Press, Reprinted 2003) p. 15 at 21.

emancipation through their contributions to custom-making in the international legal system. Therefore, it has become imperative to investigate the effect of the practices and opinions of Third World non-state actors leading to custom-making from Third World perspective.

In view of the above, this thesis aims to address the law-making gap by examining the role of non-state actors in regards to custom-making in international law, notwithstanding the traditional position that customary international law depends on state practice and *opinio juris.*[14] This thesis questions the basic principle of public international law's dependence on the state by attempting to bring into perspective some compelling activities of groups of non-state actors in the Third World that challenge this traditional notion. This provides evidence of resistant practices of non-state actors, leading to the development of customary rules in the political and socio-economic lives of people in the Third World, particularly in African societies. This thesis explores practices in African societies from the pre-colonial to post-colonial periods. In the pre-colonial era, there is evidence of common and general practices leading to the development of diplomacy in spite of the diversity of African cultures. Taslim Elias (one of the first generation of post-colonial international lawyers and a central figure in raising awareness of the colonial legacies of international law) described this phenomenon as 'a unity in diversity'.[15] He argued that common practices prevailed over many areas of pre-colonial Africa and these practices

[14] See note 1.

[15] Robert Smith, 'Peace and Palaver: International Relations in Pre-Colonial West Africa' (1973) THE JOURNAL OF AFRICAN HISTORY, Vol. 14, No. 4, pp.599-621; Taslim O Elias, *The Nature of Customary Law* (Manchester: University of Manchester, 1956); Graham W Irwin, 'Precolonial African Diplomacy: The Example of Ashanti' (1975) THE INTERNATIONAL JOURNAL OF AFRICAN HISTORICAL STUDIES, VOL. 8, NO. 1, pp. 81-96.

constituted customary laws that are no different from the status accorded to those developed by the Global North. In other words, as is argued in this thesis, these diverse forms of customs from diverse legal traditions contributed to the development of customary international law.[16]

As argued in this thesis, the emergence of legal positivism (during the late eighteenth and early nineteenth centuries) and the subsequent colonisation of Africa suppressed the legal capacity of the diverse pre-colonial African 'entities' in the international system. However, the resilience of Africans (and other Third World peoples) in recapturing their place in the international legal system introduced another platform of participation through resistance to hegemonic rule. For instance, resistance commonly arose where certain established customs in Africa were threatened by colonial rule. An example explored in this thesis concerns taxation. The non-payment of tax by women was a common practice in south-eastern Nigeria prior to and during colonial rule. When there was a perceived breach of this custom by the British colonial authority that attempted to impose a tax on women, fierce resistance ensued. A landmark act of resistance was the *ogu umuwanyi,* commonly referred to as the Aba women's riot of 1929.[17] The resistance by those women shook the foundation of colonial rule in Nigeria, and is regarded as the bedrock of anti-colonialism in Nigeria and other parts of Africa. During negotiations between the women and the colonial authority, the women asserted their rights to representation in decisions affecting their socio-economic lives. Ultimately, they were able to compel the colonial authority

---

[16] Robert Smith, 'Peace and Palaver: International Relations in Pre-Colonial West Africa' (1973), see note 15 at p. 600.

[17] U.E. Umoren, 'The Symbolism of the Nigerian Women's War of 1929: An Anthropological Study of Anti-Colonial Struggle' (1995) AFRICAN STUDY MONGRAPHS, 16 (2), pp. 61-72.

to reach certain agreements with them; most importantly the continued exclusion of women from the payment of tax in colonial eastern Nigeria. Since the formal end of colonialism, women have continued to use this form of activism to influence decision-making in international law.[18] Arguably, as will be discussed in-depth in this thesis, such participation in the decision-making process questions the reliance on state practice and opinions of states in this region for customary norms.

ii. RESEARCH QUESTIONS

This is an inquiry into the potential of non-state actors as custom-makers and, with this, as actors in a counter-hegemonic practice. The type of practices already introduced are arguably common, consistent and widespread among African societies. Following the above illustrations, it is arguable that Third World non-state actors are contributing to the formation of custom within the African region that could (and should) manifest in public international law. This challenges the insistence on the traditional concept of state practice and *opinio juris* in the formation of customary international law. The focus of this thesis is in African states, and particularly in Nigeria. However, this focus should be regarded as *illustrative* of a larger phenomenon among non-state actors from the Third World. The case study of Nigeria arguably provides an example of the potential for non-state actors to concretise a form of resistance to Western hegemony.

[18]Leymah Gbowee,'Effecting Change through Women's Activism in Liberia' (2009) IDS BULLETIN, VOL. 40, ISSUE 2, p. 50.

Based on the above observations, the following questions have been raised to investigate the role of these non-state actors in regards to custom making:

1. Is customary international law hegemonic? If so, how has it been reproduced and sustained?
2. Is custom, in the present international system, evolving beyond the state to include other subjects of international law, i.e. non-state actors? If so, do these non-state actors have legal capacity under international law and, in particular, can they make laws?
3. Can, moreover, Third World non-state actors, and Africans in particular, have the capacity to 'make' international law, and, if so, *which* non-state actors can make customary international law within this region?

While this thesis acknowledges international law as a necessary means of international governance – or at the very least as a part of the reality of international governance – it questions oppressive practices in line with TWAIL objectives. Although there are diversities in TWAIL scholarship, as will be elaborated in Chapter One, this research aligns with those that believe in finding means of reform which can incorporate interests of the Third World. In this regard, customary international law is recognised as a means of international rule-making. It recognises the contribution of states in custom-making. However, the state is seen as just one actor in the international sphere, in which there are other actors playing various roles.[19] More specifically, this thesis brings into perspective the argument that post-colonial states

[19] Balakrishnan Rajagopal, 'Counter-hegemonic International Law: rethinking human rights and development as a Third World strategy' (2006) THIRD WORLD QUARTERLY, VOL. 27, NO. 5, pp. 767- 783 at 768.

are based on a Western model that does not reflect Third World realities, as well as a distortion and deprivation of the right of diverse actors to make custom in the Third World. Therefore, subsequent resistance by non-state actors in the Third World forms counter-hegemonic practices to the hegemonic practices of the state (both Western and Third World) in the formation of custom.

iii. RESEARCH STRATEGY

The first research question noted above will be addressed in Chapter One. The terms 'hegemony' and 'counter-hegemony' will be explored by making use of Antonio Gramsci's the *Prison Notebooks* and other authors who have examined Gramsci's notion of these concepts. It will also rely on TWAIL literature to establish the hegemonic nature of international law. Antony Anghie, Balakrishnan Rajagopal, Obiora Chinedu Okafor, James Thuo Garthii, and Jacqueline Stevens will be employed as authorities.

Chapter Two introduces Nigeria as a case study. It traces the historical development of the Nigerian state from pre-colonial to post-colonial era. This exposes Nigerian domestic and international relations within this period. The chapter sets off the background on hegemony and counter-hegemonic discourse within Africa through Nigerian colonial encounter and resistance to hegemonic tendencies.

Chapter Three begins by setting out the classical position in customary international law which has privileged some states in the Global North over others in the Global South. Contemporary challenges are necessitating the inclusion of diverse actors, providing opportunities for non-state actors. Case laws from the Permanent

International Court of Justice and International Court of Justice will be discussed. Case law from national jurisdictions and scholarly works will also be employed.

The examination of legal personality is the object of study in Chapter Four, which acknowledges the works of scholars such as Hersch Lauterpacht, Robert McCorquodale, and Roland Portmann.[20] The conceptualisation of non-state actors from the Third World perspective in the later part of Chapter Four will answer the question on the scope of non-state actors who can participate in law-making in this region.

Finally, Chapter Five considers concrete examples of resistance through non-state actors. Education, scholarship, the media, judicial decisions and diverse social movements will be used as frames to establish the counter-hegemonic potential of non-state actors in the making of international custom. It also assesses custom-making from a Third World perspective. It is argued that customary practices arising from resistance in this region contribute to the development of customary international law. At the very least, these practices could guide law-making activities within the region. Furthermore, it is posited that law-making originating from African regions can and should contribute to the participation of non-state actors in the international legal system. As will be shown in this thesis, non-state actors contribute *de facto* immensely to law-making in this region. Importantly, from an African

---

[20] Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens & Sons Limited, 1950); Robert McCorquodale, 'The Individual and the International Law' *in* Malcolm Evans (ed.) *International Law* (3rd edn.) (Oxford: Oxford University Press, 2010). Roland Portmann, *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010).

perspective, the contributions of non-state actors will confirm the argument of this thesis for their capacity to contribute to the making of international custom.

iv. SIGNIFICANCE OF RESEARCH

Custom is an almost universally recognised source of international law, particularly on matters not covered by treaties; it has, significantly, a very wide range of application[21]. Africans are familiar with the making and application of custom, as it governs a significant part of their interactions and predates the advent of colonialism. Although there are similar attributes in the formation of custom from diverse legal traditions, such as its unwritten nature, care must be taken in order not to trap African legal thoughts within that of the West.[22] Here, non-state actors play significant roles in its development, irrespective of post-colonial states.

The choice of custom by Third World non-state actors over other sources of international law as counter-hegemonic may be challenged, given the controversies surrounding the formation of custom.[23] In addition, the capacity of Third World non-state actors to make custom may be questioned. This research addresses such contests. The inclusion of the practices and opinions of diverse actors, especially non-state actors in Africa, as part of international customary rules offers a representative

---

[21]Anthony D'Amato, *The Concept of Custom in International Law* (1971) note 1 at p. 12; Patrick Dumberry, 'The Last Citadel! Can a State Claim the Status of Persistent Objector to prevent the Application of Customary International Law in Investor-State Arbitration?' (2010) LEIDEN JOURNAL OF INTERNATIONAL LAW, VOL. 23, NO. 2, p.381.

[22] It has been noted that there is the tendency for Western ideologies to trap African ideologies in a double cord. This could result in the disappearance of African ideologies within that of the West when regarded as been similar and having no distinction from the West; or that African ideology is distinctive and, most times, there is a doubt that it is genuine. See Hamid Dabashi, *Can Non-Europeans Think* (London: Zed Books, 2015), particularly p. xviii.

[23] J Patrick Kelly, 'The Twilight of Customary International Law' (1999- 2000) 20 VA. J. INT'L L. 449.

role in the international legal system. It will assist in the reduction of the hardships caused by the alien state system within the African region. It will also provide a platform for the resolution of countless conflicts between African indigenous communities and persons on the one hand and post-colonial states' international 'collaborators' (such as multinational corporations, institutions and other forms of state power) on the other hand.

v. BRIEF LITERATURE REVIEW

The role of non-state actors in international law has become a topic of growing interest in international legal research. Several scholars have dedicated much time and thought to discussions on the legal personality of non-states actors and their role in international law. One of the leading authors in this area, Robert McCorquodale, explores various areas of international law, such as international criminal law, international human rights law and international economic law to buttress the creation, development and enforcement of international law by individuals upon other subjects of international law.[24] Ultimately, McCorquodale foresees the feasibility of non-state actors' contributions to the development of customary international law, as their participations affects the practice of international law.

Till Müller points to the interaction between national governments and non-governmental organisations as forming part of modern customary international law.[25] Müller's analysis describes these interactions as forming 'customary transnational

[24]Robert McCorquodale, 'The Individual and the International Law' *in* Malcolm Evans (ed.) *International Law* (3rd edn.) (2010), see note 20.

[25] Till Müller, 'Customary Transnational Law: Attacking the Last Resort of State Sovereignty' (2008) INDIANA JOURNAL OF GLOBAL STUDIES, VOL. 15, ISSUE, ARTICLE 3, p. 19.

law' that is not exclusively dependent on states, but the entire international community.[26] Christiana Ochoa also makes some theoretical justifications for the inclusion of non-state actors, with a specific focus on individuals in customary international law formation.[27] She also proposes methods by which these particular non-state actors might participate in customary international law formation. Her methods include 'belief and expectations' in the determination of the contents of customary international law. She used the term 'expectation' to capture what individuals expect from interactions with other subjects. This is in regards to the ways in which the state or other entities ought to behave. Ochoa compares 'belief' to *opinio juris* although ultimately dispensing with the term '*opinio juris'* so as to avoid confusion with traditional state-based *opinio juris*.[28]

A further pertinent source is the International Law Commission's third report (headed by Special Rapporteur Sir Michael Wood) on the role of inaction, treaties and resolutions, judicial decisions and writings, the relevance of international organisations, as well as particular custom and the persistent objector in the identification of custom.[29] Although there is heavy a reliance on traditional means of formation of custom based on state practice and *opinio juris*, there could be a flexibility in which non-state actors provide evidence for its formation. Overall,

---

[26] Till Müller, 'Customary Transnational Law: Attacking the Last Resort of State Sovereignty' (2008), see note 25.

[27] Christiana Ochoa, 'The Individual and customary international law' (2007) VIRGINIA JOURNAL OF INTERNATIONAL LAW, Vol. 48, No. 1, pp. 119-186.

[28] Christian Ochoa, 'The Individual and customary international law' note 27 at p. 175.

[29] http://legal.un.org/ilc/sessions/67/ [accessed on 17 September 2016].

however, the commission is skeptical about regarding the practices of non-state actors as independently forming custom.[30]

The examples above challenge the traditional position of international law that sees the state as the sole actor in international customary processes. Although previous works on custom-making by non-state actors have raised divergent opinions, as demonstrated above, this research builds on the need and possibility of non-state actors in custom-making from the Third World approach. It adds a novel perspective to the on-going debate by investigating the role of practices and opinions of Third World non-state actors as a counter-hegemonic tool for their participation, self-determination and emancipation in the international system. This has become relevant, since these non-state actors, especially ordinary people in the Third World, are the main victims of Western domination in decision making. This study explores resistance practices of Third World non-state actors, and assesses them based on the elements of custom to ascertain whether there are (re)emerging and continuing contributions to custom-making.

vi. STRUCTURE OF THESIS

This thesis is comprised of five chapters. The first chapter introduces important terminologies such as hegemony and counter-hegemony. In the course of explaining hegemony, it raises some key issues concerning the research, such as: is the insistence on the formation of customary international law as constituted by state practice and

[30] Michael Wood, Special Rapporteur, 'Third report on identification of customary international law' International Law Commission, Sixty-seventh session, 27 March 2015, available at http://legal.un.org/docs/?symbol=A/CN.4/682 [accessed on 25 September, 2016].

opinio juris dominated by Western state ideologies and practices? If so, what form does this hegemony take and how has it been preserved and presented as natural against the interest of the Third World, particularly Africa? Chapter One employs the features of Antonio Gramsci's notion of hegemony to answer the above questions. It explores some key elements, such as education, media, and international organisation in the institution, reproduction and sustenance of hegemonic custom over the interest of the Third World. These are demonstrated with Nigerian examples. Chapter One will also discuss Third World Approaches to International Law (TWAIL) as a methodology and theory. This is pertinent because this thesis employs the concept of TWAIL to expose the hegemonic nature of (customary) international and how resistance to it is a tool to situate the interests of the Third World in international activities.

The second chapter aims to help the reader understand the historical development of Nigeria and its role as a case study in this thesis. In doing so, the chapter explores pre-colonial Nigeria, showing its legal capacity to participate in (customary) international law. An overview is provided on the Nigerian colonial encounter with Britain and the subsequent tensions that arose between the Nigerian indigenous and British colonial systems. The chapter also explores Nigerian independence and its admittance into international organisations, which appears to demonstrate Nigerian consent to the reproduction of hegemony in the making of customary international law. The chapter re-examines Nigeria's role in globalized systems, evaluating acts of the state in the reproduction and sustenance of hegemonic customary international law. These acts provide the foundation of resistance in that region.

The third chapter argues that insistence on the traditional approach to customary international law serves the hegemonic purposes of the great powers in the Global North. At the very least, the traditional approach is out of step with reality in that it fails to reflect the fact that the international system is characterised and shaped by the activities of diverse non-state actors. These observations support a reassessment of the formation of custom to include the interests of diverse actors in the making of customary international law. Based on the above, this chapter explores the nature of customary international law by tracing its development. In doing this, it will be shown that custom is present in many legal traditions besides European (or Western) states, despite the current rules of customary international law having been modelled on Western traditions and norms. Underlying factors in the formation of custom are examined to uncover flexibilities and evolutionary processes that could provide opportunities for the inclusion of non-state actors. Chapter three concludes by highlighting how modern challenges and developments have necessitated the involvement of non-state actors in custom-making in contemporary times.

Having established the potential of non-state actors in the formation of custom, the fourth chapter analyses their legal personality under international law for the purpose of law-making. This chapter commences by exploring the diverse conceptions of legal personality and an examination of the historical presence of non-state actors in international law. A critical enquiry into accepted historical narratives is necessary, as it has been observed that authors appear to choose divergent pathways in beginning their narratives on the commencement of international law, therefore already privileging certain narratives of progress over others. Through historical analysis, the

chapter seeks to understand international law prior to Western domination through colonialism. This reveals their legal capacity prior to the Western model of statehood from a Third World perspective. This chapter also demonstrates the re-emergence of non-state actors and their contemporary roles in the international sphere. Furthermore, this chapter will examine self-determination and the conceptualisation of non-state actors in the Third World.

The fifth and final chapter demonstrates that the resistance and practices of some Third World non-state actors are effecting changes in their daily lives, as well as their transnational relationships, and this could influence the formation of customary international law beyond a state monopoly. It will first identify some tools of resistance used by the Third World, such as solidarity, education, a composition of post-colonial national legal systems and social movements. The chapter will also conceptualise customary international law from an African perspective. In addition, it will assess the moments of resistance that serve as a lens through which to understand counter-hegemonic discourse in the participation of Third World non-state actors in (customary) international law making. In carrying out these tasks, it is noteworthy that scholarship within this area is scarce. Consequently, this research is further made relevant in writing the Third World into customary international law-making. This is understood as a counter to the Western scholarship that has shaped the traditional customary international law.

vii. METHODOLOGY

The thesis employs a socio-legal methodology to address the research questions raised above. Although the thesis aims to capture the situation of the Third World, it

emphasises the African perspective. Naturally, Africa is not a homogenous society. While presenting the poly-ethnic nature of Africa, care must be taken in order not to exaggerate the situation so that the effects of past and present socio-economic contacts among its people are not suppressed.[31] In this thesis, Nigeria is used as a lens to explore the terms, hegemony and counter-hegemony in relation to customary international law. In many respects, the Nigerian situation is similar to the experience of other African states and peoples. Before British colonisation, there was no single entity called Nigeria.[32] Pre-colonial Nigeria was made up of several autonomous societies. The northern and western parts of the country were characterised by centralised systems of government.[33] In these parts of Nigeria, there was evidence of trade and diplomatic interaction with other neighbouring societies and European trading nations.[34] Prominent among these societies are the Hausas/Fulanis, Yoruba and the Benin people. Southern and Eastern parts of Nigeria practised (and still practice) a decentralised system of government that may be regarded today as a form of direct democracy.[35] Prominent among these groups are the Igbos.

Like most African states, Nigeria experienced colonial rule between the late nineteenth and mid-twentieth century and was created out of colonial domination. It attained independence in 1960. As has been frequently noted, particularly in post-colonial studies, the post-colonial state suffers both moral and legal legitimacy

[31] Taslim O. Elias, *The Nature of African Customary Law*, see note 165 at pp. 2-3.
[32] Michael Crowder and Guda Abdullahi, *Nigeria: An Introduction to its History* (Hong Kong: Longman Group Ltd, 1979).
[33] Michael Crowder and Guda Abdullahi, *Nigeria: An Introduction to its History* (1979) see note 39.
[34] Taslim Elias, *The Nature of Customary Law* (1956), see note 32.
[35] Elizabeth Isichei, *The Igbo People and the Europeans* (London: Faber and Faber Ltd, 1973).

issues.[36] The state as a construct and as a political, cultural and economic entity has been used to foster Western hegemony. The severity of the disunity and disjuncture between the people and the state of Nigeria arguably reached its peak in the three-year civil war (from 1967-1970), during which the Igbos sought to be an independent state.[37] The forceful amalgamation of Nigeria has continued to create disparity and mount pressure on the Nigerian state to date due to the Nigerian north-south rivalries arising from socio-economic and political competitions, as well as religious crises.[38] The colonial and post-colonial experience of Nigeria, as well as its internal divisions, make it an illustrative site of study for the questioning of the centrality of the state in international law, as a case study for hegemony and counter-hegemony, and for the role of non-state actors and their influence on (customary) international law.

viii. CONCLUSION

The current debate in international legal scholarship fails to fill a gap that concerns customary rules emanating from Third World non-state actors. To fill this gap, this thesis aims to promote an alternative legal vision for the Third World rather than defending the (hegemonic) *status quo* in international law making.[39] In this regard,

---

[36]Makau W Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995), note 10; Richard Drayton, The wealth of the west was built on Africa's exploitation ' available at https://www.theguardian.com/politics/2005/aug/20/past.hearafrica05 [accessed on 25 September 2016]; Frantz Fanon, *The Wretched of the Earth*, Translated by Richard Philcox (New York: Grove Press, 1963); Edward W. Said, *Orientalism* (London: Penguin books, 2005- Reprint); Gayati Chkravorty Spivak, A Critique of Postcolonial Reason: Toward a History of the Vanishing Present (Cambridge-Massachusetts-London: Havard University Press, 1999).

[37] Raph Uwechue, Reflections on Nigeria Civil War: facing the future (Victoria: Trafford, 2004); Chinua Achebe, *There was a Country: A Personal History of Biafra* (London: Penguin Group, 2012).

[38] Abimbola Adesoji, 'The Boko Harem Uprising and Islamic Revivalism in Nigeria' (2010) AFRICAN SPECTRUM, VOL. 45, NO.2, pp.95-108.

[39] David Fidler criticised Third World scholarship, for example TWAIL, that it has not provided solutions for the Third World people, but appear to be entrenched in the *status quo* it is resisting. See David P Fidler, 'Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law (2003) 2 CHINESE J. INT'L L. 29 at p. 60.

this research focuses on the impact of practices and resistances of non-state actors in the Third World that would assert them in the making of (customary) international law in order to ameliorate the hardship caused by Western domination. Such a position challenges the insistence on classical notions of state practice and *opinio juris* for the purpose of custom-making.

CHAPTER ONE

FOUNDATIONAL ISSUES – HEGEMONY AND COUNTER-HEGEMONY AS A THEORETICAL FRAME AND TWAIL AS METHODOLOGY

'No one should be excluded from decision-making because they are African, or female, or belong to a minority… We all should have a voice that counts in our societies.'[1]

1. INTRODUCTION

In order to set out the parameters of the study of the hegemonic and counter-hegemonic properties of customary international law, this chapter examines some key terminologies used in this thesis. The first is the term 'hegemony'. This research adopts Antonio Gramsci's idea of hegemony. According to Gramsci, power is distributed both through force (in the political society) and through manufactured consent (in the civil society), whereby his emphasis is on the latter.[2]

The universality of international law, and therewith of customary international law, is often invoked through the global reach of member states to the United Nations and

[1] Navi Pillay, United Nations Human Rights chief, stated at University of Oxford during her lecture to the Rhodes House scholars while praising the work of human rights defenders in Africa. This can be viewed on http://www.ohchr.org/EN/NewsEvents/Pages/HRinAfricaprogressandchallenges.aspx [accessed on 3 August 2014. Paradoxically, Cecil Rhodes has been a subject of controversy in recent times in respect of his alleged roles in British colonialism, racism and oppression. There have been protests against the retention of his statue in University environments and this has resulted in his sculpture being removed from the University of Cape Town and request for same to be removed from the University of Oxford, United Kingdom. See Martin Hall, 'The symbolic statue dividing a South African university' BBC news available at http://www.bbc.co.uk/news/business-31945680 [accessed on 21 March, 2016]; Jen Mills, 'Oxford has decided Not to tear down Cecil Rhodes Statue' http://metro.co.uk/2016/01/29/oxford-has-decided-not-to-tear-down-cecil-rhodes-statue-5650890/ [accessed on 21 March, 2016].

[2] It is important to note here that Gramsci used the term 'civil society' in a different manner to how it is generally understood today as concerning grassroots movements. He understood civil society as the public sphere, which is shaped by media, universities and religious institutions. It is the sphere in which ideas and beliefs are shaped.

other international organisations. It is claimed that international law is a tool to fight hegemony and, through its consensual nature, to keep hegemony in check. However, I consider this to be a case of manufactured consent in which the inequality of states is *enabled* through international law. Customary international law is a particularly interesting platform for exploring questions of hegemony in international law since (a) many indigenous legal systems refer to custom as an important source of law, even in those societies in which no central legal system exists and in which law is not written down and (b) because it is so elusive, requiring a court for it to be identified.

I ask the following questions: Does the insistence on the formation of customary international law through state practice and *opinio juris* represent hegemony of a particular Western ideology? If so, what form does such hegemonic rule take and how has it been reproduced in the making of customary international law? The examination of these issues will attempt to reveal how the dominant Western position on custom is presented and reproduced as a universal ideology.

The other side of the story is one of customary international law as counter-hegemonic. The acceptance of custom as an important source of law, no matter which society, and the flexible nature of its principle, also provide a space for Third World resistance.[3] In spite of the strength of hegemonic practices in post-colonial African states, several non-state actors have been resisting such domination.[4] The effectiveness of resistance by non-state actors, as will be explored later in this

---

[3] Although the West is predominantly used in this thesis, it takes into consideration the great powers in Europe, United States of America, Russia, as well as China due to the active participation in deciding matters of international concerns.

[4] Augustine Ikelegbe, 'The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria' (2005) NORDIC JOURNAL OF AFRICAN STUDIES, 14 (2), pp. 208-234.

research, is hard to ignore. This thesis views such resistance as the counter-hegemonic efforts of the Third World to assert themselves in the making of customary international law. The continuous presence of non-state actors and their participation from pre-colonial to postcolonial Africa presents a 'decisive factor' of the African voice in international relations. Consequently, the role of non-state actors as a potential alternative to strict insistence on post-colonial African states as sole actors in the formation of customary international law is made imperative in the African reality. Such an alternative is imperative if Africans and the rest of the Third World are not to remain what this thesis terms 'perpetual-recipient-heirs' of hegemonic international law but active participants in representing African interests in the making of (customary) international law.

The use of the term 'Third World' is employed in this thesis in line with the Third World Approaches to International Law (TWAIL) scholarship. According to TWAIL, the 'Third World' represents the shared experience of colonisation and a collective resistance to hegemonic practices in international law.[5] Beyond this argument, the chapter explores the concept of TWAIL through its objective and methodology. It aims to enable the reader to understand the background of TWAIL and its approach to international law upon which this thesis relies.

This thesis is framed on TWAIL perspectives in that it highlights practices of exploitation in the colonial encounter between the former colonial powers (in the Global North) and the colonised peoples (in the Global South).

---

[5] B. S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) INTERNATIONAL COMMUNITY LAW REVIEW 8: 3-27.

I will consider the playing out of hegemony and counter-hegemony from a Nigerian perspective. The Nigerian perspective is interesting because it is in a sense a microcosm of the tensions, which can be found on a global scale. It has both a centralised as well as a decentralised system of power exercise; its legal system has been influenced by its former colonial masters (the British) in some parts and has been resistant to the Western legal forms and institutions in other parts; and it has social movements which have favoured alignment with Western powers and development strategies as well as social movements which have resisted this.

The question of development and law is first and foremost a question of political economy. In this thesis, I adopt a critical perspective on universality and how it privileges a particular political economy. The principle of universality in the international legal system often assumes a natural status; compliance (derived from consent) to such a system is expected without the use of force.[6] Arguably, universality aims to create a form of dominant political economic ideology to dictate economic principles for the benefit of the ruling class.[7] This brings into perspective Marx's criticism of the mode of production based on capitalism that enables the bourgeois (owner of capital) to exploit the proletariat.[8] Adopted to the relationship between

[6] Robert Jennings, 'Universal International Law in a Multicultural World' *in* Maarten Bos and Ian Brownlie (eds.) *Liber Amicorum for Lord Wiberforce* (Oxford University Press, 1987) p. 39. There have been debates regarding the notion of universality of international law. On the one hand, it has been argued that heterogeneity challenges universality of international law following the fragmentation of international law, proliferation of international courts and tribunals, and the emerging multi-level international governance. On the other hand, it has been argued that heterogeneity does not exclude the universality of international law, as long as the law retains and develops its capacity to accommodate an ever-larger measure of such heterogeneity. See Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) EUROPEAN JOURNAL OF INTERNATIONAL LAW, Vol. 20, Issue 2, pp. 265-297.

[7] O. E. Udofia, 'Imperialism in Africa: A Case of Multinational Corporations' (1984) JOURNAL OF BLACK STUDIES, Vol. 14, No. 3, pp. 353-368.

[8] Ulrich Steinvorth, 'Marx's Critique of Capitalism and the Concept of Basic Income' *in* Michael Pirson *et al* (Eds.) *From Capitalistic to Human Business* (London-New York: Palgrave Macmillan, 2014) p. 131.

European colonial states and previously colonised African states, this perspective exposes a capitalist ideology which has created a dependency system that leaves the resources of African nations dependent on the terms of Western industry; as well as causing poverty, economic inequalities, unemployment, and ecological destruction.[9]

2. CONCEPTUALISING HEGEMONY

There are divergent opinions and interpretations of the concept of hegemony and such views render it 'elastic and contestable'.[10] Antonio Gramsci, an Italian Marxist theorist, largely conceptualised hegemony in his Prison Notebooks (1929-1935), which he wrote during his incarceration under Mussolini's regime.[11] Gramsci's works are dominated by his experience of Italian culture: political, historical and 'super-structural'. His works were also influenced by Machiavelli's philosophy on human action, the importance of leadership and political craft; a praxis-based approach in which he brings everything back to politics '… ie to the art of governing men, of securing their permanent consent, and hence of founding "great states"'.[12]

In Gramsci's view, and following Marx, hegemony could be equated with domination. It arises where the interests of the dominant classes are concealed in the pretence or language that presents them as if they were of universal interest to people in general.

---

[9] For detailed criticisms on capitalism, see Eve Chiapello, 'Capitalism and its Criticisms' *in* Paul Du Gay and Glenn Morgan (Eds.) *New Spirits of Capitalism?: Crises, Justifications and Dynamics* (Oxford: Oxford University Press, 2013) pp. 65-76. See also Christian Fuchs and Vincent Mosco (Eds.) *Marx and the Political Economy of the Media* (Leiden-Boston: Brill, 2015) p. 1.

[10] Jonathan Joseph, *Hegemony: A Realist analysis* (London-New York: Routledge, 2002).

[11] Antonio Gramsci, Selections from Prison Notebooks of Antonio Gramsci (edited and selected by Quintin Hoare and Geoffrey Nowell Smith) (London: Lawrence and Wishart, 1971).

[12] Antonio Gramsci, Selections from Prison Notebooks (1971), see note 11 at pp. 248-9; Niccolò, Machiavelli, 'The Art of War' in *The Chiefs and Others*, Vol. 2, (Durham, NC: Duke University Press, 1965); Niccolò, Machiavelli, *The Prince* (Cambridge: Cambridge University Press, 1988); Jonathan Joseph, *Hegemony: A Realist analysis* (2002), see note 19 at p. 20.

This usually occurs through the ruling class, which establishes a particular set of cultural norms, upholds these norms and declares them to be natural and ineluctable. Such norms are made to appear to benefit a culturally diverse society, rather than artificial social construct that favour only the ruling class. Therefore, the subordinate groups are expected to consent to these fixed set of norms; however, the ruling class may resort to the use of force to compel obedience from the subordinate group.[13]

Nevertheless, Gramsci's idea of hegemony emphasises the maintenance of control that is achieved through *consent*, rather than via violence or coercion. Such consent could be achieved through ideology.[14] Here, the ruling class develop a hegemonic culture that matures and spreads its own values and norms so that these values and norms appear rational to the populace. Members of the working class (including other classes) consent to such ideas, which seem logical. In view of this, the working class help to maintain the status quo instead of revolting. Consequently, a social order, which produces and reproduces the ideology of the dominant class, is maintained through a nexus of institutions, social relations and ideas built on a political and

---

[13] T. J. Jackson Lears, 'The Concept of Cultural Hegemony: Problems and Possibilities' (185) THE AMERICAN HISTORICAL REVIEW, Vol. 90, No 3, pp.567- 593.

[14] The term 'ideology' has diverse meaning following its ambiguous and complicated history due to various usage and interpretations. Based on European history, the term was first coined towards the end of the eighteenth century by *philosophe* Antoine Destutt de Tracy as a name proposed for 'the science of ideas'. Karl Marx was the first to develop the term into a theoretical inquiry. See Susan Marks, *The Riddles of All Constitutions: International Law, Democracy and Critique of Ideology* (Oxford University Press, 2000). Marx's expansion of ideology was heavily hinged on the 'functionality of ideas of class domination' and this was criticised as too one-dimensional. In order to address such gap, John Thomspon conceptualised ideology as 'the study [of] ways in which meaning serves to establish and sustain relations of domination.' Here, 'some individuals and groups benefit more than others, and which some individuals and groups have an interest in preserving while others may see to contest.' See John B. Thomspson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (California: Stanford University Press, 1990); Susan Marks, *The Riddles of All Constitutions: International Law, Democracy and Critique of Ideology* (2000). Borrowing from these works, I employ the term in this thesis as the way meanings are legitimized, naturalised, supported and contested in the making of custom within the international system.

ideological superstructure.[15] Through this, political practices, norms, values and relations are shaped on the terms of the ruling class.[16]

The idea of the state and civil society are crucial to understanding Gramsci's political thought. Gramsci expanded the definition of the state beyond the elements of government. His notion of the state includes the underpinning of the political structure in civil society.[17] The definition was based on some concrete historical terms such as the educational system, religion, and media, amongst others. These groups help to propagate in people certain patterns of behaviour and expectations that are in conformity with the hegemonic social order.

In analysis of the above, a thin division is made where the 'political society', comprising the police, army, and legal systems, amongst others form the space for political institutions and legal institutions.[18] Whereas the civil society is made up of the private/non-state actors, mediating between the state and the economy. Although this distinction was drawn, Gramsci points out that there is an overlap between the political society as the state which rules through force and consent; where the political society is the arena of force and the civil society that of consent. Here Gramsci stresses that 'in concrete reality' the civil society and state are one and the same.[19] In spite of the above admittance of the overlap between the state and civil society, he points out that there could be resistance (political struggle) to the state by the civil society. Here the concept of passive revolution (or war of position) was introduced. He states that

---

[15] Antonio Gramsci, Selections from Prison Notebooks (1971) see note 11.
[16] Ann Showstack Sassoon, *Approaches to Gramsci* (London: Writers and Readers, 1982).
[17] Antonio Gramsci, Selections from Prison Notebooks (1971) see note 11.
[18] Robert W Cox, 'Gramsci, Hegemony and International Relations: An Essay in Method' *in* Louise Amoore (ed.) *The Global Resistance Reader* (Routledge: London and New York, 2005) p. 35. (2005).
[19] Antonio Gramsci, Selections from Prison Notebooks (1971), see note 11 at p. 208.

war of position will give way to war of manoeuvre at a certain point in the historical development, and then it will once again be possible to carry out a 'frontal attack' on the state. This is relevant in the exploration of the possibility of resistance to state dominance in custom-making by non-state actors.

3. HEGEMONY IN INTERNATIONAL LAW

Gramsci's conception of hegemony is expressed through state relationships with its citizens.[20] But the concept is also relevant in inter-national relations and international law.[21] Applied to the international, hegemony may acquire different meanings. One of such meanings is an understanding of hegemony as a euphemism for imperialism.[22] Inferring from Gramsci's view, international relations may involve the domination of 'powerful' states over 'weaker' states or ruling classes over exploited classes.[23] Here, an ideology consistent with a particular state or class becomes dominant as it assumes a leadership position in the world order. The idea of such a state or class is treated as universal and spreads beyond its borders. For example, between 1845 and 1875, the economic doctrines of Britain with regards to free trade was gold standard and made universal as it spread gradually from Britain to other parts.[24] At this time, Britain held the balance of power in Europe. Another instance could be drawn following World War II when the United States of America assumed domination in the world order similar to that of Britain, but, perhaps, more sensitive to the political repercussions of

[20]Antonio Gramsci, Selections from Prison Notebooks (1971), see note 11.

[21] Uprendra D Acharya, 'Globalization and Hegemony Shift: Are States Merely Agents of Corporate Capitalism?' (2013) BOSTON COLLEGE LAW REVIEW, Vol. 54, Issue 3, p. 937.

[22] Robert W Cox, 'Gramsci, Hegemony and International Relations: An Essay in Method' *in* Louise Amoore (ed.) *The Global Resistance Reader* (2005) see note 18.

[23] James Thuo Gathii, 'Africa' *in* Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) p. 407.

[24] Robert W Cox, 'Gramsci, Hegemony and International Relations (2005) see note 18.

economic crises. Drawing from these examples, the balance of power is within the domain of certain states and these states would usually devise certain structures for others to emulate for the benefits of the dominant state.[25] Alternatively, one might of course speak more broadly of a ruling class, for example multinational corporations, the so-called 1%, or the decision-makers at the top of financial institutions. These privileged few have the political-economic power to align their interests with policy decisions, often at the expense of those less fortunate. This would be a trans-national perspective on hegemony.[26] Often, the dominant state interests align with those of a dominant class and certainly in the international legal arena, the dominant class would mostly be presented as state interests.

In order to get a grip on the dominant states in international law today, we must return to international law's origins. The development of international law is usually attributed to European origin.[27] The Peace of Westphalia is often named as marking the emergence of the modern international system.[28] The peace treaty at Westphalia

[25] Robert W Cox, 'Gramsci, Hegemony and International Relations (2005) see note 18.
[26] William I. Robinson and Jerry Harris, 'Towards a Global Ruling Class? Globalisation and the Transnational Capitalist Class' (2000) SCIENCE & SOCIETY, Vol. 64, No. 1, p. 11.
[27] Historical accounts are usually fraught with diverse narratives of a given event. In the case of the present international law, it is often attributed to European source. See Martti Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' (2011) 19 RECHTGESCHICHETE 151-76, particularly p. 158; and RP Anand, *Development of Modern International Law and India* (Germany: Nomos, 2005). However, the attribution of the history of international to European origin has faced criticisms and viewed as a distortion. Non-European scholars who give account on how their home legal traditions, practices and activities have contributed to the development of international law usually raise such criticisms. They argue that the development of international law is not to be regarded as a Western privilege. See Taslim O Elias, *Africa and the Development of International Law*, second revised edition by Richard Akinjide (Dordrecht: Martinus Nijhoff Publishers, 1988) and JJG Syatauw, *Some Newly Established Asian States and the Development of International law* (The Hague: Martinus Nijhoff, 1961) at 29-30. *The Oxford Handbook of the History of International Law* (Oxford: OUP, 2012) is a recent project towards including diverse perspective in the history of international law. These efforts are pertinent to the making of international law that would encourage the participation of the Global North and South, which is relevant to this thesis.
[28] Martti Koskenniemi, 'A History of International Law Histories,' *in* Bardo Fassbender and Anne Peters (eds.) *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012)

of 1648, which was intended to end the 30-year war, first installed the idea of co-existing sovereign states. The treaty was constituted among European states, but it was also concluded with other states that Europe had come into contact with, such as the Mogul Empire in India, the Ottoman Empire, China, Japan, Persia, Ethiopia, and Haiti.[29] The treaty relationship was based on state equality. However, as the saying goes, some were distinctly more equal than others. Equality was often preserved for European states among themselves. It is important to note that these states shared a common form of organising state power (centrally) as well as a common religion.[30] The idea was that if each state (or sovereign) was viewed as equal, and this equality was viewed as binding, there would be peace.[31] International law was clearly state-centred law.[32] Since then, this European form of politics and law has continued to define international law as it has moved from the European to the international.

It was largely through colonialism that international law principles, including customary international law, were extended to non-Europeans.[33] Colonial rule started in the Americas in the fifteenth century, reaching India in the eighteenth century and, shortly thereafter, Africa. Colonialism occurred largely for trade purposes, to exploit the rich resources for a growing European consumer base. The colonisers dictated the trade practices and rules governing such relations; these principles privileged them

---

pp. 943–971; Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1954; Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2001).

[29] Antonio Cassese *International Law* (2nd edn.) (Oxford: Oxford University Press, 2005).

[30] Martti Koskenniemi,' Histories of International Law: Dealing with Eurocentrism' (2011) see note 27 at p. 158.

[31] Derek Croxton, *Westphalia: The Last Christian Peace* (New York: Palgrave Macmillan, 2013); Gene M Lyons and Michael Mastanduno (eds.) *Beyond Westphalia? State Sovereignty and International Intervention* (Maryland: The John Hopkins University Press, 1995).

[32] Malcolm N Shaw, *International Law* (6th edn.) (Cambridge: Cambridge University Press, 2008).

[33] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP, 2005).

economically over the colonised non-Europeans.[34] Historically, the early trade relations were usually conducted by trading companies such as the British East India Company and the Dutch East India Company.[35] The extent of the economic domination of these companies was summed up by M. F. Lindley in his statement that these companies were…

> Formed in most cases, at all events from the point of view of the shareholders, for the purpose of earning dividends, these corporations have proved to be instruments by which enormous areas have been brought under the dominion of the states under whose auspices they were created, and in this way they have been utilized by all the important colonising Powers. The special field of their operations has been territory, which the state creating them was not at the time prepared to administer directly, but which offered good prospects from the point of view of trade or industrial exploitation.[36]

In the colonial relationship, the colonised were reduced to mere objects without legal power to effectively control the trade relations or the practices that could lead to binding rule thereafter. This colonial disruption and lack of a legal capacity to participate in such trade relations brings to perspective the issue of sovereignty, which was only available to European states. Taslim Elias, a Nigerian international lawyer, writes that so far as Africa is concerned, Africans were dependents in respect of their

---

[34] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 HARV. INT'L L. J. 1.

[35] D.K. Fieldhouse, *The Colonial Empires: A Comparative Survey from the Eighteenth Century* (New York, Delacorte Press, 1966).

[36] M. F. Lindley, T*he Acquisition and Government of Backward Territory in International Law: Being A Treatise on the Law and Practice Relating to Colonial Expansion* (London: Longmans, Green and Co., 1926.) at p. 91.

relationships with European governments and mere spectators in the game.[37] The end of colonisation, as explored in this chapter, has not significantly improved the participatory position of many non-European states in international law-making.

The encounter between Europeans and Africans during colonialism was characterised by the use of force, intimidation, deceit and conquest in order to institute and maintain 'particular binding principles' derived from Europe.[38] Some of such binding principles arose from the Congress of Vienna of 1814-1815, where Europe reconstructed the frontiers of states and set the fate of many countries.[39] In maintenance of such state structure, the colonial period often witnessed the setting aside of indigenous culture and various means of law creation, resulting in the neglect of legally constituted 'indigenous groups' with an established mode of governance.[40] Femi Adegbule has, for example, drawn attention to changes to Nigeria's Igbo political system involving the gradual erosion of traditional mores among predominantly segmentary peoples. In this example, the Igbo political institution was rooted in village republicanism and the principle of *Igbo-Enwe-Eze* (the Igbo have no kings). Following the European encounter, this system was distorted through the introduction of warrant chiefs in the Igbo societies by colonial administration.

Furthermore, and connected to the neglect of indigenous culture in the public sphere, this era saw the 'gathering' of different African entities into larger groups to create

---

[37] T. O. *Elias, Africa and the Development of International Law* (1974) see note 27.
[38] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), see note 33.
[39] Tim Chapman, *The Congress of Vienna: Origins, Process and Results* (London& New York: Routledge, 1998).
[40] Femi Adegbule, 'From Warrant Chiefs to Ezeship: A distortion of traditional Institution in Igboland?' (2001) AFRO ASIAN JOURNAL OF SOCIAL SCIENCES, Vol. 2, No. 2 Quarter II, available at onlinereseachjournals.com/aajoss/art/63.pdf (accessed 7 June 2014); Adele E Afigbo, *The Warrant Chiefs: Indirect Rule in Southern Nigeria 1891-1929* (London: Longman Group Limited, 1972).

the Western model of statehood that became the primary actors of governance.[41] As a consequence, the colonial state became characterised by 'artificial' boundaries set by the colonial power.[42] These Western state models have remained to decolonisation times. The maintenance of these boundaries in Africa have been impliedly adopted from the Latin-American doctrine of '*uti possidetis* of 1810'.[43] This principle of international law maintained colonial frontiers at the independence of African states in spite of the various boundary disputes in Africa. Far from showing resistance, the agents of the post-colonial states have been accused of sustaining hegemony in Africa, even after colonisation. This often results in a strained relationship between the states and the people.[44] In spite of the resistance that may emanate from the dominated to such hegemonic tendencies, the ruling class is expected to institute their economic domination without the use of force. Force from colonialism is replaced by economic incentives and penalties in the post-colonial state. Arguably these limit the representation of the interests of the Third World in the international system.

As Anthoy Anghie has argued, factors such as Christianity and sovereignty were used as means to exclude other (colonial and non-Christian) states from participating in international relations.[45] Here the idea of a positivist theory of sovereignty is brought to focus. In this context, the traditional idea of sovereignty is reconceptualised from

---

[41] Makau Mutua, 'Why Redraw the map of Africa: A Moral and Legal Inquiry' (1995) MICHIGAN JOURNAL OF INTERNATIONAL LAW, VOL. 16, p. 1113.
[42] Ngongura J Udombana, 'The Ghost of Berlin still haunts Africa! The ICJ Judgement on the Land and Maritime boundary disputes between Cameroon and Nigeria' in AFRICAN YEARBOOK OFF INTERNATIONAL LAW (2002) Vol. 10, p. 13.
[43] Felix Chuks Okoye, *International Law and the New African States* (London: Sweet & Maxwell, 1972)
[44] Robert W Cox, 'Civil Society at the turn of the Millennium: Prospects for an Alternative World Order' *in* Louise Amoore (ed.) *The Global Resistance Reader* (Routledge: London and New York, 2005) p. 103 particularly at. 117.
[45] Antony Angie, *Imperialism, Sovereignty and the Making of International Law* (2005) see note 33.

two dimensions in relation to Europe and the non-European world. The character of sovereignty for Europe entailed empowerment- the assertion of power, authority, and authenticity giving rise to the legal capacity to determine international law. Such a European type of sovereignty was used as a mechanism for suppression, management, as well as the adoption of European civilisation. The European sovereignty attained a universal status, which the rest of the world had to adopt, whereas, for the non-Europeans who were not regarded as sovereigns, the attainment of sovereignty for them consisted of alienation and subordination rather than empowerment.[46] It deprived non-Europeans the legal capacity to participate in international law making.

Furthermore, Anghie demonstrates that the exclusion of non-Europeans was as a result of their non-Christian status.[47] Through the exploration of Francisco de Vitoria's work, the idea of difference through Christian standards is highlighted between Europe and the non-European world. Although, according to Anghie, Vitoria succeeded in arguing for the transition of divine law, which made the pope to have a universal jurisdiction to a secular law, not much was achieved in the inclusion of the Indians (non-Europeans) in the family of nations. The ability of the Indians to reason like their European counterparts was not enough to include them in the family of nations. Such position resulted from the difference in cultural practices. The cultural practices of the non-European world, which were not in conformity with the practices of Christian Europe, were regarded as 'barbaric' and as a result could not elevate them

[46] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law,' (1999) see note 34, particularly at pp. 37-41.
[47] Antony Angie, *Imperialism, Sovereignty and the Making of International Law* (2005) see note 33.

to the position of being sovereign for the purpose of inclusion into the family of nations.

Besides the above historical account, Christianity was not the only exclusionary factor then. The so-called 'civilising mission' was part and parcel of exclusion and forced submission.[48] During the period of colonialism, non-Europeans were described as 'uncivilised', 'barbaric' and in need of 'guidance'.[49] Such a perception of non-Europeans legitimized the colonisation and domination of non-European countries, especially in Africa and Asia.[50] From a perspective of law, this period was characterised by conquest and cession based on 'unequal treaties' entered into by European and non-European states.[51] For example, King Dosunmu signed the Treaty of Cession of 1861, which transferred the sovereign rights of land in Lagos, Nigeria, to the British Crown.[52] In this treaty, the sovereignty and management of Lagos, Nigeria was transferred to the Queen of England. According to the British view, such transfer enabled the Queen to 'assist, defend and protect' the inhabitants of Lagos. It was also declared as a means to put an end to slave trade and prevent destructive wars arising from the capture of slaves. King Dosunmu retained 'native claims' on the land, received revenue and settle disputes between 'native people' with their consent and

[48] R. J. Vincent, 'Racial Inequality' *in* Hedley Bull & Adam Watson (eds.) *The Expansion of International Society* (Oxford: Oxford University Press, 1984).
[49] Dakas C J Dakas, 'The Role of International Law in the Colonization of Africa: A Review in Light of Recent calls for Re-colonization' (1997) AFRICAN YEARBOOK OF INTERNATIONAL LAW, Vol. 7, p. 85.
[50] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) see note 33.
[51] Charles Henry Alexandrowicz, *The European-African Confrontation: A Study in Treaty Making* (Leiden: AW Sitjhoff, 1973); Charles Henry Alexandrowicz, *An Introduction to the History and Law of Nations in the East Indies* (Oxford: Clarendon, 1967).
[52] F. Abiola Irele and Biodun Jeyifo (Eds.) *The Oxford Encyclopedia of African Thought*, Volume 1: Absolutism-Imperialism (Oxford: Oxford University Press, 2010). It is noteworthy that the treaty of cession of 1861 has been contested on the ground that the lands in Lagos, Nigeria, which is the subject matter of the treaty could not have been given to the British Crown as it is believed that King Dosunmu does not own the said land, but the 'White Cap chief', a certain category of chiefs. See p. 84.

subject to appeal to British laws. King Dosunmu resisted the signing of the treaty at first, but he later succumbed after the British attacked and defeated him in a war.[53] Consequently, Lagos was declared a British colony.

The criteria for being accepted into the 'family of nations' emphasized the European perception of sovereignty (often aligned with a following of the Christian faith) and civilization. Subsequently, the European standard became the universally accepted norm as it defined the rules of international law.[54] Such criteria were intended to grant legal personality in order to qualify for participation in international law-making.[55] Through such process, non-European states were assumedly placed on 'the same order of equality'.

4. HEGEMONY IN CUSTOMARY INTERNATIONAL LAW

In this thesis, I argue that customary international law, as one of the main sources of international law, is both defined by this European form of international law (and is therefore hegemonic) and that it also has possibilities within it to resist the dominance of the European form (and is therefore also counter-hegemonic). Customary international law has a central role to play in the development of international law such that most often international lawyers do not bother to explain its importance, as it is believed to be fairly obvious.[56] An example of the relevance of customary

---

[53] Chris N. Okeke, 'The Debt Burden: An African Perspective' (2001) THE INTERNATIONAL LAWYER, Vol. 35, No. 4, P. 1489.

[54] Antony Angie, 'Identifying Regions in the History of International Law in Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) p. 1058.

[55] Dakas C J Dakas, 'The Role of International Law in the Colonization of Africa: A Review in light of Recent Calls for Re-colonisation' (1997), see note 49.

[56] Vassilis P. Tzevelekos and Kanstantsin Dzehtsiarou, 'International Custom Making and the ECtHR's European Consensus Method of Interpretation' (2016) EUROPEAN YEARBOOK ON HUMAN RIGHTS, Vol.

international law is in the areas of state immunity and state responsibility where multilateral treaties of a general scope are yet to be negotiated.[57] It also serves as an instrument for filling lacunae within treaties, and for finding the meaning of unclear or undefined terms in a text.[58] Furthermore, its relevance is purported to lie in the protection of human rights, where states are neither party to existing treaties nor party to the relevant treaty enforcement mechanisms.[59]

Traditionally, customary international law binds all states except persistent objectors.[60] Such universal application implies, among other things, the expansion of international law beyond its European origins. The universally binding nature of customary international law is explained through theory of state consent.[61] This has raised problems of legitimacy following the imposition of the practice of a small number of states on all states.[62] Some scholars have abandoned the idea of 'express consent' contending that the theory does not explain what really happens in the formation of customary international law.[63] However, some scholars have relied on

---

16, pp. 313-344; David P. Fidler, 'Challenging the Classical Concept of Custom' (1996) GERMAN YEARBOOK OF INTERNATIONAL LAW, Vol. 39, p.198.

[57] Michael Byers, *Custom, Power and the power of Rules: International Relations and Customary International* Law (Cambridge: Cambridge University Press, 1999).

[58] Patrick Dumberry, 'The Last Citadel! Can a State Claim the Status of Persistent Objector to prevent the Application of Customary International Law in Investor-State Arbitration?' LEIDEN JOURNAL OF INTERNATIONAL LAW, vol. 23, no. 2 June 2010, p. 381.

[59] Michael Byers, *Custom, Power and the power of Rules: International Relations and Customary International* Law (1999), see note 57 at p. 2.

[60]Anthony D'Amato, *The Concept of Custom in International Law* (London: Cornell University Press, 1971).

[61] David P. Fidler, 'Challenging the Classical Concept of Custom' (1996), see note 56.

[62] David P. Fidler, 'Challenging the Classical Concept of Custom' (1996), see note 56.

[63] Jonathan Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) BRITSIH YEARBOOK OF INTERNATIONAL LAW, Vol. 56, 1, 16.

‘inferred consent’, in the form of acquiescence to explain the basis of such binding obligation.[64]

Chapter 3 includes an in-depth analysis of customary international law; notwithstanding this, this section provides a brief historical overview. According to Article 38 of the Statute of the International Court of Justice (ICJ), international custom is defined ‘as evidence of a general practice accepted as law’.[65] Classical international law summarises this as the constitution of two elements, namely state practice and *opinio juris.*[66] These elements are derived from the general and uniform practices of states, and the belief that such practices raise legal obligations that require compliance. The identification of these elements has continued to raise scholarly debates.[67] However, the material sources of custom include diplomatic correspondence, policy statements, press releases, and opinions of government legal advisers amongst others.[68] The value attached to these varies and depend on circumstances. The International Court of Justice (ICJ) considers duration and consistence of practice, generality of practice and *opinio juris* (evidence of a belief that

---

[64] Michael Akehurst, ‘Custom as a Source of International Law’ (1974-5) BRITISH YEARBOOK OF INTERNATIONAL LAW, Vol. 47, p. 1.

[65] The definition of custom in Article 38 of the Statute of the ICJ was a derived verbatim from Statute of the Permanent Court of International Justice, a predecessor of the present ICJ.

[66] *North Sea Continental Shelf* ICJ Reports (1969) p. 3, *Military and Parliamentary Activities in and Against Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 97(para. 183,110 (para. 211); *Asylum case*, ICJ Reports (1950) pp. 226, 276-277; *Right of Passage over India Territory*, ICJ Reports (1960) pp.6, 40; *Legality of the Threat or Use of Force*, ICJ Reports (1966) pp. 226, 253-255 (paras. 65-73); Anthony D’Amato, *The Concept of Custom in International Law* (1971) note 65; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999) see note 62; Ian Brownlie, *Principles of Public International Law* (6th edn.) (Oxford: Oxford University Press 2003); Anthony Aust, *Hand Book of International Law* (2nd edn.) (Cambridge: Cambrdge University Press 2010).

[67] Michael Byers, *Custom, Power and the power of Rules: International Relations and Customary International* Law (1999) see note 57.

[68] James Crawford, *Brownlie’s Principles of Public International Law* (8th edn.) (Oxford: Oxford University Press, 2012).

such practice is rendered obligatory by the existence of a rule requiring it) for the determination of custom.[69] Customary international law is premised on the traditional notion of sovereignty that views states as the sole subject which enjoys full legal personality under international law.[70] This position concentrates the making of customary international law within the state system.

As mentioned above, historically, the state, in particular the *European* state, was regarded as the element around which all of international law revolved. In spite of the participation of non-European societies, for example Africa, in the development of customary international law,[71] only Eurocentric origin has been adopted to the exclusion of others. In view of such European bias, the first definition of customary international law as we know it today is traced back to 1920 and the Advisory Committee of the Permanent Court of International Justice.[72] The initial draft treaty defined international custom as 'practice between nations accepted by them as law'.[73] In the final draft, some changes were made and the paragraph later read 'evidence of a general practice accepted as law'.[74] This definition was reproduced in article 38 (1) (b) of the Statute of the International Court of Justice.[75] Before the accepted definition of customary international law, since 1920, customary international law is thought of

[69] *North Sea Continental Shelf (Federal Republic of Germany/Netherland; Federal Republic of Germany/Denmark)* 1969 ICJ Reports p. 3, 43.
[70] J. L. Brier, *The Basis of Obligation in International Law* (Oxford: Clarendon Press 1958).
[71] Taslim Elias, *The Nature of African Customary Law* (Manchester: Manchester University Press, 1956).
[72] Andrea Pellet 'Article 38' in Andreas Zimmermann et al (Eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006), p.750.
[73] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), Annexe No. 3, p. 306.
[74] 'Draft-Scheme for the Institution of the Permanent Court of International Justice Mentioned in article 14 of the Covenant of the League of Nations presented to the Council of the League by the Advisory Committee of Jurists', Official Journal, Special Supplement No.2, Article 35, September 1920; Article 38 (1) (b) Statute of the Permanent Court of Justice.
[75] Article 38 (1) (b) Statute of the International Court of Justice.

as made by and made for sovereign states. Given that the understanding of statehood as comprised of a particular territory, population and centralised form of governance,[76] is a form of organisation with European origins which was historically also exclusively available to European states, it is also a system which privileges those states which adhere to the European model.[77] Of course, 1920 was prior to decolonisation, meaning that the Euro-centric visions in the drafting process came from a largely European drafting committee.[78] Certainly the exclusive and Euro-centric nature of the provisions in Article 38 are still evident in the mention of 'civilized nations', implying of course, that there are 'uncivilized nations'. There is, therefore, something distinctly hegemonic in customary international law in that it privileges those European states making up the *ancient regime* of international law as well as other great powers such as the United States.

[76] James Crawford, *The Creation of States in International Law* (2nd edn.) (Oxford: Oxford University Press, 2007).

[77] I. A. Shearer, *Starke's International Law* (11th edn.) (Sydney: Butterworths, 1994) see particularly the definition of international law in p. 3; Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging armed Groups in the Creation of International Humanitarian Law' (2012) THE YALE JOURNAL OF INTERNATIONAL LAW, vol. 31:1, p.108.

[78] Members of the committee included MINEICHIRO ADATCI, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the Emperor of Japan, at Brussels; M. RAFAEL ALTAMIRA, Senator, Professor of the Faculty of Law of the University of Madrid; CLOVIS BKVILAQUA, Legal Adviser to the Ministry of Foreign Affairs of Brazil; BARON DESCAMPS, Senator, Belgian Minister of State; FRANCIS HAGERUP, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of Norway, at Stockholm; ALBERT DE LAPRADELLE, Professor of the Faculty of Law of the University of Paris; Dr. LODER, Member of the Supreme Court of the Netherlands; LORD PHILLIMORE, Member of the Privy Council of His Majesty the King of England; ARTURO RICCI-BUSATTI, Minister Plenipotentiary of His Majesty the King of Italy, Legal Adviser to the Ministry of Foreign Affairs of Italy; Mr. ELIHU ROOT, Former Secretary of State of the United States of America. RAOUL FERNANDES, former Brazilian delegate to the Paris Conference, was present at the meetings of the Committee, at first in a consultative capacity, as adviser to M. BEVILAQUA, who was prevented from attending; but in the course of the Committee's work he was appointed a member of the Committee to replace the latter. Dr. JAMES BROWN SCOTT was present at the meetings as legal adviser to Mr. ROOT. Available at http://www.archive.org/stream/procsverbauxof00leaguoft/procsverbauxof00leaguoft_djvu.txt [accessed on 1 June 2016].

Customary international law is, I argue, not simply hegemonic in its form (in that is has a bias for centrally biased power structures modelled on the Westphalian state), but also in its substance (in that it is more likely for the great powers to influence the making of customary norms).[79] The bias for the customs of European states and the exclusion of non-European states in custom-making goes back to the imposition of European governance principles. The logic of international law is that the power to make international law lies in the domain of the state. However, many colonised countries were said lacked this distinct 'state-like' structure resembling that of the Europeans.[80] Therefore, any practice arising from, for example, decentralised African societies did not amount or contribute to customary international law. The custom that counted as law was that which was practiced only among the 'civilised' countries.[81] Henry Wheaton, an influential American jurist, identified these civilised nations in his influential treatise on international law, *Elements of International Law* as 'the Christian people of Europe or those of European origin'.[82]

Wheaton, and other jurists who succeeded him, believed that there was a cultural gap between Europeans and non-Europeans.[83] According to them, this gap could not be bridged by a universal natural law, but by the explicit imposition of European

---

[79] J. Patrick Kelly, 'The Twilight of Customary International Law' (1999- 2000) 20 VA. J. INT'L L. 449.

[80] However, it should be noted that the criteria for State-like structure was based on European standard. It has been argued that it does not mean that such African societies lacked a form of organisation and governance. While some of the societies were centralised, others were decentralised. Both societies successfully governed their affairs and related with people across their borders.

[81] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', (1999) see note 34.

[82] Henry Wheaton, 1866 Elements of International Law, George Grafton Wilson (ed.), The Carnegie Institute of Washington photo, reprint 1964, at p. 15.

[83] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', (1999) see note 34; Antony Anghie, 'Francisco De Vitoria and the Colonial Origins of International Law' (1996) 5 SOCIAL LEGAL STUDIES, p. 321.

international law over the 'uncivilised' non-Europeans,[84] thereby asserting that only the practice of European States could create (customary) international law.[85] Participation in law-making was the exclusive preserve of European states.[86] They insist that the making of custom is solely dependent on state practice and *opinio juris*.[87] Therefore, whatever practices existed in the so-called 'uncivilised tribes' of former colonies did not matter in the creation of customary international law. The lack of sovereignty was used as a smokescreen to exclude non-Europeans. As a result, the tribal societies (non-Europeans) could not be admitted into international law.[88] Consequently, the constitution of customary international law was determined by those European states, which were considered 'civilised' and 'sovereign'. To buttress this point, the Permanent Court of International Justice in its decision in *SS Lotus Case: France v. Turkey,*[89] stated that:

> International law governs relations between independent states. The rules of law binding upon states therefore emanates from their own will as expressed in conventions [treaties] or by usages generally accepted as expressing principles of law established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims[90].

[84] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) see note 33.
[85] Gerrit W. Gong, *The Standard of Civilization in International* Society (Oxford: Oxford University press, 1984) at pp. 53-57.
[86] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) see note 33.
[87] Insistence on Statehood for the formation of custom has continued in spite of active participation of the individual in modern international law.
[88] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law,' see note 34 at p. 16.
[89] (1927) PCIJ Rep Ser A No 10, 18.
[90] Alina Kaczorowska, *Textbook Public International Law*, (London: Old Bailey Press, 2002) at p. 6.

Based on the foregoing, only the civilised 'independent' European states possessed the status of sovereignty. They were independent from any interference. Consequently, they appropriated the legal capacity to participate in international relations out of their own free will, as well as contribute to the making of customary rules unlike the colonial territories that lacked such independent status.

In *Trendtex Trading Corporation v. Central Bank of Nigeria*,[91] the English court also supported the above perception of international law in the following terms:

> I know no better definition of it than it is the sum of rules or usages that civilised States have agreed shall be binding upon them in their dealing with one another. It is quite true that whatever has received the common consent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations in general may be international law…[92]

Based on the foregoing, the universalization of the idea of attaining sovereignty by adopting the Western model of statehood in order to achieve the legal capacity to participate in the making of (customary) international law became inevitable.[93] Such a premise brings into perspective the idea of consent in the making of (customary) international law in relation to the Third World.

According to one of the features of Gramsci's definition of hegemony, dominant social forces maintain their domination by presenting their ideology as natural without the

[91] (1977) 1 All ER 881.
[92] *Trendtex Trading Corporation v. Central Bank of Nigeria* see note 82 at 901-902; Alina Kaczorowska, (2002) *Textbook Public International Law*, (2002) see note 90 at 6.
[93] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) see note 33.

use of force.[94] The dominant ideas become the worldview and are accepted by those under its authority. However, the notion of Third World consent during the period of colonialism has faced severe scrutiny following the manner in which they were obtained by colonial powers.[95] For instance, there was a state practice for the transfer of ownership of land from African chiefs to colonial powers through the signing of treaties between both parties.[96] There is evidence to show that the consent of African chiefs, as exemplified in the above case involving King Dosunmu, was sometimes obtained through the employment of violence.[97]

The end of colonisation brought a different dimension in the assessment of Third World consent in international relations. For instance, the attainment of independence by these states led to their membership of the family of nations. Following such status, many of these states became signatories to international treaties like the United Nations Charter. Based on this premise, it would be expected that the hegemon has the ability to command compliance of the Third World to what constitutes (customary) international law without coercion. However, there are situations in which powerful states still use force to insist on the monopoly of certain practices.[98] They also use force to combat resistance.[99] Such use of force could be

[94] Antonio Gramsci, Selections from Prison Notebooks (1971) see note 11; Ted Hopf, 'Common-sense Constructivism and Hegemony in World Politics' (2013) INTERNATIONAL ORGANISATIONS, Vol. 67, Issue 02, pp. 317-354.
[95] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) see note 33.
[96] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law,' see note 34.
[97] F. Abiola Irele and Biodun Jeyifo (Eds.) *The Oxford Encyclopedia of African Thought*, Volume 1: Absolutism-Imperialism (2010) see note 52.
[98] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law,' see note 34.
[99] Balakrishnan Rajagopal, 'The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India' (2005) LEIDEN JOURNAL OF INTERNATIONAL LAW, 18, p. 345 at 347-348.

carried out through their overwhelming military power to suppress possible challenges to what they regard as the customary rules or their perception of the world order.[100] In such situations, international norms appear not to be a constraint for dominant states, be it with regard to the use of force or minimum respect for international humanitarian law. The United States intervention in Nicaragua, the Gulf war, the NATO intervention in Kosovo, and the Iraq war are a few examples. Arguably, the practice surrounding the institution of peace in the contemporary world by powerful states becomes a function of dominance, which could be enhanced, with the use of force.[101]

Furthermore, Antony Anghie emphatically demonstrated the use of coercion by hegemonic powers against Third World. He stated that:

> The violence of positivist language in relation to non-European people is hard to overlook. Positivists developed an elaborate vocabulary for denigrating these peoples, presenting them as suitable objects for conquest, and legitimizing the most extreme violence against them, all in the furtherance of the civilizing mission - - the discharge of the white man's burden.[102]

---

[100] B. S. Chimni, 'Third World Approaches to International Law: A Manifesto', (2006), see note 5.

[101] BS Chimni, 'Third World Approaches to International Law: A Manifesto', (2006), see note 5 at p. 19.
[102] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) see note 33 at p. 38

Positivism replaced naturalism as a prime jurisprudential technique of the discipline of international law during the late nineteenth century.[103] Its jurisprudence is centred on the supremacy of the state in the international system. The states are bound only to that which they have consented and this has remained the 'standard' in the present regime of international law. In the above text, Anghie examined the relationship between positivism and colonialism. He sought to understand the legal framework employed by the positivist to subordinate and exclude non-Europeans from membership of the family of nations, as well as the significance of the nineteenth-century colonial encounter for the disciple of international law as a whole. In this inquiry, he brings to perspective positivist doctrine, which sought to account for the 'native's legal personality' leading to their exclusion. Anghie highlights two types of violence employed for exclusion: that which uses force and then the violence of the law as a language. Here, Anghie argues that the brutal realities of such dispossession and exclusion can hardly be ameliorated.

This is harshly demonstrated in the case of *The Antelope* in 1825, where the Supreme Court of America, made an inquiry into whether slavery was an accepted practice according to the law of nation.[104] In that case, the Chief Justice made a gesture towards including Africa within the law of nations and for European and American states to respect the law of nations as practiced within Africa. Such gesture was opposed following a fierce statement that whatever custom existed in the African

[103] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, (1999) see note 34 at p.2.
[104] *The Antelope,* 23 U.S. (10 Wheaton) 5, 66 (1825)

continent was irrelevant- the only custom that mattered was that practiced by the civilised and Christian people of European origin.[105]

The above mechanisms and more have continued to enable the hegemon to sustain hegemonic custom in international law. In modern international law, hegemony appears to adopt other forms that entrap Third World victims in the reproduction of hegemonic practices.

5. HEGEMONY AND POLITICAL ECONOMY IN THE INTERNATIONAL SPHERE

Gramsci saw hegemony as deeply connected with the capitalist state. In a global neoliberal society, which has seen capitalism become the globally dominant ideology, Gramsci's notion of hegemony becomes even more relevant.

It has been argued that the purpose of the relationship of domination and exploitation is centred on economic domination of 'powerful' states over 'weaker' states.[106] Such economic domination/exploitation has continued to exist since the colonial to post-colonial encounter between the 'powerful' and 'weaker' states.[107] Colonialism marked a new and expansionist phase in the evolution of the modern market economy through open market policies.[108] Its main target was to remove the constraints, which hindered European exploitation of the export sector in the nineteenth century. In West Africa, the colonial industrialised powers established trade policies that they dominated. The policies aided the flow of primary products and simultaneously kept

[105] Henry Wheaton, Elements of International Law (George Grafton Wilson, ed., The Carnegie Institute of Washington Photo. Reprint 1964) (1966) particularly at p. 15.
[106] James Thuo Gathii, 'Africa' (2012) see note 23 at p. 17.
[107] Lepold Senghor*, On African Socialism* (Westport: Prager, 1974).
[108] A. G. Hopkins, *An Economic History of West Africa* (London-New York: Routledge, 1973).

an open door for the sale of their manufactured goods. In Nigeria, three major cash crops (cocoa, palm oil and groundnuts) were exported to Britain, while British manufactured products dominated the Nigerian market.[109] Tariffs were kept low, although there were situations when higher duties were imposed to restrict the entry of manufactured goods from rival industrial powers or the exportation of raw materials to rival colonial power. For instance, the British colonial government imposed a total ban on the exportation of palm oil, with the United Kingdom being the only exception. In order to enforce this, discriminatory export duties were imposed on palm kernel. The economic benefits derived from such colonial economic policies benefitted Britain to the detriment of the economy of colonial Nigeria.

Not only trading in raw materials is a means for exploitation. Aid from Western states has been regarded as a tool for influential countries to perpetuate their economic domination as demonstrated by the pattern of policies and conditions attached to such aid.[110] The Third World aspirations for development geared towards improving living standards within the international model has encouraged aid assistance from international institutions.[111] In spite of the numerous assistance received in this region, developmental aspirations have remained unfulfilled. Such failures have been blamed on the failure of legal institutions within the Third World.[112] By the late 1990s, this understanding was embedded in international development policy. This was

[109] Olusegun Adeyeri and Kehinde David Adejuwon, 'The Implications of British Colonial Economic Policies on Nigeria's Development' (2012) INTERNATIONAL JOURNAL OF ADVANCED RESEARCH IN MANAGEMENT AND SOCIAL SCIENCES, Vol. 1, No. 2, pp. 1.
[110] Dermot McAleese, 'Economic Exploitation of the Less Developed Countries: A Survey' (1973) AN IRISH QUARTERLY REVIEW, Vol. 62, No. 246, pp. 139-153.
[111] Balakrishnan Rajapopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridege University Press, 2003).
[112] Sundhya Pahuja, *Decolonising International Law: Development, Economic and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

transferred into a development project, which was concentrated on the need for the existence of the 'rule of law' among states.

Financial aid institutions such as the International Monetary Fund (IMF) and World Bank became part of the international bodies to propagate and ensure the universal ideology in respect of development globally.[113] Rather than creating expanded economic and political systems to accommodate the Third World, it became an instrument to further subject more lives within the Third World to international surveillance and scrutiny.[114] In view of the forgoing, it was contended that the development strategy of the 'rule of law' was another device employed for the Third World to use the universal potentiality of international law to become subordinated to a ruling rationality.[115]

Besides the above positions, there are other strategies, which have been employed to sustain dominant ideas. According to Gramsci, civil society (as the sphere in which ideas and beliefs are shaped) sees the reproduction of hegemony in cultural life through the media, universities, and religious institutions. I will modify these slightly in order to explore the reproduction of hegemony through (a) the media, (b) education, and (c) the purportedly faith-based institutions (with a secular idea of faith) in the United Nations and in particular the International Court of Justice. I argue that these three spheres of influence have helped in the reproduction and sustenance of

[113] Amanda Perry, 'International Economic Organisations and the Modern Law and Development' *in* Ann Seidman, Robert Seidman and Thomas Walde (eds.), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (The Hague: Kluwer, 1999).
[114] Sundhya Pahuja, *Decolonising International Law: Development, Economic and the Politics of Universality* (2011) see note 112.
[115] Sundhya Pahuja, *Decolonising International Law: Development, Economic and the Politics of Universality* (2011) see note 112.

hegemonic tendencies in the international legal system by the ruling class. This has created and influenced the making of international law from a particular perspective and enforced these as universal irrespective of the exercise of diverse legal traditions. Such hegemonic practices will be examined in relation to customary international law.

a.) The Media

Despite its diversity and also its possibilities for resistance, the media tends to be a means to spread and sustain dominant ideologies across national borders and that could maintain the statist position of custom-making. Its roles in different spheres of human relationships are continually increasing, both nationally and internationally. New technologies are restructuring the content, mode and speed of media dissemination; as well as enhancing the impressions of particular ideas easily within and across borders.[116] The easy dissemination of information and wide coverage is further enabling the media to compress the world into a global village with regard to matters of business, human rights, social movements, and other opportunities.[117]

Furthermore, social media is providing a wide environment dealing with different topics among divergent group of people. Such forms of social media include twitter, YouTube, Facebook, blog, amongst others. There is a wide spread believe that the use of social media has an elective affinity with participatory democracy.[118] This arose from the adoption of social media as a platform by politicians, political activists and

---

[116] Leah A Lievrouw, 'New Media and the 'Pluralization of the life-worlds': A Role for information in Social Differentiation' (2001) NEW MEDIA AND SOCIETY, Vol. 3, No1, pp. 7-28.
[117] Habibul Haque Khonder, 'Role of New Media in the Arab Spring' (2011) GLOBALIZATIONS, Vol. 8, No. 5, pp. 675-679.
[118] Brian D. Loader and Dan Mercea (eds.) *Social Media and Democracy: Innovations in Participatory Politics* (Oxon-New York: Routledge, 2012).

citizens to engage, organise and communicate their views. The system promises the consideration of diverse views for the formulation of policies. However such potential is to be taken with caution following the domination of particular ideologies over other competing conceptions of democracy.[119] Also, it has been contended that in most pro-Western developing countries, the media system is directed towards maintaining control rather than educating for democracy. [120]

Although the media have been playing the above roles, their creation of complex and contradictory cultural identities in the international sphere cannot be over-emphasised.[121] Usually, people, issues, ideologies and happenings are presented in a manner that represents the bias of the presenter,[122] which tends to be viewed with suspicion across the North-South divide. This is typified in the presentation of Western goods and culture to appeal to a wide range of audience; as well as their culture and ideologies being superior to those of non-Westerners.[123] Such a position has been enhanced, since the international media system is based on the 'philosophical and political rationales or theories of the West'.[124] Through the media, the West is left to

---

[119] Brian D. Loader and Dan Mercea (eds.) *Social Media and Democracy: Innovations in Participatory Politics* (2012) see note 118.

[120] James Curran and Myung-Jin Park (eds.) *De-Westernizing Media Studies* (London-New York: Routledge, 2000).

[121] Heather Jean Brookes, 'Suit, Tie, and a touch of Juju'- The Ideological Construction of Africa; A Critical Discourse of News on Africa in the British press' (1995) DISCOURSE & SOCIETY, Vol. 6, pp. 461-494.

[122] The attempt to dehumanise a particular race often suggest that the presenter is of a different race and perhaps ignorant of the race that is being dehumanised. For instance, the lack of understanding of African race has often led to the dehumanisation of the African race by Western press. Similarly, the portrayal of a particular race or idea as superior could suggest an attachment to such ideas or race. See Charles Piot, *Remotely Global: Village Modernity in West Africa* (Chicago & London: The University of Chicago Press, 1999).

[123] Rod Chavis, 'Africa in the Western Media' available at www.africa.upenn.edu/Workshop/chavis98.htm [accessed 20 August, 2014].

[124] James Curran and Myung-Jin Park, 'Beyond Globalization Theory' *in* James Curran and Myung-Jin Park (eds.) *De-Westernizing Media Studies* (New York: Routledge, 2000) p. 3 at p. 4

decide world opinion on many issues today. In this manner, many people from different cultures are influenced into accepting particular views in their everyday lives. This strategy has made people conscious of the outside rather than their immediate environment in matters concerning public affairs, which are often anchored on Western ideologies and experiences.[125]

Although the Western media have encouraged the greater participation of non-state actors in international affairs (as well as in the formation of customary international law),[126] the presentation of Western ideologies in a manner superior to others arguably constitutes a form of sustenance of Western hegemony within the international legal system. Different generations of Western media have reproduced this hegemonic division of Western superiority over non-Westerners. In particular, propaganda is used to monopolise the control of the media, often supplemented by official censorship to serve the interests of the dominant group.[127] The domination and marginalization of dissenters are filtered through certain controls so that the news or media people are convinced that they are passing objective information to the public based on professionalism.[128] Ultimately, the focus on such an idea forms public opinion through which society is indoctrinated into believing to be natural and accepted values. Consequently, those with media power and skills are likely to dictate

---

[125] James Curran and Myung-Jin Park, 'Beyond Globalization Theory' *in* James Curran and Myung-Jin Park (eds.) De-Westernizing Media Studies (2000) see note 124.

[126] Achilles Skordas, 'Hegemonic Custom' *in* Michael Byers and Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (New York, Cambridge University Press, 2003) 317 at 321.

[127] Edward S Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (London: Vintage, 1994).

[128] Edward S Herman and Noam Chomsky, Manufacturing Consent: The Political Economy of the Mass Media (1994), see note 127 at p. 2.

the form and content of what is or could become customary practices in the international system.[129]

b.) Education

The understanding of hegemony and the sustenance of hegemonic ideologies expressed above could be greatly influenced by education according to Antonio Gramsci.[130] This assertion could be sustained following the strong base of international law education in Western culture.[131] Western institutions, in conjunction with their state agencies, influence the global research agenda.[132] Usually, students, legal officers, jurists and persons from the Third World who are studying or applying international law rely on these resources, as well as being influenced by books, journals and other scholarly materials written by Northern authors, in order to understand international law.[133] Most of these Western sources fail to provide the lived experiences or practices of the Third World in the study of international law.

There is no doubt that Western education and scholarship have made huge contributions towards making resources available for the study and practice of international law. However, there appear to be some limitations to these resources, as they appear to neglect the lived experiences of the Third World, for example, Nigeria and its citizens rely on the reproduction of a Western stereotype of

[129] John Street, *Mass Media, Politics and Democracy* (2nd edn.) (Hampshire-New York: Palgrave Macmillan, 2011).

[130] Antonio Gramsci, Selections from Prison Notebooks (1971) see note 11.

[131] Leon Tikly, 'Globalization and Education in the Post-colonial World: Towards a Conceptual Framework' (2001) COMPARATIVE EDUCATION, Vol. 37, No. 2, pp. 151-171.

[132] B. S. Chimni, 'Third World Approaches to International Law: A Manifesto', (2006) see note 5 at P.15.

[133] Christian N. Okeke, 'International Law in the Nigerian Legal System' (1997) 27 CAL. W. INT'L L. J. 311.

information in international law-making.[134] Arguably, the imparting of Western ideology to Nigerians and other members of the Third World can be best described as 'instruction' rather than education. This inference is drawn from the colonial relationship between the colonialists and the colonised in Africa. For instance, the colonialists described many practices of Africans during the colonial era as 'obnoxious and unsuitable' for human existence.[135] Also, the negative tagging of such African life styles has led to forceful relegation by the colonial powers.[136] In some instances, European missionaries and Western schools have instructed Africans to neglect their own cultural practices and/or replace them with a European (Christian) life-style.[137] This form of transfer of knowledge (or 'instruction') made African students purely passive and mechanical receivers of abstract notions.[138] In this regard, the students passively received whatever the Western school/scholarship presented to them as the means of forming customs. Arguably, there seemed to have been no correlation between what was taught by the Western education/scholarship and the reality of African society in the formation of customary international law.

The above scenario brings into perspective Christine Schwöbel-Patel's criticism on the teaching of international law.[139] Her analysis exposes the shortcomings within the teaching of international law that reproduce a pattern, which does not encourage

---

[134] Bardo Fassbender and Anne Peters (Eds.) *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012).

[135] Takyiwaa Manuh, 'Law and Society in Contemporary Africa' *in* Phyllis M. Martin and Patrick O'Meara (eds.) *Africa* (3rd edn.) (Bloomington: Indian University Press, 1995) p. 330.

[136] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) see note 33.

[137] Michael Crowder and Guda Abdullahi, *Nigeria: An Introduction to its History* (Longman: London1979).

[138] Antonio Gramsci, *Selections from Prison Notebooks* (1971) see note 11 at p. 35.

[139]Christine E J Schwöbel-Patel, 'I'd like to learn what hegemony means' - Teaching International Law from a Critical Angle. (2013) RECHT EN METHODE VOL. 2 pp 67-84.

critical thinking. Her position also reflects the Nigerian situation as its students are made merely consumers of the Western perspective of International law. Such Western scholarship and ideologies could be exemplified by Gower's articulation of the British legacy in Nigeria. Gower presented statehood, membership of the Commonwealth, indirect rule, and the British style of education in a manner that justifies the interference of Britain in Nigeria.[140] He argues that statehood was among the best things to happen to Nigeria and the rest of Africa. In his lectures and book, he attempted to convince Nigerians that the Western model of statehood is the best form of political grouping, irrespective of how colonial rule imposed boundaries on the people. He concluded that the 'civilising mission' bequeathed British civilisation for the benefit of Nigerians. His articulations and similar Western scholarship attempted to indoctrinate Nigerian and other Third World scholars into the Western concept of customary international law. The training of these scholars emphasises the role of the dominant Western state practices and *opinio juris* in the formation of custom as natural, universal and inevitable. These scholars are expected to pass on the same notion of Western ideologies and practices to future Third World students. Consequently, the dominant Western idea of state practice and *opinio juris* as constituting customary international law, as well as other aspects of international law, are implanted and reproduced in Nigeria and other the Third World states.[141]

---

[140] L C B Gower, *Independent Africa: The Challenge to the Legal Profession* (Cambridge, Massachusetts and London: Harvard University Press and Oxford University Press, 1967).

[141] Richard Falk observing the strong implantation and reproduction of Western ideologies stated that '… the bureaucrat in the new state who is called upon to apply international law often turns for guidance to the most conventional texts produced by European international lawyers. See Richard A Falk, *The New States and International Legal Order* (Leiden-Boston: Brill-Nijhoff, 1966, p.24.

c.) The International Court of Justice

This section samples the United Nations to discuss the reproduction of hegemonic practices through the International Court of Justice, the judicial organ of the United Nations. This choice is based on the fact that its Article 38(1) (b) 'defines' international custom. It provides a good understanding of how international organisations can determine and sustain the constitution of customary international law.

The origination of the United Nations and its organs such as the International Court of Justice resulted from the visions of the victorious states, the Allies, after the Second World War.[142] During this time, most African countries were under colonial rule.[143] The theory and practice of what constituted international law at this time were pre-determined by Western experiences and ideologies,[144] so matters concerning the formation of custom were held to be based on the practices and opinions of Western states, which were regarded as 'sovereigns and civilised' at that time.[145]

The admission of Third World states into the United Nations bound them to the rules of the International Court of Justice and United Nations as a whole. The composition of these state practices and *opinio juris* is greatly influenced by largely powerful Western states (also Russia and China) owing to their technological, economic and

---

[142] The name 'United Nations' was coined by United States President Franklin D. Roosevelt and was first used in the Declaration by United Nations of 1 January 1942, during Second World War. Available at http://www.un.org/en/about-un/index.html [accessed on 30 January 2016].

[143] During the World War II, many African colonies were conscripted into battle. The control over Africa was crucial for the Axis and the Allied Power as Africa's human and material contributions to the war were viewed as decisive factor between victory and defeat. See Judith Byfield et al (Eds.) *Africa and World War II* (New York: Cambridge University Press, 2015) at p. 403.

[144] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), see note 33.

[145] *SS Lotus Case: France v. Turkey (1927)* PCIJ Rep Ser. A No. 10, 18.

military strength.[146] Consequently, the Western position on the traditional custom that is dominated by Western ideas has been co-opted by Nigeria, Third World states and their elites.

The above position on the formation of customary international law has a basis in the international court decisions, as shown in several cases in the International Court of Justice.[147] For example, in *Libya/Malta*, the court stated that 'it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states'.[148] International law practitioners and scholars have also relied on these case laws in Western education and scholarship.[149] Such positions by scholars appear to contribute towards the reproduction of Western ideology centred on state practice and *opinio juris* in the formation of customary international law.

In view of the above examination of the concept of hegemony in relation to customary international law, it has been demonstrated that the formation of customary rules has been dominated and reproduced by Western states and their institutions. However, there has been consistent, widespread resistance to these principles in Nigeria, Africa and other parts of the Third World. Usually, in some cases, the same apparatus of domination such as education, scholarship, and media can be used as agents of

---

[146]Michael Byers, *Custom, Power and the Power of Rules: International Relations and CUSTOMARY INTERNATIONAL LAW* (1999) see note 57.
[147]*North Sea Continental Shelf* ICJ Reports (1969) p. 3, *Military and Parliamentary Activities in and Against Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 97(para. 183,110 (para. 211); *Asylum case*, ICJ Reports (1950) pp. 226, 276-277; *Right of Passage over India Territory*, ICJ Reports (1960) pp.6, 40.
[148] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* ICJ Reports (1985) p. 13, 25.
[149] Anthony D'Amato, *The Concept of Custom in International Law*, (1971), see note 60. Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) THE AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 95, No. 4. Pp. 757-791.

counter-hegemonic tendencies, as will be seen later in this thesis. Such resistance to Western hegemonic practices leads to the next discussion on counter-hegemony. This discussion will introduce the concept of counter-hegemony and non-state actors as its agents of resistance. Specific examples of acts of resistance by non-state actors will be explored in the later part of this thesis.

6. COUNTER-HEGEMONY

Counter-hegemony will be discussed in more depth in Chapter five. Here, a brief introduction to its relevance to the thesis. According to Gramsci, counter-hegemony '…is not a question of introducing from scratch a scientific form of thought into everyone's individual life, but of renovating and making "critical" an already existing activity'.[150] His idea of counter-hegemony emphasises the introduction of new elements in order to critically interrogate the ways in which hegemonic projects succeed or fail.[151] Such a position supports the rising scholarship among critical analysts from the Third World in challenging the hegemonic nature of the international legal system. Third World scholars strive to rethink the models through which international law operates. These Third World scholars place emphasis on the 'actual terrain that power operates on, rather than on some pre-determined ones such as the "nation".'[152] This creates the consciousness to interrogate how issues of class, gender, region, and language affect people; it also helps to question the context

---

[150] Jorge Larrain, *Marxism and Ideology* (London: Macmillan, 1983) p. 84.
[151] Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography' (1998-99) THIRD WORLD LEGAL STUDIES, pp.1-20.
[152] Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography', (1998-99) see note 151.

of local struggles and oppression.[153] In a way, it compels a rethinking of the relationship between the local and global.[154]

In rethinking the local and the global, Third World scholars like those affiliated to TWAIL are readdressing the issues of international law and how it affects the Third World.[155] They seek the incorporation of the Third World into international law so that their people could benefit from the international system.[156] In order to achieve this goal, resistance is employed as a counter-hegemonic tool for restructuring international law. Such a medium seeks to rewrite the 'Eurocentric' history of international law to include the Third World in the international law processes. It emancipates the Third World from Western models of international law, which is allegedly rooted in 'discriminatory sovereignty and universal values, norms and social forms'.[157]

Apart from the collective activities of Third World scholars, there are no limitations regarding who and how the existing principles of (customary) international law can be challenged. Resistance is a complex concept that may be viewed from different

[153] Robert Cox, 'Civil Society at the turn of the millennium' in *The Global Resistant Reader* Louise Amoore (ed.) (2005), see note 44 at p. 103.
[154] Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography', (1998-99) see note 151.
[155] Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Oxford: Oxford University Press, 2015).
[156] Obiora Chinedu Okafor, 'Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective' (2005) OSGOODE HALL LAW JOURNAL, Vol. 43, pp. 171-191 at 186.
[157] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003), see note 111 at pp. 248-249. Third World scholarship insists that the concept of sovereignty is a device to exclude Third World states from participating in international affairs, see Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' see note 34. Also, it is argued that the employment of the term 'universality' in international law bears only Western ideologies and does not incorporate other cultures. For example, the human rights discourse is seen to emphasis Western idea rather than universal idea. In resisting such position, TWAIL calls a rethinking of what could constitute universal rights that would incorporate other cultures. See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance,* see note 111.

perspectives.[158] It is reflected in the daily lives of people in the Third World.[159] One of the ways in which Third World resistance could be employed is through ethical standards that portray the actual behaviour of people as opposed to the imposed European models of morality. Although this form of resistance aims to challenge the generally accepted societal parameters, this does not mean that people are free to act lawlessly.[160] Models within the Third World cultures, which distinguish them and grant them identity within the international setting, guide them.[161]

Resistance to Western domination could also be carried out through the use of violence. This method could be identified during the colonial occupation of Africa in the nineteenth century, which took some form of violence in countries like Kenya.[162] During such resistance, people could be exposed to risks. For example, where a state of emergency was declared by the colonial powers, persistence in pursuing resistance activities could lead to personal harm to those within such an environment. Arguably, direct confrontation with the law enforcement agents of the colonialists often led to injuries or loss of life for the members of the resistant movements. Sometimes, such resistance was ignored, as the positivists continued the practice of creating treaties without regard for the violence and coercion that led to its formation.[163]

---

[158] Jocelyn A Hollander and Rachel L Einwohner, 'Conceptualizing Resistance' (2004) SOCIOLOGICAL FORUM, Vol. 19, No. 4, p.533-554.

[159] Natalie Armstrong and Elizabeth Murphy, 'Conceptualising Resistance' available on http://hea.sagepub.com/content/16/3/314 [accessed on 4 July 2014].

[160] Jocelyn A Hollander and Rachel L Einwohner, 'Conceptualizing Resistance' (2004) see note 158.

[161] Jocelyn A Hollander and Rachel L Einwohner, 'Conceptualizing Resistance' (2004) see note 158 at 537.

[162] Niels Kastfelt, 'African Resistance to Colonialism in Adamawa' (1976) JOURNAL OF RELIGION IN AFRICA, Vol. 8, pp. 1-12.

[163] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law,' see note 34 at p.34.

In spite of the risks associated with resistance, the Third World continues to resist Western domination. This could be expressed in the politics of protest, demonstrations, public statements or declarations, and boycotts.[164] Sometimes, resistance was exemplified through the insistence of indigenous legal systems in the post-colonial states, such as the roles of indigenous leaders in conflict resolution (as will be demonstrated later). Such resistance reinforces the indispensable capacity of non-state actors to participate in both domestic and international law-making to represent Third World interests.

7. NON-STATE ACTORS AS AGENTS OF COUNTER-HEGEMONY

The history of the Peace of Westphalia created a state monopoly over international activities.[165] However, there is increasing scholarship on the shift in the distribution of power in international relations.[166] This is viewed from the cyclical rise and fall of hegemonic powers.[167] It creates an inevitable shift in the locus of power.[168] In a bid to effect this shift, union workers, armed rebels, political dissidents, students and certain intellectuals are now the agents of resistance. In the Third World, resistance by these non-state actors has become inevitable owing to the oppressive nature of the post-colonial states and their Western counterparts.

---

[164] Robert Cox, Gramsci, hegemony and international relations: An essay in method' *in* (Louise Amoore (ed.) *The Global Resistant Reader* (2005) see note 18, at p. 35.

[165] Gabriel Fosson, 'The Evolution of Westphalian Sovereignty' (2003) JOURNAL OF INTERNATIONAL RELATIONS, Vol. 9, pp. 31-41.

[166] Ronald A Brand, 'Sovereignty: The State, the Individual and the International Legal System in the Twenty First Century' (2002) HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW, Vol. 25, pp. 279-295.

[167] Charles A Kupchan, 'The Normative foundations of Hegemony and the Coming Challenge to Pax America' (2014) SECURITY STUDIES, Vol. 23, p. 219.

[168]Charles A Kupchan, 'The Normative foundations of Hegemony and the Coming Challenge to Pax America' (2014) see note 167.

According to Third World critics, the forceful creation of states in Africa allegedly has brought about crises and instability.[169] The inability of these state structures to sufficiently 'perform basic functions of statehood; effective and rational collection of revenue; maintenance of adequate natural infrastructure; and capacity to govern and maintain law and order further result in peoples scepticisms towards receiving these states as their own.[170] This challenges the legitimacy of African statehood and renders Africa as 'an imported state, in trouble'.[171]

In examining the failure and legitimacy of the inherited colonial states in Africa, Makau Mutua opines that these states lack basic moral legitimacy because 'their normative and territorial constructions were of legal and moral nullity'.[172] While the Western states shared certain features such as 'named human population sharing a historical territory, common myths and historical memories, public culture, a common legal rights and duties for all members', the present African states lack these features.[173] This does not necessarily signify that these must be the criteria for statehood, but that an African perspective is necessary. He further elaborates that the West rather than the African peoples decolonised these states. In other words, the African victims of colonisation did not envision the right to self-determination, but the colonialists and elites who controlled the international legal system did.[174]

---

[169] Makau Mutua, 'Why Redraw the map of Africa: A Moral and Legal Inquiry' (1995) see note 41.
[170] J Peter Pham, 'African Constitutionalism: Forging New Models for Multi-ethnic Governance and Self-Determination' *in* Jeremy I Levitt, *Africa: Mapping New Boundaries in International Law*, (Portland: Hart Publishing, 2008).
[171] J Peter Pham, 'African Constitutionalism: Forging New Models for Multi-ethnic Governance and Self-Determination' *in* Jeremy I Levitt, *Africa: Mapping New Boundaries in International Law,* (2008) see note 170 at pp. 184-185.
[172] Makua Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry', (1995) see note 41.
[173] Anthony Smith, *National identity*, (London: Penguin, 1991) at p. 43; Makau Mutua, 'Why Redraw the map of Africa: A Moral and Legal Inquiry' (1995) see note 41.
[174] Mukua Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry', (1995) see note 41.

In agreement with the previous assertions, Pham argues that Africa had its own rich 'cultural- political history of social life', but that these values are poorly represented in the post-colonial African states, which were created out of the arbitrary powers of Europe.[175] This has engendered inter-ethnic rivalries and violence as a consequence of Western imperialism.[176] He further argues that a solution may be possible through the inclusion of non-state actors in civic and political reconstruction.[177] He expects such inclusiveness to provide an indigenous political solution by means of a 'bottom up' approach.[178]

Following the alleged shortcomings of the post-colonial African states as discussed above, diverse non-state actors such as scholars, armed groups, women's transnational networks and other grassroots groups are resisting African states and their Western allies.[179] They challenge the oppressive policies of the African states. These collective activities create opportunities for these non-state actors collectively to present their interests both locally and globally. Also, these collective forms of resistance frustrate the daily functions of the state as commonly seen in boycotts.[180] Such resistance has been described as counter-hegemonic; it represents both violent

---

[175] J Peter Pham, 'African Constitutionalism: Forging New Models for Multi-ethnic Governance and Self-Determination' *in* Jeremy I Levitt, *Africa: Mapping New Boundaries in International Law,* (2008) see note 170.

[176] Robert Blanton et al, 'Colonial Style and Post-colonial Ethnic Conflict in Africa' (2001) JOURNAL OF PEACE RESEARCH, Vol. 38, No. 4, pp. 473-491; Bruce Berman, 'Ethnicity Patronage and the African State: The Politics of Uncivil Nationalism' (1998) AFRICAN AFFAIRS, Vol. 97, pp. 305-341.

[177] J Peter Pham, 'African Constitutionalism: Forging New Models for Multi-ethnic Governance and Self-Determination' *in* Jeremy I Levitt, *Africa: Mapping New Boundaries in International Law,* see note 170.

[178] There are arguments in support of bottom-up system, as it is believed to encourage popular participation. See Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from Bottom up' (2008) JOURNAL OF LAW AND SOCIETY, Vol. 35, Issue 2, pp. 265-292.

[179] Augustine Ikelegbe, 'Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramification of Civil Society for a Regional Resource Struggle' (2001) JOURNAL OF MODERN AFRICAN STUDIES 39, 3, pp. 437- 469.

[180]James H Mittelman and Christine B N Chin, 'Conceptualising resistance to globalisation' *in* (Louise Amoore (ed.) *The Global Resistant Reader* (Routledge: London and New York, 2005) p. 17.

and non-violent confrontations of the state by non-state actors.[181] It has been argued that movements within the Third World, such as peasant rebellions, environmental movements and human rights demonstrations, cannot be isolated from the expansion and renewal of international law as noted earlier.[182]

8. THE THIRD WORLD IN INTERNATIONAL LAW

The term 'Third Word' is used to describe Africa, Asia and Latin America because of their common history of being subjected to colonialism, continuing under-development and exploitation.[183] However, the term 'Third World' has divergent meanings; it may portray the end of a period, new challenges, dreams or possibilities.[184] In some cases, it is believed that the categorisation of the 'Third World' has lost its relevance in the present international system, especially after the end of the Cold War.[185] This perception raises further questions because of the present reality facing the people from the region, stated above. In considering the purported end of the anti-colonial national struggles, Arturo Escobar raised questions concerning the unfulfilled aspirations of 'Bandung Third Worldism', the call for international solidarity, a passion for justice and a demand for a new international legal order by the exploited.[186] He wondered whether these issues have been neglected in the past

[181] James H Mittelman and Christine B N Chin, 'Conceptualising resistance to globalisation' *in* (Louise Amoore (ed.) *The Global Resistant Reader* (2005) see note 190.
[182] Balakrishnan Rajagopal, 'From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions' (2000) HARVARD INTERNATIONAL LAW JOURNAL, vol. 41, no.2, p. 529
[183] B. S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) see note 5 at p.3.
[184] Arturo Escobar, 'Beyond the Third World: Imperial Gobality, Global Coloniality, and Anti-Globalization Social Movements' (2004) THIRD WORLD QUARTERLY, Vol 25, No 1, pp 207-230, 2004 137 at p. 207.
[185] BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) see note 5.
[186] Arturo Escobar, 'Beyond the Third World: Imperial Gobality, Global Coloniality, and Anti-Globalization Social Movements' (2004), see note 184.

by modern capitalist history, and argued that the circumstances that gave rise to this labelling persist.[187] Based on this position, Escobar concluded that the Third World does not belong to a bygone past, but it indicates that modernity can no longer serve the great singularity but rather should accommodate true multiplicity.[188] According to him, this multiplicity is expected to embrace the downtrodden and the giants, the West and the rest.

Besides the above perspective on the term 'Third World', it is believed that the Third World goes beyond a mere geographical location, as popularly conceived. Balakrishnan Rajagopal examined the meaning of 'Third World' from four perspectives.[189] Firstly, he viewed it as an 'ideological category'. This portrays the Third World as a collection of states that practised a dominant bipolar bloc politics through non-alignment. Secondly, the Third World is understood as a 'geopolitical concept' that is differentiated from the First and Second Worlds in political and economic terms. Thirdly, 'Third World' signifies a history associated with the suffering and experience of colonialism and imperialism. Fourthly, it is used as a 'popular representational model'. In this sense, 'Third World' has been used to express certain negative images, such as 'poverty, squalor, corruption, violence, calamities and disasters, irrational local fundamentalism, bad smells, garbage, filth, technological "backwardness" or simply a lack of modernity'.[190]

---

[187]Arturo Escobar, 'Beyond the Third World: Imperial Gobality, Global Coloniality, and Anti-Globalization Social Movements' (2004) see note 184.
[188]Arturo Escobar, 'Beyond the Third World: Imperial Gobality, Global Coloniality, and Anti-Globalization Social Movements' (2004) see note 184 at p. 18.
[189]Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography', (1998-99) see note 151.
[190] Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography', (1998-99) see note 151.

In a later work, Balakrisnan Rajagopal opined that the above perceptions of the term 'Third World', based on states as defined by political economy, historical experience, general backwardness and geography, has expanded to include non-state actors of various kinds, including social movements.[191] This is based on the collective efforts of non-state actors in liberating the Third World from Western domination. It is an indication of Third World resistance and stepping out of the Westphalian structure in international law.[192] Such moves support a power shift in international law. It views the state as only one actor in international affairs amidst other actors. It encourages inclusiveness in order to make a balanced impact on the affairs of the Third World. It makes the term 'Third World' relevant and active. The insistence on the continuous use of the term 'Third World' is also emphasised as being 'crucial to organizing and offering of collective resistance to hegemonic policies' in international law.[193]

9. METHODOLOGY OF TWAIL

The view of 'Third World' as a signifier for resistance is emphasised and generally shared by Third World Approaches to International Law (TWAIL), which revives Third World opposition during the process of decolonisation (which took place from the 1950s through to the 1970s) and enhances such opposition in this period of globalisation.[194] In a bid to formalise this aspiration, a formal structure was set up by

[191]Balakrishnan Rajagopal, 'Counter-hegemonic International Law: Rethinking human Rights and development as a Third World Strategy', (2006) THIRD WORLD QUARTERLY, Vol. 27, No. 5, pp. 767-783 at p. 767.
[192]Balakrishnan Rajagopal, 'Counter-hegemonic International Law: Rethinking human Rights and development as a Third World Strategy', see note 191 at 768.
[193]BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) see note 5.
[194]David P Fidler, 'Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law, (2003) 2 CHINESE J. INT'L L. 29 at p. 29-32.

a group of Harvard law graduates in 1996, which sought the feasibility of TWAIL.[195] TWAIL first emerged from New Approaches to International Law (NAIL),[196] and represents a move from the dominant Eurocentric vision and practices of international law to the idea and vision of international interactions from a non-Western point of view.[197] It reassesses the history of Eurocentric international law and exposes the arrogance, violence and ruthlessness of European rules as well as the destruction of other legal traditions.[198] Currently, this group has developed a theory and methodology that critically analyses different aspects of international law from the Third World point of view.[199] It is aimed at understanding, reconstructing and situating the Third World peoples in international law. TWAIL represents a Third World perspective that is shared in the discourse of this thesis on the formation of customary international law.

TWAIL is recognised as a method in international law.[200] In 2008, TWAIL was formally presented as a theory and method during the workshop held at the University of British Columbia, Vancouver, Canada.[201] TWAIL's methodological assessment was

---

[195] James Thuo Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography' (2011) 3 (1) TRADE L. & DEV. 26. For a detailed history and mission of TWAIL see James T Gathii and TWAIL Conference papers. Before the inception of TWAIL, there were other Third World groups such as New Approaches to International Law, whose mission was to represent the Third World in international law and rewrite the Eurocentric nature of International law.

[196] Usha Natarajan, 'TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring' (2012) 14 OREGON REV. INT'L L. 177.

[197] James Thuo Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliograpghy' (2011) see note 195.

[198] Bardo Fassbender and Anne Peters, 'Introduction: Towards a Global History of International Law' in Bardo Fassbender and Anne Peters (eds.) *The Oxford Handbook of the History of International Law* (2012) see note 134 at p.2.

[199] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both? (2008) INTERNATIONAL COMMUNITY LAW REVIEW 10, pp. 371-378.

[200] Steven Ratner and Anne-Slaughter (eds.) *The Method of International Law* (Washington DC: American Society of International Law, 2014).

[201] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both? (2008), see note 134.

based on whether it, or some sections of it, forms in itself a science of method; or whether TWAIL is instrumental to scientific methods in international law. It was argued that TWAIL might be less of a science of method; however, it has been accepted as a school of thought that has contributed significantly to the science of method in international legal studies.[202] The major contributions of TWAIL centre on rethinking global history. Its critique on global history opposes the alleged Western distortion of international law. Such a '*historically aware methodology'* distinguishes TWAIL from other legal thinking.[203] TWAIL'S historical methodology begins from 'the assumption that it is not possible to isolate modern forms of domination such as governmentality, from the older modes of domination'.[204] It questions the simplistic visions of an 'innocent' Third World and the dominating First World. TWAIL's methodology aims at 'reconceptualising and restructuring' international law.[205]

Arturo Escobar also stated that TWAIL is:

> [D]issolving some of the strong structures of Euro-modernity at the level of theory by favoring flat alternatives; positing the fact that epistemic differences can be – indeed are – grounds for the construction of alternative worlds; calling on scholars and activists to read for difference rather than just for domination;

---

[202] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both? (2008), see note 134 p. 377.

[203] James Thuo Gathi, 'TWAIL: A Brief History of its Origin, its Decentralized Network, and a Tentative Bibliography' (2011) see note 195.

[204] James Thuo Gathi, 'TWAIL: A Brief History of its Origin, its Decentralized Network, and a Tentative Bibliography' (2011) see note 195 at p. 34.

[205] Makua Mutua, 'Critical Race Theory and International Law: The View of an Insider-Outsider' (2000) 45 VILLANOVA LR 851-852.

or imagining that aiming for worlds and knowledge otherwise is an eminently viable cultural-political project.[206]

Furthermore, the contribution of TWAIL to international law is that it aims to transform the language of oppression into a language of emancipation.[207] It seeks a body of rules and practices that reflect and represent the struggles and aspirations of the Third World for the promotion of a true global justice.[208] TWAIL's methodology promotes 'unity in diversity'.[209] Its process is aimed at 'decentring' the international legal discourse derived from Eurocentric sources of ideas and practices.[210] Therefore, TWAIL has developed an expansive, heterogeneous and polycentric network and field of study that enables it continuously to re-invent and shape its central concerns and contributions.[211]

However, Fidler critiqued the heterogeneous nature of TWAIL by stating that it is hard to discern a common mode in TWAIL scholarship in two areas.[212] He based the first observation on the 'kind of tolerance/pluralism to advance (substance)'. The second observation is on 'how to advance tolerance/pluralism in the face of intolerant

---

[206] Arturo Escobar, *Territories of Difference: Place, Movements, Life and Redes* (United States of America: Duke University Press, 2008) pp. 310- 311; James Thuo Gathi, 'TWAIL: A Brief History of its Origin, its Decentralized Network, and a Tentative Bibliography' (2011) see note 195 at p. 38.

[207] Antony Anghie and Bhupinder Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal conflict' (2003) 2 CHINESE J. INT'L L. 77 at 79.

[208] Antony Anghie and Bhupinder Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal conflict' (2003) see note 207 at p. 79.

[209] David P Fidler, 'Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law, (2003) see note 195 at P. 70.

[210] James Thuo Gathii, 'Neocolonialism, 'Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' (2000) 98 MICHIGAN LR 2054; David P Fidler, 'Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law,' (2003) see note 194 at p. 70.

[211] James Thuo Gathi, 'TWAIL: A Brief History of its Origin, its Decentralized Network, and a Tentative Bibliography' (2011) see note 195 at p. 26.

[212] David P Fidler, 'Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law, (2003) see note 194 at p. 70.

hegemony (procedure)'. In spite of these varying modes of TWAIL scholarship, David Fidler identifies an element of consensus among TWAIL members that the post-colonial Third World states create problems in their quest for a post-hegemonic international legal system. Therefore, TWAIL emphasises local and transnational social movements as a means of reform for the benefit of the Third World. Such a position by TWAIL lays a foundation for the need to explore the role of Third World non-state actors as counterhegemonic agents in the formation of customary international law for the benefit of the Third World.

Also, Michael Fakhri made a similar observation concerning the diverse nature of TWAIL's agenda.[213] While acknowledging that TWAIL collectively explores history to pursue an emancipatory international law, he posited that there are points of departure. Fakhri maintained this position by examining the perception of certain members of TWAIL on issues concerning 'capitalism and common good'. For example, he noted that Chimni's perception of 'capitalism, imperialism and international law operate as a triumvirate of semi-autonomous dynamics'.[214] Chimni argued that these concepts are interrelated; neither can each be understood in isolation. He stated that capitalism is always changing and so do its social and political formations; including imperialism and international law. Therefore, one has to take note of imperialism's change from historical imperialism and the exploitation of post-colonial states to global imperialism that is associated with a transnational capitalist class and international institutions.

[213] Michael Fakhri, 'Questioning TWAIL's Agenda' (2012) OREGA REVIEW OF INTERNATIONAL LAW, vol. 14, no. 1, p. 1.
[214] B.S. Chimni, *Capitalism, Imperialism, and International Law in the Twenty-First Century*, (2012) 14 OR. REV. INT'L L. 17.

Furthermore, Fakhri explored Singh's (another TWAIL advocate) view on the relationship between capitalism, the common good and international law by asking whether international law (as a language of hope) can provide a common good in spite of capitalism.[215] Singh argued that the capacity of international law to bring about common good is dependent on traditional writing in a mode of critical inquiry. Despite the diversity of the TWAIL agenda, Fakhri concluded that TWAIL maintains a semblance of its own character through its ever-growing literature.[216]

Elements such as the description of natural or social phenomena, a predictive, logical and testable model/framework, and self-consistency were used to test TWAIL as a theory.[217] In the course of such assessment, Okafor argued that TWAIL performs all of the functions enumerated above. He stated that TWAIL offers 'windows into international law's tomorrow'. Its scholarship imagines and predicts the ways in which international law is likely to behave towards the Third World. The work on *International Law and the Third World: Reshaping Justice* was cited as proof of this assertion.[218] Okafor also argued that TWAIL offers 'logical and testable arguments, propositions and thesis' through incisive critiques. Makau Mutua's incisive critique of international human rights law's fixation on the 'savages-victim-savior' metaphor was employed to support this position.[219] It was based on a 'thorough, systematic and

---

[215] Prahbakar Singh, *Macbeth's Three Witches: Capitalism, Common Good, and International Law*, (2012) 14 OR. REV. INT'L L. 47.
[216] Michael Fakhri, 'Questioning TWAIL's Agenda'(2012) see note 213 at p. 8.
[217] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) see note 199.
[218] R. Falk, B. Rajagopal and J. Stevens (eds.) *International Law and the Third World: Reshaping Justice* (London and New York: Routledge-Cavendish, 2008).
[219] Makua Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42 HARVARD INTERNATIONAL LAW JOURNAL, p. 201.

testable analysis of relevant evidence and literature'.[220] Another example is James Gathii's thorough empirical and conceptual appraisal of 'claims of the emergence of a new doctrine of pre-emptive war under the doctrine of sources'.[221] Also, Okafor described Gathii's appraisal as logically systemic.

Furthermore, TWAIL offers various models/frameworks to describe the behaviour of a related set of social phenomena.[222] Anghie provides an example through the colonial origins of international law.[223] However, on the question of whether TWAIL is a 'logically self-consistent model or framework', it was compared with other theories, such as the Marxist and feminist legal theories. It was opined that these later theories do not agree on everything, but there are central ideas that bind each of the theories, without exception to TWAIL. TWAIL members are united in pursuing committed intellectual and practical struggles to expose, reform and place the Third World within the international legal system.[224] One such struggle lies in TWAIL's persistent argument on the hegemonic nature of post-colonial Third World states. This position contributes to the argument concerning the hegemonic nature of customary international law presented in this thesis.

---

[220] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008), see note 199 at p. 374.

[221] J. T. Gathii, 'Assessing Claims of the Emergency of a New Doctrine of Pre-emptive War under the Doctrine of Sources' (2005) 43 OSGOODE HALL LAW JOURNAL, p. 67.

[222] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008), see note 199 at p. 374.

[223] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004) see note 33.

[224] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) See note 199 at p. 376.

10. CONCLUSION

The concept of hegemony, conceptualised by Antonio Gramsci as including violence and consent, as well as a form of political economic domination, is relevant within the international legal system. This chapter demonstrated the idea of hegemony through the colonial/post-colonial encounter between the West and the Third World, particularly the African continent. Such an encounter demonstrated a form of domination that is motivated by Western ideologies to privilege the West against the Third World. In this chapter, the idea of customary international law was viewed as having emanated from Western experiences and beliefs and was subsequently imposed as universal.

The end of colonisation did not end hegemonic rule; rather, this has been sustained through international organisations, the Western media, scholarship and institutions. However, TWAIL and other Third World non-state actors are resisting Western hegemony and its institutions as the agents of counter-hegemony. The increasing activities of the non-state actors in the international sphere question the monopoly of states over international law making, particularly customary international law. Since these are considered through the Nigerian example, the next chapter introduces Nigeria in this thesis

CHAPTER TWO

INTRODUCING NIGERIA AS A CASE STUDY

1. INTRODUCTION

This chapter introduces Nigeria as a case study in my thesis. Nigeria is an illustrative example of an African state adhering to indigenous political practices. Nigeria retains the two major indigenous political organisations in Africa namely centralised and decentralised systems and, as a case study, Nigeria gives us the opportunity to explore both systems simultaneously in regard to issues of participation in customary international law-making. Nigeria's colonial and post-colonial experiences shared with other Third World countries further highlights the manner in which countries within the Global South have adopted alien customary practices, as well as the reproduction of and resistance to these customary practices.

The historical background of Nigeria as a state, and how state and non-state actors within its domain influenced the nation's domestic and international activities, will be analysed. These activities demonstrate the conflict and complexity between dominant ideologies and resistance by competing actors in Nigeria. Such struggles arose following the imposition of colonial rule and subsequent introduction of the English legal system, which unsettled existing indigenous systems hugely dependent on customary law.[1] This imposition created a platform for foreign domination (portraying hegemonic tendencies) through British colonial power and their indigenous allies.

[1] John Ademola Yakubu, 'Colonialism, Customary Law and the Post-colonial State in Africa: The Case of Nigeria.' (2005) AFRICA DEVELOPMENT 30 (4), pp. 201-220.

Although such platforms successfully served colonial interests, it was challenged by different resistance groups.[2]

Nigeria participates in international law through its contributions to the formation of regional customary practices and beyond through international relations with diverse entities within and outside the African continent. Such contributions are evident in the development of diplomatic relations, although they are seemingly neglected in present international law.[3] Nigeria's involvement in these international activities spans from its pre-colonial history to the present day. Within this period, its participation in the development of (customary) international law has varied depending on its legal personality at any given time.[4] Nigeria had freely participated in and consented to the development of certain international practices in the pre-colonial period prior to the arrival of British colonialists through platforms that differ from the Westphalian model of state actors.[5] However, the events of the colonial era as discussed in this chapter curtailed the participation of these pre-colonial entities in international relations. This was as a consequence of the institution of foreign ideologies in Nigeria. Various events within this period provide indications to justify

---

[2] Elizabeth Isichei, *A History of Nigeria* (New York: Longman Inc., 1983).

[3] U. O. Umozuruike, *Introduction to International Law* (Ibadan: Spectrum Law Pub, 1993). Some African scholars equate the development of these practices to the development of diplomatic practices and other international law concepts from Westphalian/Western origin. Such position challenges the seeming neglect of non-European legal traditions in the development of (customary) international law.

[4] Legal personality (often associated with subjectivity theory) confers rights and duties on an entity under international law. See Roland Portmann, *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010); Rosalyn Higgins, 'Conceptual Thinking about individuals in International Law' (1978) BRITISH JOURNAL OF INTERNATIONAL STUDIES, Vol. 4, Issue 1, p.1. Detailed analyses and the controversies surrounding subject and object theories are contained in chapter four of this thesis.

[5] Christian N. Okeke, 'International Law in the Nigerian Legal System' (1997) 27 CAL. W. INT'L L. J. 324.

Gramsci's notion of hegemony and counter-hegemony in relation to customary international law from the Nigerian perspective.

The end of colonialism (following numerous acts of resistance from Nigerians) ushered in a new political system in the post-colonial Nigerian state which combine both indigenous and English legal systems.[6] Such combination results in conflict arising from the loyalty of the Nigerian people to their indigenous customary practices, as opposed to the received English system which scrutinizes indigenous custom and attempts to align it with the English 'universalised accepted ideology'.[7] Besides these antecedents, there is a continuous desire in the Nigerian state to remain a relevant sovereign actor in international activities by being signatories to international treaties. Such a position pushes the Nigerian state to 'consent' to hegemonic (customary) international law, which is often unfavourable to it and its people.[8] For example, African states, who were not participants in the formation of customary rules during the colonial period, have been bound by customary international law at decolonisation through inferred consents.[9] Resistance by these post-colonial states to some of these unfavourable customary practices through the platform of the United Nations General Assembly has not been very successful.[10] Arguably, such a situation sustains the status of the former colonisers in the position of the ruling class in the international legal system. Unfortunately, the post-colonial states still maintain the

[6] Niki Tobi, *Sources of Nigerian Law* (Lagos: MIJ Professional Publishers Ltd, 1996).
[7] Abdulmumini A. Oba, 'Administration of Customary Law in a Post-Colonial Nigerian State' (2006) 37 CAMBRIAN L. REV. 95.
[8] Christian N. Okeke, 'International Law in the Nigerian Legal System' (1997), see note 5.
[9] Michael Byers, *Custom, Power and the power of Rules: International Relations and Customary International* Law (Cambridge: Cambridge University Press, 1999).
[10] Michael Byers, *Custom, Power and the power of Rules: International Relations and Customary International* Law (1999), see note 9.

interest of their former colonisers by adhering to these rules which are neither favourable to them nor their people. In a bid to circumvent this negative impact on the populace, non-state actors exert different forms of resistance to the Nigerian state. To successfully address these hegemonic tendencies, which flow from the international system and are sustained by the Nigerian state, an inclusive system comprising the state and non-state actors becomes imperative in the making of customary international law to accommodate the Nigerian experience.

The above processes of legal development are not peculiar to Nigeria. Many Third World countries, especially African states, have shared and continue to share similar experiences to Nigeria. African 'indigenous' societies are made up of two major political systems; namely chieftainship or monarchist, and the 'chiefless' or republican.[11] The chieftainship political system operates on a centralized authority with administrative and judicial machineries. In this hierarchical system, the ruler (often referred to as chief) is assisted by a well-established council-of-chiefs that are lower in rank, leaders of economic and political bodies, and family heads.[12] In the decentralized system, which is also referred to as a 'chiefless' or republican society, there is a diffusion of power among certain groups, such as family heads, elders and others within a town or village.[13] These types of indigenous political systems display the elements of a political society, although they are sometimes perceived as

[11] Taslim Olawale Elias, *The Nature of African Customary Law* (Manchester: Manchester University Press, 1956).
[12] Felix Chuks Okoye, *International Law and the New African States* (London: Sweet & Maxwell, 1972).
[13] Vernantius Emeka Ndukaihe, *Achievement as Value in the Igbo/African identity: The Ethics* (Berlin: Lit Verlag, 2006) p. 205

rudimentary governments.[14] The above narratives are explored below, from Nigerian pre-colonial times to contemporary times.

2. PRE-COLONIAL 'NIGERIA'

Pre-colonial Nigeria was not a single entity, but a combination of several independent entities with different cultures, religions and languages.[15] These autonomous entities operated two major indigenous political organisations: a central and a decentralised system. They are still in operation in post-colonial Nigeria, although they are sometimes relegated to the background in terms of state organisation.

a.) Centralised system

The western and northern parts of Nigeria are examples of centralized regions and, given their similarities, this chapter will discuss them together. It should be noted that the western region is dominated by the Yorubas and Binis, while the Hausa and Fulani people are dominant in the north. The political administration of the north, and their local laws and customs, are greatly influenced by Islamic law and religion.[16]

Centralised systems of government as witnessed in Nigeria are often a result of cultural and economic heterogeneity, corresponding to distinctions of wealth and status.[17] In this system, a chief is recognised as the administrative and judicial head within a given territory. The chief often has final economic and legal control over all

---

[14] Felix Chuks Okoye, *International Law and the New African States* (1972), see note 12.
[15] Ema I Orji, 'Issues on Ethnicity and Governance in Nigeria: A Universal Human Rights Perspective' (2001) 25 FORDHAM INT'L L. J. 431, 436; Remigius N. Nwabueze, 'Historical and Comparative Contexts for the Evolution of Conflict of Laws in Nigeria' (2001) 8 ILSA J. INT'L & COMP. L. 31, 35-36.
[16] Enyinna S Nwauche, 'Law, religion and human rights in Nigeria' (2008) 2 AFRICAN HUMAN RIGHTS LAW JOURNAL pp. 568- 598.
[17] Taslim Olawale Elias, *The Nature of African Customary International Law* 1956) see note 11 at p. 11.

the land within a given territory. Such a position is sometimes referred to as territorial ruler, or in other words, Head of State.

However, mindful of the potential for forms of oppression, tyranny or autocracy, certain political apparatus have been put in place to act as checks and balances.[18] Such mechanisms include: king's council of chiefs, queen mothers' courts, sacerdotal officials with a decisive voice in the king's investitures, powerful secret courts, as well as public opinion, which could result in an inevitable devolution of the office of the chief. Yorubaland is often cited as an example in Nigeria in this regard. An erring head chief (*oba*) in the Yoruba community may be requested by his chiefs-in-council to 'open the calabash'.[19] That signifies a voluntary commission of suicide by taking poison or voluntary exile. It has also been noted that in some Yoruba communities, like the Oyo Empire, an official known as *Baṣọrun* pronounces the peoples' and council's rejection of the head chief (*Alaafin*) by proclaiming: 'The gods reject you, the people reject you, earth rejects you'.[20] On hearing such pronouncement, the head chief

---

[18] Yunusa Kehinde Salami, 'The Democratic Structure of Yoruba Political-Cultural Heritage' (2006) THE JOURNAL OF PAN AFRICAN STUDIES, Vol.1, No.6, p. 67.

[19] Taslim Olawale Elias, *The Nature of African Customary International Law* (1956) see note 11.

[20] J.A. Atanda, *The New Ọyọ Empire: Indirect Rule and Change in Western Nigeria 1894-1934* (London: Longman Group Ltd, 1973). This form of checks and balances was practiced between the 17th and the 18th century in the Yoruba speaking area of pre-colonial western Nigeria. The extreme demand by the people for their leader to commit suicide could occur where, for example, a monarch is seen to be cruel or tyrannical due to 'harsh policies'. If members of the monarch's cabinet warn the monarch and later occupy the monarch's palace, but the harsh policies persist, parrot eggs may be presented to the monarch to signifying that they should commit suicide. The first recorded rejection and suicide in history was that of Alaafin Ayibi. While Ayibi had one of his wives bath him, he took offence to this particular wife's joking remark that 'this is all of the man so much dreaded by all'. Ayibi ordered that both his wife's parents be beheaded and brought to him in a calabash (a form of large woody gourd/container). When the heads were brought to him, he ordered the offending wife to open the calabash and identify the heads. At that moment, he told his wife that this is one of the reasons why he was dreaded. This incident was seen as an act of cruelty and it led to the rejection and suicide of Alaafin Ayibi. See Toyin Falola and Akanmu Adebayo, 'Culture, Politics and Money among the Yoruba' (New Brunswick, U.S.A. - London, UK: Transaction Publishers, 2000) p. 85. In post-colonial Nigeria, different strategies, such as petition to the regional government or mass demonstration are employed to depose a tyrannical indigenous ruler. For instance, the failure of a monarch to improve the socio-economic

would have to commit suicide. Such punishment may appear grave and extreme, but it rarely occurs in practice.

Since the safeguards established in the Yoruba area make it very difficult for *Alaafin* to establish an absolute Monarchy,[21] the effective participation of members of the community is guaranteed in matters concerning internal relations. The checks and balances in most Yoruba societies are not mere institutional affairs. In practice, the monarch does not rule single-handily as the 'kingmakers' participate in decision-making.[22] The monarch and other members of the ruling class act as varying forms of check against one another to balance the governance of the kingdom. Also, members of the community liaise with the cabinet (made of chiefs) to contribute to the governance of the community. Where the members of the ruling class act contrary to community expectations, protest usually follows. Such movements act as checks on the monarch who is constantly conscious of the people's active participation in the affairs of governance. The aim is for both the ruler and the ruled to be involved in the running of the kingdom. Such political relationships between the people and the monarch have been described as a reconciliation of the 'autocratic dictatorship and

---

situation of his domain in one the communities in western post-colonial Nigeria led to the demand for the vacation of office for a more 'progressively minded personality' in that town. While such demands, in the form of a meeting, were being made, some youths invaded the venue, removed the clothes of the ruler, including his beads and crown and chased him out of the town. Thereafter, some traditional trees in prominent shrines were cut down to denote the demise of the said ruler. In respect of this deposition, the spokesman of the community stated that the above dethronement was a collective decision of both young and old in response to the 'disastrous, woeful and sorrowful' reign of the deposed monarch. See The Guardian Newspaper, 23 July, 2003. See also, George Ayittey, 'Indigenous African Institutions' (2nd edn.) (Ardsley, NY: Transnational Publishers, Inc., 2006).

[21] J.A. Atanda, *The New Ọyọ Empire: Indirect Rule and Change in Western Nigeria 1894-1934* (1973) see note 20 at p. 17-18; GN Uzoigwe, 'The Warrior and the State in Precolonial Africa' *in* Ali Al Amin Mazrui (Ed.) *The Warrior Tradition in Modern Africa* (Netherlands: E.J. Brill-Leiden, 1977) p. 20.

[22] Adedayo Emmanuel Afe & Ibitayo Oluwasola Adubuola, 'The Travails of Kingship Institution in Yorubaland: a Case Study of Isinkan in Akureland' available on http://www.nobleworld.biz/images/Afe_Adubuola.pdf [accessed on 16 May, 2015].

popular democracy'.[23] The declared effectiveness of the system has also led to it being described as a participatory form of 'democracy'.[24]

Beyond the internal relationships between members of the community, the chiefs within the centralised settings were major actors in economic activities with other parts of Africa and Europe during pre-colonial times. Trade was one of the major international relations at that time, and the chiefs also strongly protected their political positions and sovereignty. The chiefs took special care to protect the land within strict customary law which positioned them as trustees of the land. They could not relinquish any aspect of the land to foreigners without the consent of the people.[25] It is pertinent to note that such a process is guided by a common decision-making mechanism in Africa described as 'consensus', which serves both the weak and the strong.[26] This decision-making mechanism emphasises agreement and compromise among parties rather than the majority rule obtained in most modern democracies.[27] It aims to seek the approval of everyone on every issue pertaining to the community. On that ground, the people's right of participation is protected.

Consensus is not just a political phenomenon; it also serves as a means of social interaction. For example, in interpersonal relationships, consensus is generally accepted as a means of dispute settlement. It is aimed at the restoration of good will

---

[23] Godfrey Tangwa, 'Democracy and Development in Africa: Putting the Horse before the Cart" in *Road Companion to Democracy and Meritocracy* (Bellingham: Kola Tree Press, 1998) p.2.

[24] Yunusa Kehinde Salami, (2006) THE JOURNAL OF PAN AFRICAN STUDIES, vo.1, no.6, p.67.

[25] Kenneth Onwuka Dike, *Trade and Politics in the Niger Delta 1830-1885: An Introduction to the Economic and Political History of Nigeria* (Oxford: Clarendon Press, 1956).

[26] Kwasi Wiredu, 'Democracy and Consensus in African Traditional Politics: A Plea for a Non-party Polity', available at http://them.polylog.org/2/fwk-en.htm [accessed on 22 October, 2014].

[27] Elizabeth Isichei, *A History of the Igbo people* (London-Basingstoke: The Macmillan Press Ltd., 1976).

through a reappraisal of the significant issues for determination in a matter. In this regard, reconciliation is usually employed to ensure that all parties involved in a dispute feel that adequate account has been taken of their views in any proposal of future action or co-existence. Although there are times that a total agreement on an issue may not be achievable in the first instance, it has been argued that:

> Nowhere was African society a realm of unbroken harmony. On the contrary, conflicts (including mortal ones) among lineages and ethnic groups and within them were not infrequent. The remarkable thing, however, is that if and when a resolution of the issues was negotiated; the point of it was seen in the attainment of reconciliation rather than the mere abstention from further recriminations or collisions.[28]

Often times, it has been argued that the consensus form of decision-making is indigenous and most suitable for the African setting. It is believed to truly protect the interests of both the people and the community.

b.) Decentralised system

A decentralized system of governance diffuses power among certain groups. The Igbos, located in the south-eastern part of Nigeria, are often cited as an example of decentralized political organisation. Their socio-political set-up is derived from the family. Families are organised in a cluster of village groups. Each village is independent of the other and has a central market. Although there are some variations in their

---

[28] Kwasi Wiredu, 'Democracy and Consensus in African Traditional Politics: A Plea for a Non-party Polity', see note 26 at p.2

pattern of housing and certain rituals, they share a similar political structure that may be defined as a decentralised system.[29] Some Igbo communities share neighbours such as Ibibios, Ijaws and Efiks, who adopted similar socio-political structures.[30]

Direct democracy was practiced in the pre-colonial Igbo region of Nigeria (to post-colonial period).[31] The political institutions featured popular participation with weighting for experience and ability. This involves widespread participation of family heads, the oldest surviving males of each family.[32] In some places, it is constituted of the council of elders known as *ndi oha* that makes up the community as it is seen in the Owerri area of Igboland.[33] These groups of people are held in high esteem and they carry the responsibility of settling disputes and other functions that arise within the family. The status of these groups of people is relevant in Igbo society as it recognises single individual accomplishment and accountability.[34] These attributes could include material success, wealth resulting from industry and diligence, integrity, and a high level of morals. The presence of these qualities in the life of an individual increases the chance to participate in governance and attainment of leadership positions. Lack of these qualities, on the other hand, could deprive an individual of such positions and responsibilities. In certain circumstances, the Igbo system of

---

[29] Susan Keech McIntosh, 'Pathways to Complexities: an African perspective' in Susan Keech McIntosh (ed.) *Beyond Chiefdoms: Pathways to Complexity in Africa* (Cambridge: Cambridge University Press, 1999) at p. 1

[30] K Onwuka Dike, *Trade and Politics in the Niger Delta 1830-1885: An Introduction to the Economic and Political History of Nigeri*a (1956), see note 25.

[31] Forde, D. and Jones, G.I. *The Igbo and Ibibio Speaking Peoples of Eastern Nigeria* (London: International African Institute, 1950).

[32] Elizabeth Isichei, *A History of the Igbo people* (1976), see note 27.

[33] See generally Elizabeth Isichei, *A History of the Igbo people* (1976), see note 27, particularly pp. 21-24

[34] Chinyere Ukpokolo, 'Ezigbo Mmadu: An Anthropological Investigation into the Concept of a Good Person in Igbo Worldview' (2010) LUMINA, Vol. 21, No.2, p. 1.

governance has been described as a gerontocracy, however, not all elderly men participate equally.[35]

Age grades and secret societies are also important political institutions in the Igbo society.[36] These are groups of people who fall within a close range of age. They are usually dominated by young men and perform specific functions within the community. For instance, the age grades execute decisions in the community made by the council of elders. Furthermore, there are women groups that also perform certain functions in the community; the Association of Daughters (*Umuada*) and the Association of Wives (*Alutaradi*), for example.[37]

During the pre-colonial period, the activities of the people in Igbo society were not limited to their communities alone. For example, the age grades, secret societies and titled men formed network systems to participate in cross border trade involving other Africans and Europeans. This could be referred to as international trade. The intricacies of these networks have demonstrated the complexity of Igbo society.[38] It has been argued that these trade networks expanded across Igbo society.[39] It was observed that this expansion was not regulated by a central authority but in some instances through religious institutions. For instance, the Arochukwu area (one of the

---

[35] Elizabeth Isichei, *A History of the Igbo people* (1976) see note 27.

[36] Ikechukwu Okodo, 'The Igbo Age Grade System and African Traditional Religion', (2012) INTERNET AFRREV: AN INTERNATIONAL ONLINE MULTI-DISCIPLINARY JOURNAL, Vol. 1 (3) pp. 70-78.

[37] Emma Nina Mba. 1982. *Nigerian Women Mobilised: Women's Political Activity in Southern Nigeria, 1900-1965 (*Berkeley: University of California Press, 1982); Theodora Akachi, 'Traditional Women's Society: Implications for the female writers' (1990) AFRICAN LANGUAGES AND CULTURES, 3:2, pp. 149-165.

[38] Susan Keech McIntosh, 'Pathways to Complexities: an African perspective' *in* Susan Keech McIntosh (ed.) *Beyond Chiefdoms: Pathways to Complexity in Africa* (1999) see note 29 at p. 11.

[39] David A Northrup, *Trade without rulers: Pre-colonial economic development in South-eastern Nigeria* (Oxford: Clarendon Press, 1978).

Igbo communities) operated an *ibini okpa* oracle whose powers included resolving disputes and settling warfare among others. Arochukwu people were also known to have travelled wide and established trade alliances in interested territories. Furthermore, it was argued that the trading activities of the Arochukwu developed 'a specialised decision-making apparatus that functioned parallel with the normal, sequential hierarchy of the Igbo village groups.'[40] These specialised decision-making village sub-groups maintained considerable complexity without recourse to vertical control hierarchies.

The decentralised system that was obtainable in Igbo society has remained in existence even after Nigerian independence, although it appears relegated to the background in terms of European model state governance. However, this indigenous system appears effective in Igbo society despite the criticisms of alleged lack of cohesion and inferiority to other political structures, such as centralised monarchies and Western state systems.[41] Modern ethnographers have argued that there is no basis on which to compare the centralised and decentralised socio-political organisations.[42] According to this view, there is no universal criterion on which to make such comparisons, and scholars who make such comparisons are usually influenced by their own conditioning. In such scenarios, these scholars seem to favour their own customs, referring to them as a standard while placing alien cultures as inferior to theirs. In this regard, it is cautioned that 'No human community is any

---

[40] Susan Keech McIntosh, 'Pathways to Complexities: an African perspective' in Susan Keech McIntosh (ed.) *Beyond Chiefdoms: Pathways to Complexity in Africa* (1999) see note 29.
[41] Kenneth Onwuka Dike, Trade and Politics in the Niger Delta 1830-1885: An Introduction to the Economic and Political History of Nigeria (1956) see note 25.
[42] M. J. Herskovits, *The Myth of the Negro Past* (New York: Beacon Press, 1941).

lower, earlier, or more ancient than any other. All represent highly specialised human adaptations, the product of millennia of traditionalized cultural life.'[43] Similarly, some African writers, such as Onwuka Dike and Taslim Elias, posit that each structure effectively serves the needs and aspirations of the community concerned. Dike stated that there are deep, fundamental unities in religious and cultural spheres, as well as fraternity in matters of politics and economics beneath the fragmented authority obtainable in the Igbo society.[44] Furthermore, Taslim Elias' work on *The Nature of African Customary Law* aimed to place different Western and African systems on a level playing field, since each society has been able to provide for the rights and duties of the people in each society.[45]

As observed above, Nigerian pre-colonial autonomous entities, both centralised and decentralised, maintained different degrees of interaction with other parts of the world, mostly centred on trade, prior to British colonization.[46] During this period, the nature of these entities did not matter in the international system. Although they might be regarded as non-state actors in the present international legal order according to the Westphalian criteria of statehood,[47] they had international dealings

---

[43] V. Gordon Childe, *Social Evolution* (London: Watts & Co., 1951).

[44] Kenneth Onwuka Dike, Trade and Politics in the Niger Delta 1830-1885: An Introduction to the Economic and Political History of Nigeria (1956) see note 25 at p 44

[45] Taslim Elias' work on *The Nature of African Customary Law* (1956), see note 11.

[46] Basil Davidson, *The African Past: Chronicles From Antiquity to Modern Times* (New York: Grosset and Dunlap, 1967).

[47] Some scholars argue that pre-colonial 'Africa' was a world of societies rather than states, which is recognisable to anthropology rather than in international relations. See Robert H. Jackson, *Quasi-states: Sovereignty, international relations and the Third World* (Cambridge: Cambridge University Press, 1990) p. 67. However, it has been argued that pre-colonial Africa was made up of states, but they differed from Westphalian state system. For instance, pre-colonial African states were less interested in territorial influence which has been attributed to the vast spans of land mass within the continent compared to their European counterparts. In the pre-colonial Africa, political control has to be won rather than by administrative fiat. See Jeffrey Ira Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton: Princeton University Press, 2000). For state creation in

with diverse actors. These entities interacted with both states and non-states (in a Westphalian sense) in pursuit of their needs.[48] For instance, records of international relations between the pre-colonial north-eastern regions of Nigeria and the region of Segu (known as modern Mali) attest to such action.[49] Also, the Benin Empire in the southern part of Nigeria had extensive relations with the Portuguese.[50] However, the participation of pre-colonial Nigeria (and for that matter the majority of the Global South) in the international sphere was seemingly neglected in classical international law as European practices attained a universal status.[51] These pre-colonial entities were regarded as backward and primitive compared to the European states that formed the centre of the international community. They were said to lack the capacity to employ serious diplomatic pressure or engage in international relations. Such negative perception, as argued in this thesis, contributed to the exclusion of pre-colonial Nigerian entities in the family of nations.[52]

The trade relations with pre-colonial Nigerian entities and other international actors from Europe assumed a different dimension when their European counterparts sought to gain greater control. Following this turn of events and news from around the world concerning the British conquest of other territories, many pre-colonial Nigerian rulers perceived the threats of colonialism and attempted to resist it.[53]

---

present international law, see James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 2007).

[48] Christian N. Okeke, 'The Use of International Law in the Domestic Courts of Ghana and Nigeria' (2015) 32 ARIZ. J. INT'L & COMP. L. 371.

[49] Basil Davidson, *The African Past: Chronicles from Antiquity to Modern Times* (1967), see note 46.

[50] Basil Davidson, The African Past: Chronicles from Antiquity to Modern Times (1967), see note 21.

[51] Felix Chuks Okoye, International Law and the New African States (1972), see note 12.

[52] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP, 2005).

[53] Elizabeth Isichei, *A History of Nigeria* (New York: Longman Inc., 1983).

3. COLONISED NIGERIA

The Portuguese (explorers and traders) were the first Europeans to interact with pre-colonial Nigeria through the Atlantic slave trade, which they monopolized from the 15th to mid-16th centuries.[54] The monopoly enjoyed by the Portuguese was later challenged by other European powers. British explorers, such as Mungo Park, Hugh Clapperton, and Richard and John Lander provided information about Nigeria to the British government.[55]

Following the abolition of the slave trade in 1807, Britain introduced another form of relationship with Nigeria centred on the procurement of raw materials in response to the industrial revolution in Britain.[56] The new economic interest also involved political control. In 1851, there was a gunboat attack on Lagos by Britain, which resulted in loss of sovereignty and a subsequent annexation of Lagos as a Crown colony in 1861.[57] The colonial conquest then extended to other parts of Nigeria.

The arrival of George Taubman Goldie (a British administrator) in the Niger Delta region of Nigeria changed the mode of imperial trade and political activities in Nigeria.[58] Goldie sought to protect Britain's imperial interests by halting competition from German and French traders through the imposition of trade policies in the region. In 1879, he brought all British trading firms together to form a single company

---

[54] Cyril Akobundu Ndoh, *Imperialism and Economic Dependency in Nigeria* (2nd edn.) (Owerri: Achugo Publications, 2000).

[55] Michael Crowder and Guda Abdullahi, *Nigeria: An Introduction to its History* (London: Longman Group Limited, 1979).

[56] Elizabeth Isichei, *The Ibo People and the Europeans* (London: Faber and Faber Ltd, 1973).

[57] F. Abiola Irele and Biodun Jeyifo (Eds.) *The Oxford Encyclopedia of African Thought*, Volume 1: Absolutism-Imperialism (Oxford: Oxford University Press, 2010). p. 84.

[58] Jeremiah I. Dibua, *Modernization and the Crisis of Development in Africa: The Nigerian Experience* (Aldershot-Burlington: Ashgate Publishing Limited, 2006).

called United Africa Company (UAC). Later, in 1882, following a reorganization, he changed the name of the company in order to halt any other form of competition from French trading firms. He signed many treaties with different indigenous chiefs which empowered him to interfere in their internal politics during this period.

The Berlin conference, which arose from the scramble and partition of Africa between 1884 and 1885, energised further colonial ambitions. Goldie sought to have full control of the political and administrative activities of the entities that made up pre-colonial Nigeria. In this effort, Goldie obtained a royal charter for his company from the British government in 1886.[59] The charter granted his company political and administrative authority over areas where treaties of 'protection' had been signed. The charter also pursued further British imperial interests through the conquest of new territories. This led to another change to the company's name to Royal Niger Company (RNC). Following these events, Britain strengthened its control over the Nigerian territories by signing more treaties and stopping any lingering activities by Germany and France. Such economic security has been viewed as the major interest of colonial powers in Nigeria and other African states.[60]

Between 1902 and 1903, following the conquest of Northern Nigeria by the British government, Frederick Lugard, a British colonial administrator, declared full authority of the British Crown over lands in northern Nigeria, using the following words:

---

[59] Jeremiah I. Dibua, *Modernization and the Crisis of Development in Africa: The Nigerian Experience* (2006) see note 58.

[60] Matthew Craven, 'Colonialism and Domination' *in* Bardo Fassbender and Anne Peters (eds.) *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) at p.862; Curtis A Keim, 'Africa and Europe before 1900 *in* Phyllis M Martin and Patrick O'Meara, *Africa* (3rd edn.) (Bloomington: Indiana University Press, 1995) p.115.

> … The Fulani in ancient times under Dan Fodio conquered this country. They took the rights to depose kings and create kings. They, in turn, have come into the hands of the British. All these things which I have said the Fulani by conquest took the right to do, now pass to the British … the Government in future holds rights over land which the Fulani took by conquest from the people and, if the Government requires land, it will take it for any purposes.[61]

Although customary rights over lands resided with the people of northern Nigeria, the above statement by Lugard appeared to grant an absolute right to lands to the British government during colonial rule. The colonial government reserved the right to take land for any purpose, irrespective of the customary owner's concern, as observed in the above statement. In furtherance of this degree of control, and their disregard to resultant hardship caused to the peasantry, European traders made more demands for land. For example, the Liverpool Chamber of Commerce requested a system of land tenure that would give greater security, possibly a freehold of some nature, to enable them (European traders) to develop their interests more rapidly.[62]

Nigerians did not welcome the above British activities, including forceful acquisition of lands, unfavourable treaties and trade policies, due to the economic and socio-political hardship it caused them.[63] They engaged in numerous acts of resistance. For example, in March 1893, Ibadan, a city in the western part of Nigeria, refused to sign

---

[61] Northern Nigeria Annual Report, 1902 Appendix 111,164; M.G. Yakubu, *Land Law in Nigeria* (Oxford: Macmillan Education, 1985) at p. 15

[62] M.G. Yakubu, *Land Law in Nigeria* (1985) see note 61 at p. 17.

[63] Michael Crowder and Guda Abdullahi, *Nigeria: An Introduction to its History* (1979) see note 55. Although there were resistances to the occupation, such oppositions were often neglected in Western scholarship as observed in the cause of this research. Some of these resistances, which have continued even after independence, will be explored in chapter six.

any agreements with G. Carter, a British colonial official in order not to lose their freedom and sovereignty to the British government.[64] In 1902, in the Umuahia area of south-eastern Nigeria, the people vacated their homes and sent a message to the British colonial administrators that they would never give in; that the British could destroy their homes if they wanted to.[65] Also, King Koko of Nembe in the Niger Delta area of southern Nigeria, protested against trading policies of the Royal Niger Company and in 1894 began to plan a war against the British colonialists.[66] In early 1895, King Koko and his forces destroyed the Royal Niger Company's premises, warehouse and killed a number of indigenous African members of staff. In the British counter attack, he refused to negotiate or meet with the representative of the British company. He later went into self-exile and died (allegedly by suicide) in 1898. King Koko's status as a resolute hero admired by his people and neighbours earned him the nickname 'restless shark'. King Koko's resistance created sufficient fear among the British colonisers that they stationed large forces in the Niger Delta to prevent the occurrence of similar resistance.[67] Despite these and other numerous resistances, the people of Nigeria were overpowered mostly through the use of military force by Britain to establish control.[68] Between 1851 and 1914, the entire territory called Nigeria was brought under British colonial rule. In 1914, the Northern and Southern Protectorates of colonial Nigeria were brought together as one entity called Nigeria,[69]

---

[64] J. A. Atanda, *The New Oyo Empire: Indirect Rule and Change in Wester Nigeria 1894-1934* (1973), see note 20 p.51.
[65] Elizabeth Isichei, *A History of the Igbo People* (1976) see note 27.
[66] Toyin Falola, *Colonialism and Violence in Nigeria* (Bloomington: Indiana University Press, 2009).
[67] Toyin Falola, *Colonialism and Violence in Nigeria* (2009) see note 66 at p. 44.
[68] Elizabeth Isichei, *A History of the Igbo People* (1976), see note 27 at p. 368.
[69] The name Nigeria was first coined by Miss Flora Shaw (who later married Fedrick Lugard, the British colonial administrator in Nigeria) and was published in The Times of London on 8 January 1897 to replace the name 'Royal Niger Company Territories'. The name Nigeria was said to have been derived

and has remained so in spite of the 1967-70 civil war that threatened to divide the state.[70]

The practices of European states and companies during this period are hegemonic in a Gramscian sense of the word. Both slave trade and so-called 'legitimate' trade (which dealt in cash crops for export to Britain) incorporated pre-colonial and colonial Nigeria into the world capitalist economy in a subjugated position.[71] The British colonial rule in Nigeria destroyed indigenous political institutions and social structures and created a new political structure through which Nigerians were indoctrinated into a world system built on British capitalist ideology aimed at serving British interests.[72] It has been contended that the idea of colonial domination in Nigeria (and other parts of Africa and the Third World) could not be totally justified by might or civilisational superiority alone, but had to be legitimised through the idea of bringing 'progress' to the people of Nigeria.[73] Such 'progress' consisted of the promise to liberate the peasants as well as improve Nigerians by raising their educational, political and social status to the standard of the modern world. For example, British missionaries sent negative reports describing human sacrifices and domestic slavery to their native country.[74] These reports were often exaggerated and functioned as propaganda to justify their occupation of Nigeria.[75] These missionaries played significant roles in

---

from Niger (a river in Nigeria). See M.D.W. Jeffreys, 'Niger: Origins of the World' (1964) CASHIERS D'ETUDES AFRICANES, Vol. 4, No. 15, pp. 443-451.

[70] Ntieyong U. Akpan, *The struggle for Secession, 1966-1970: A Personal Account of Nigerian Civil War* (London: Frank Cass, 1971).

[71] Cyril A. Ndoh, *Imperialism and Economic Dependence in Nigeria* (2nd edn.)(2000) see note 54.

[72] Cyril A. Ndoh, *Imperialism and Economic Dependence in Nigeria* (2nd edn.) (2000) see note 54 at p.4.

[73] Brian Larkin, *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (USA: Duke University Press, 2008) p.23.

[74] Michael Crowder and Guda Abdullahi, *Nigeria: An Introduction to its History* (1979), see note 55.

[75] Michael Crowder and Guda Abdullahi, *Nigeria: An Introduction to its History,* see note 55 at p. 135.

backing colonialism in different parts of Africa by suppressing African culture and facilitating colonial and racist indoctrination among African people.[76] This is in line with the civilizing mission, as discussed in the previous chapter.[77]

There is a diverse opinion on how such a civilizing mission was received in Nigeria and other parts of the Third World.[78] Recent scholarship argues that colonial rule operated through the medium of governmentality, a process whereby rule is exercised through the creation of a space for the free will and the incorporation of individuals who consent to act within this space rather than solely brutal subjection.[79] Such position aligns with Gramsci's notion of hegemony explored in chapter one of this thesis. Gramsci's notion of hegemony emphasises the maintenance of control that is achieved through *consent*, rather than via violence or coercion through the institution of a hegemonic culture/ideology by a ruling class.[80] Such ideology matures and spreads its own values and norms so that these values and norms appear rational to the populace. However, it has been contended that force was employed in order to elicit consent where voluntary consent was lacking.[81] In the institution of the British ideology within the Nigerian territory, 'consent' is made complex. British ideology was centred on an imperialistic culture.[82] It disrupted the pre-colonial Nigerian system of

---

[76] Maina wa Kinyatti, *Thunder from the Mountains: Mau Mau Patriotic Songs* (London-Kenya: Zed Press & Midi-Teki Publishers, 1980).
[77] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) see 52.
[78] Brian Larkin, *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (2008), see note 73.
[79] Gyan Prakash, *Another Reason: Science and the Immigration of Modern India* (Princeton: Princeton University Press, 1999); David Scott, *Refashioning Futures: Criticism after Postcoloniality* (Princeton: Princeton University Press, 1999); Brian Larkin, *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (2008) see note 73.
[80] Antonio Gramsci, *Selections from Prison Notebooks of Antonio Gramsci* (edited and selected by Quintin Hoare and Geoffrey Nowell Smith) (London: Lawrence and Wishart, 1971).
[81] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) see note 52.
[82] Cyril A. Ndoh, *Imperialism and Economic Dependence in Nigeria* (2nd edn.) (2000) see note 54.

production and subordinated it to the needs of colonial economic zones. It created trade policies that promoted the export of raw materials from Nigeria and the import of British manufactured goods. In order to secure this imperialist culture in Nigeria, Britain also interfered with indigenous political systems and their social frameworks. Such interference is noted to have created tension arising from the desire to preserve 'native institutions' in opposition to the transformation of 'native institutions' radically to conform to universalized British (European) ideologies.[83] It is important to note that during this period, Britain controlled Nigeria's international affairs following the treaties that surrendered the sovereignty of Nigeria to the British domain and trade policies that secured British monopoly.

In the midst of the above competing tendencies, Britain devised some strategies to impose their ideologies on Nigeria.[84] Such strategies especially in the area of institution of trade policies and political organisations by the British colonisers, deprived Nigeria its legal capacity. These activities impeded the participation of colonial Nigeria in the making of (customary) international law during colonisation. The colonial domination succeeded in preparing colonial Nigeria to inherit hegemonic customary international law (at de-colonisation).[85] Despite the divergent views on the applicability of customary international law in Nigeria, arguably post-colonial Nigeria became a legitimising instrument for the acceptance of (hegemonic) customary international law, especially through section 12 of the Constitution of the Federal

[83] Brian Larkin, *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (2008) see note 73.
[84] TWAIL scholarship asserts that the positivist theory devised legal means to stripe non-Europeans of their legal personality. It is asserted that such act was aimed to hinder Non-Europeans from participating in the making of international law. See Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) HARVARD INTERNATIONAL LAW JOURNAL, Vol. 40, No. 1, p. 1.
[85] Christian N. Okeke, 'International Law in the Nigerian Legal System' (1997) see note 5.

Republic of Nigeria, 1999.[86] This section seeks to make international law enforceable in Nigeria. Although the section did not expressly mention customary international law, its application of customary international law in Nigeria has been inferred from this section.

Colonial domination brought the entire pre-colonial Nigerian group of diverse entities into the European model state called Nigeria. During the colonial period, Britain introduced a system of indirect rule to enforce colonial interests in Nigeria.[87] Indirect rule is a system of governance that employed indigenous collaborators/chiefs as British local representatives in the execution of British projects in Nigeria.[88] Such forms of rule imposed a British structure of governance in colonial Nigeria, while retaining some 'Nigerian' indigenous customary practices which were not in conflict with British ideology and interests.[89] Indirect rule was instituted in order to pre-empt inevitable friction between British rule and indigenous systems.[90] It was founded on the European stereotypical assumption that African societies possess some kind of rudimentary kings.[91] Indirect rule was successful in the northern part of Nigeria due in

---

[86] E. A. Oji, 'Application of Customary International Law in Nigerian Courts' (2011) NAILS LAW AND DEVELOPMENT JOURNAL, 1 (1) p. 151.

[87]Anthony I. Nwabughuogu 'The Role of Propaganda in the Development of Indirect Rule in Nigeria, 1890-192 (1981) THE INTERNATIONAL JOURNAL OF AFRICAN HISTORICAL STUDIES, Vol. 14, No. 1, pp. 65-92.

[88] Michael Crowder, 'Indirect Rule-French and British STYLE' AFRICA: JOURNAL OF THE INTERNATIONAL AFRICAN INSTITUTE, Vol. 34, No. 3 (Jul., 1964), pp. 197-205.

[89] Robert L. Tignor, 'Colonial Chiefs in Chiefless Societies' (1971) THE JOURNAL F ODERN AFRICAN STUDIES, 9, 3, pp.339- 359.

[90] 'Indirect rule in West Africa, The Round Table' (1948) THE COMMONWEALTH JOURNAL OF INTERNATIONAL AFFAIRS 39:153-156, 125-130.

[91] Terrence Renger, 'The Invention of Tradition in Colonial Africa' *in* Roy Richard Grinker, Stephen C. Lubkemann and Christopher Steiner (eds.), *Perspectives on Africa: A Reader in Culture, History and Representation* (2nd edn.) (West Sussex: Wiley-Blackwell, 2010) p. 450.

large part to the indigenous central structure of political organization.[92] Such centralised structures created an enabling platform for the indigenous leaders to act as intermediaries between British colonial authorities and the people of the northern part of Nigeria. However, the system of indirect rule in the southern part of colonial Nigeria did not achieve success as it did in the northern part of colonial Nigeria. The system of indirect rule in this part of colonial Nigeria has been described as 'hopelessly unsuitable to the needs of the colonial state'.[93] The failure of the system was a result of the decentralized system of governance pre-dominant among the Igbos within this region. The system of checks and balances, pursuit of consensus by protracted deliberations, the use of religious sanctions, as well as small scale units of political organization, rendered indirect rule impracticable.[94]

Some southern collaborators were granted warrants to act as British local representatives in the absence of a centralised structure of governance as obtained in the north. Such appointments earned them the title 'warrant chiefs'.[95] The appointment of only men as warrant chiefs contributed to the creation/reinforcement of a patriarchal society, as well as a hierarchy in leadership.[96] The installation of warrant chiefs in Nigeria was made necessary for the effective administration of British rule, especially in south-eastern Nigeria (occupied pre-dominantly by the Igbo

---

[92] Adebayo Oyebade (ed.), *The Foundations of Nigeria: Essays in Honour of Toyin Falola* (Trenton-Asmara: Africa World Press, 2003). Particularly p. 17.

[93] Elizabeth Isichei, *A History of the Igbo People* (1976), see note 27 at pp. 142-143.

[94] Elizabeth Isichei, *A History of the Igbo People* (1976) see note 27 at p. 142-143.

[95] Joseph O. Asagba, *The Untold Story of a Nigerian Royal Family: The Urhobo Ruling Clan of Okpe Kingdom* (New York-Lincoln-Shanghai: IUniverse Inc., 2005).

[96] David Pralten, The Man-Leopard Murders: History and Society in Colonial Nigeria (Edinburgh: Edinburgh University Press, 2007).

people). Most often the warrant chiefs held magisterial powers and held court sessions for criminal and civil hearing.[97]

The appointments of warrant chiefs in the Igbo regions were not as simplistic as suggested by some scholarship.[98] The Igbos were described as the 'most troublesome' resistant groups in Nigeria by British colonial authorities.[99] The continuous agitations underlined their loss of confidence in British authority. Uncertain of British intentions for the office of warrant chiefs, the Igbos presented people of ill repute in the community.[100] Arguably, such choices could have encouraged regular confrontation with the warrant chiefs by the people within this region. However, abuse of power by the warrant chiefs who might have suddenly attained power that they did not possess prior to their appointment have been viewed as the immediate cause of resistance as noted in the case of the 'Aba Women's War' – an act of resistance which is explored in more depth in chapter five.[101]

The diversity of the regions of Nigeria and its complexities created tensions in the institution of European practices. In spite of resistance to indirect rule systems by southern Nigeria, the people in this region embraced Western education as a means of liberation from colonialism.[102] The people of southern Nigeria rapidly transformed and adopted European civilization. Their acquisition of Western education became

---

[97] Joseph O. Asagba, *The Untold Story of a Nigerian Royal Family: The Urhobo Ruling Clan of Okpe Kingdom* (2005) see note 94.
[98]Elizabeth Isichei, *A History of the Igbo People* (1976), see note 27.
[99] E. A. Steel, 'Exploration of Southern Nigeria' (1910) JOURNAL OF THE ROYAL UNITED SERVICES INSTITUTION 54:386, PP. 433-449. See particularly the discussion at p. 446.
[100]Elizabeth Isichei, *A History of the Igbo People* (1976), see note 38 at p. 45. Sometimes, the warrant chiefs were handpicked. See Joseph O. Asagba, *The Untold Story of a Nigerian Royal Family: The Urhobo Ruling Clan of Okpe Kingdom* (2005) see note 94.
[101] Elizabeth Isichei, *A History of Nigeria* (1983), see note 53.
[102] Elizabeth Isichei, *A History of the Igbo People* (1976), see note 27.

disadvantageous to Britain and thus represented a failure of British colonial rule, as these groups of people contested colonial decisions with an unending series of petitions. This southerners' attitude of resistance created resentment among the British and was stereotyped by the British administrators as the antithesis of what the British wanted the northerners to become.[103] Based on this, the British aimed to preserve native powers in the north, forbade missionary activities in Muslim areas and restricted Western education. British officers were instructed to shun violent behaviours in the north and their wives were requested to veil themselves in order not to offend religious sensibilities.[104] In the 1930s, the urge to preserve indigenous systems in the northern part of Nigeria led J. H. Carrow, a British resident in Kano (northern Nigeria) to attempt a ban on the playing of the British national anthem in that zone.[105] This was to reassure the emir (indigenous ruler) of the 'independence' of northern Nigeria.

The difference in the application of indirect rule systems in Nigeria created lasting consequences. Rapid and wide adoptions of British lifestyle elements, such as western education, in the southern part of Nigeria have been sustained in the post-colonial era. It is believed that this led to the occupation of administrative offices in the civil services mostly by those from the southern part of Nigeria.[106] Besides this, Nigerian individuals who have acquired western forms of education have continued to resist

[103] Brian Larkin, *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (2008) see note 73.
[104] Mahmood Yakubu, *Aristocracy in Political Crisis: The End of Indirect Rule and the Emergence of Party Politics in the Emirates of Northern Nigeria* (Aldershot, UK: Averbury, 1996).
[105] Brian Larkin, *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (2008) see note 73.
[106] Brian Larkin, *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (2008) see note 73.

the imposition of hegemonic (customary) international law. For instance, Taslim Olawale Elias, (who had his legal training in England, including the attainment of a PhD, being Barrister-at-law of the Inner Temple, and Simon Research fellow in the University of Manchester) wrote extensively on the participation of pre-colonial Nigeria and other African societies in the making of (customary) international law. He argued that these contributions by diverse pre-colonial Nigerian and African actors were not inferior to that of Europeans in the making of customary international law.[107] He stated that each legal system is valid for the type of society and species of task for which it is designed. Scholarly input such as this set the background on which tools of resistance were applied by non-state actors in Nigeria, as discussed in the last chapter of this thesis. It re-establishes the place of the Third World in the making of customary international law in the current international legal system.

Despite the diversity in application of indirect rule in different regions of colonial Nigeria, the installation of warrant chiefs in the south and other indigenous administrators enabled the effective exploitation of Nigerian economic resources and indoctrination of Nigerians to British ideology, while neglecting indigenous institutions, culture and customary laws.[108] For instance, Nigerian native customs were (and have remained) subject to a 'repugnancy test'.[109] This is a process of determining the abolition/rejection of Nigerian indigenous customary practices on the ground that they appear obnoxious and inhuman.[110]

---

[107] Taslim Olawale Elias, *The Nature of African Customary Law* (1956), see note 11.
[108] Abdulmumini A. Oba, 'Administration of Customary Law in a Post-Colonial Nigerian State' (2006) 37 CAMBRIAN L. REV. 95.
[109]Akintunde Olusegun Obilade, T*he Nigerian Legal System* (Ibadan: Spectrum Law Publishing, 1979).
[110] Onyeka Igwe, 'Repugnancy Test and Customary Criminal Law in Nigeria: A time for Re-Assessing Content and Relevance'. Available at http://ssrn.com/abstract=2528497 [accessed on 15 June, 2016].

The repugnancy doctrine was evidenced in 1931 in the case of *Eshugbaye Eleko v. Government of Nigeria,*[111] where Lord Atkin stated that:

> The court cannot itself transform a barbarous custom into a milder one. If it stands in its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience.[112]

There is no clear definition or explicit principle for determining the repugnancy test. This makes the test subject to different interpretations and value systems in various courts in Nigeria.[113] In most cases, the judges are influenced by English common law, as they were trained in Britain and other Western states.[114] They argue that the basis for this rule is to make Nigerian indigenous customs conform to the 'universal' concept of what is 'good, just and fair'.[115] This is typified in the Nigerian Supreme Court case of *Okonkwo v. Okagbue* where the court defined the meaning of public policy as an aspect of the repugnancy test by stating that it:

> must objectively relate to contemporary mores, aspirations and sensitivities of the people of this country and to the consensus values in the civilised international community, which we share.[116]

Following the above definition, it has been argued that such a ruling is:

---

[111] (1931) AC 262.
[112] (1931) AC 262 at p.273.
[113] Bethel Chuks Uweru, Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism' (2008) AFRICAN RESEARCH REVIEW, VOL. 2 (2), pp.286-295 at 292.
[114] Christian N. Okeke, 'International Law in the Nigerian Legal System' (1997), see note 5.
[115] *Mariyama v. Sadiku* (1961) NRNLR 81; Bethel Chuks Uweru, Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism' (2008) see note 112 at p. 294
[116] (1994) 9 Nigeria Weekly Law Report (pt. 368) 301.

> a potent weapon in the hands of a judicial system whose value system is not rooted in the customary law which is being applied. The effect… leads to the inescapable conclusion that customary law… is subordinated to the English common law and ensures that the growth of customary law is stunted.[117]

As observed above, the application of the repugnancy test and the above decisions scrutinise Nigerian indigenous customary law in order to align them with Western legal jurisprudence. Such an assertion is further demonstrated in the case of *Helina Odigie v. Iyere Aika*, where the Court of Appeal of Nigeria held that woman-to-woman marriage was repugnant to natural justice, equity and good conscience.[118] Similarly, the Supreme Court of Nigeria applied Western legal jurisprudence and affirmed the above decision in *Meribe v. Egwu*, where Madarikin J.S.C. delivering the judgement stated that:

> In every system of jurisprudence known to us one of the essential requirements for a valid marriage is that it must be the union of man and woman thereby creating the status of husband and wife. Indeed the law governing any decent society should abhor and express its indignation of a woman-to-woman marriage and where there is proof that a custom permits such an association the custom must be regarded as repugnant by virtue of the provision of section 14 (3) of the Evident Act.[119]

[117] Enyinna S. Nwauche, 'Law, religion and human rights in Nigeria' (2008), see note 16 at p. 593.
[118] Fidelis Okafor, 'From Praxis to Theory: A Discourse on the Philosophy of African Law' (2006) 37 CAMBRIAN L. REV. 37.
[119] (1976) 3 SC. P. 23.

The position in the above cases, based on Christianity, is contrary to the African worldview in relation to the African customs that are applicable to family law.[120] Owing to the high value attached to the family and procreation, a childless woman is allowed by custom in some parts of West Africa to marry another woman who can produce children on her behalf. The essence of this woman-to-woman marriage in African culture is not to engage in a sexual relationship with a fellow woman, rather a childless woman resorts to this indigenous medium to fulfil her marital obligation of procreation by marrying another woman. In practice, the childless woman marries another woman in order to continue her husband's family tree.

The above Nigerian case laws and analyses demonstrate that the definition of universality and the standards for the repugnancy test are not universal at all but that they are instead superimposed by a Western liberal legal ideology, especially the British system. Consequently, the post-colonial Nigerian state, through its judicial organs, hinders the development of customary laws that could contribute to the regional formation of custom and general customary international law. Regardless of the questionable patriarchal nature of some of the above examples, it demonstrates a need to question that which is laid down as universal in a post-colonial context.

Besides the use of the judicial system to institute British/European ideologies, other hegemonic machinery of the media and (colonial) Western education, were tools utilised to indoctrinate Nigerians into European ideologies. Initially, media technologies were introduced in Nigeria by colonial regimes to shape political culture

[120] Fidelis Okafor, 'From Praxis to Theory: A Discourse on the Philosophy of African Law' (2006) see note 118, particularly pp. 41-43.

and create 'modern' Nigeria.[121] However, the meaning attached to media technologies, their technical functions and social uses are uncertain following changes in the political order and responses to these political orders.[122] For instance, the British colonialists built radio networks and mobile cinemas in Nigeria with the intent to educate and develop Nigerians into 'modern' colonial citizens. It operated at the imperial level through the use of the British Broadcasting Corporation (BBC) and, at the local provincial level, vernacular news and music were transmitted. During this period, the media in Nigeria was claimed to assist in the 'orderly' and full development of the country through 'suitably' planned information and cultural programmes. The use of 'orderly' and 'suitably' in this context have been criticized and interpreted to mean conforming to British policy.[123]

Subsequently, post-colonial governments in Nigeria have similarly used the media to rationalise their ideologies to the Nigerian populace.[124] Such usage brings to perspective Gramsci's notion of hegemony in which the media serves as a source of cultural hegemony by helping to produce and sustain the production of consensus and manufactured consent.[125] However, the media has enjoyed diverse application by diverse people, and this has resulted in intended and unintended outcomes which

---

[121] Brian Larkin, *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (2008) see note 73.

[122] Brian Larkin, *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (2008), see note 73.

[123] Brian Larkin, *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (2008), see note 73.

[124] Wale Adebanwi and Ebenezer Obadare (eds.) *Encountering the Nigerian State* (New York: Palgrave Macmillan, 2010).

[125] Antonio Gramsci, *Selections from Prison Notebooks of Antonio Gramsci* (edited and selected by Quintin Hoare and Geoffrey Nowell Smith) (1971), see note 80.

could culminate in tension between competing interests.[126] For instance, the Nigerian Television Authority (NTA, a Nigerian state-owned television station) is believed to be hegemonic and promote the interest of the incumbent government.[127] Equally, non-state actors in Nigeria use the media, as a tool of opposition to state domination on matters that adversely affect them. For instance, the media was employed by nationalist anti-colonial movements in Nigeria.[128] In recent times, the media has continued to be an instrument of state opposition. Radio Biafra, which is discussed later in this thesis, is an example of such counter-hegemonic practices.

4. POST-COLONIAL NIGERIA

The imposition of British colonial rule in Nigeria did not remain unchallenged, as observed in the previous section of this chapter. There were diverse forms of resistance among the Nigerian people. The First World War has been described as one of the major forces that propelled these groups of people to denounce foreign rule.[129] For instance, in the south-eastern region of Nigeria, rumours arose that the British were in danger of German defeat. Such assertions were bolstered by alleged sightings of the corpses of British soldiers floating down the river, leading to outbreaks of agitation in regions such as Oguta, Elele, Okigwe, and Bende.[130] Some towns formed alliances and constructed defensive trenches, which British observers attributed to a

[126] Brian Larkin, *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (2008,) see note 73.
[127] Toby Miller (ed), *Television: Critical Concepts in Media and Cultural Studies, Volume III* (London- New York: Routledge, 2003).
[128] Aro Olaide, 'The Nigerian Press: The Journey So Far' (2011) CONTINENTAL J. SUSTAINABLE DEVELOPMENT, Vol. 2, pp. 8-19.
[129] Elizabeth Isichei, *A History of Nigeria* (19830) see note 53.
[130] J.E.N. Nwaguru, *Aba and British Rule: The Evolution and Administrative Developments of the Old Aba Division of Igboland, 1896-1960* (Enugu: Santana Press, 1973).

German conspiracy. Conflict ensued between the British and the people following this situation, which left many Nigerians dead. The Nigerian survivors were forced by the British colonialists to work on the railway without pay.[131] Despite such incidents, rumours of the British leaving the country increased. Further agitation against British colonial government in different parts of the country were propelled by high taxation, forced labour, low prices for indigenous crops and high prices for British manufactured products.[132] Acknowledging this resistance, the Acting Lieutenant Governor of the Southern Provinces telegraphed Lagos that 'The Whole country… is in a state of rebellion.'[133]

Nationalist movements, typically formed by the Nigerian elites, were another group that opposed colonial governance through the formation of opposition and resistance political parties.[134] Different colonial activities, such as the indirect rule system, lack of consultation with the Nigerian people prior to the imposition of colonial constitutions, immigration rules and educational systems, among others, were criticized by these elites. In the late 1950s, a series of agitations for Nigerian independence led to the inevitable outcome, the exit of British officials. On 1 October 1960, Nigeria obtained independence from Britain and in 1963, became a Republic. Since then, Nigeria has witnessed diverse forms of political administration, ranging from the British model of a parliamentary system of government to an American

---

[131] Railways were built in many parts of Africa for economic reasons. It encouraged the European colonialists into African farms and these farms were turned into profitable colonies. See 'Workhorses of Empire: Railways'. Available at http://www.britishempire.co.uk/science/transport/railways.htm [accessed 26 June 2016].

[132] Elizabeth Isichei, *A History of Nigeria* (1983) see note 53.

[133] Elizabeth Isichei, *A History of Nigeria* (1983), see note 53 at p. 397.

[134] Adebayo Oyebade (ed.), *The Foundations of Nigeria: Essays in Honour of Toyin Falola* (Trenton-Asmara: Africa World Press, 2003).

presidential model, as well as civil and military rule. Presently, Nigeria operates under a presidential system of government under civil rule. The Nigerian state is made of 36 sub-units (called states) and a capital territory located in Abuja.[135] Agitations against the domination of a particular group of people in the ruling class, as well as the demand for equal representation of the diverse ethnic groups in political governance have led to the proliferation of 'states' (sub-regions) in Nigeria.[136]

Although, Nigeria became independent, the legacy of colonial state structure has endured. British colonial officials were replaced by a select group of the Nigerian elite, which left the people unsatisfied. For example, a trade union document stated, in 1963, that:

> Independence has not brought democracy to Nigerian workers and farmers. This is because the type of democracy preached and practiced by Nigerian Government is the democracy for a few rich Nigerians… The existing major political parties … are dominated, controlled and financed by the agents and representatives of the rich classes. They only use the people, the workers and farmers, as ladders to climb into power.[137]

Furthermore, the influence of colonial rule in post-colonial Nigeria has resulted in the fusion of British and Nigerian indigenous legal systems. This is evidenced in the sources

---

[135] Constitution of the Federal Republic of Nigeria 1999, Chapter 1, Part 1, **3**. (1) There shall be 36 states in Nigeria, that is to say, Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara.

[136] Philip Tezungwe Vande, 'Ethnicity and the Politics of State Creation in Nigeria' (2012) EUROPEAN SCIENTIFIC JOURNAL, Vol. 8, No. 16, p. 33.

[137] Robin Cohen, *Labour and Politics in Nigeria: 1945-71* (London: Heinemann, 1974) at p. 156.

of Nigerian law which includes Nigerian legislation, English law consisting of received English law (such as common law, doctrines of equity, statutes of general application in force in England on January 1 1960, statutes and subsidiary legislation on specified matters) and English law made before October 1 1960 extending to Nigeria. Other sources include customary law and judicial precedents in Nigerian courts.[138] Although these sources of law are being used in the administration of justice in Nigeria, the subjection of indigenous customary law to repugnancy tests as discussed above creates tensions and sometimes results in resistance.[139]

The state has retained elements of its colonial legacy, which abide to this day. This colonial legacy was legitimised through the establishment of the international law principle of *uti possidetis juris.*[140] The sustenance of these colonial boundaries appears to promote British interests. For example, during the Nigerian civil war waged from 1967 to 1970 between Nigeria and a south-eastern region (Biafra), David Hunt, the then British ambassador in Lagos, Nigeria, stated that: 'It seems to me that British interests would now be served by quick federal victory'.[141] He suggested that the maintenance of the post-colonial Nigerian state (with its intact boundaries) better serves the interests of Britain. Therefore, he urged the British government to do everything in its power to secure the Nigerian state for its benefit. He requested that Britain's supply of arms to the Nigerian side should be stepped up.

[138] Akintunde Olusegun Obilade, *The Nigerian Legal System* (1979), see note 108.
[139] Such resistance is explored further in chapter five.
[140] Makau Mutua, 'Why Redraw the map of Africa: A Moral and Legal Inquiry' (1995) MICHIGAN JOURNAL OF INTERNATIONAL LAW, Vol. 16, p.113.
[141] Chinua Achebe, *There was a Country: A personal History of Biafra*, (London: Penguin Group, 2012) p. 294

Marc Ferro observed in regard to the post-colonial phenomenon that:

> the struggles for freedom, the conquests of independence have not in any way extinguished the different processes of unification set up since the sixteenth century. This unification has been described in the economic area and standardization has in the same way invaded the nature of the political systems. It may be true that these states are self-governing, but they no longer control the functioning of their society and of production.[142]

TWAIL scholarship also identifies the issues raised above (such as colonialism, hegemony, imperialism among others) and seeks to redress them by rejecting hegemonic precepts and biases in the international legal system.[143]

5. NIGERIA IN A GLOBALISED WORLD

Globalisation is a complex concept which incorporates various practices and processes operating on several scales.[144] It is a concept used in many disciplines and its wide application has resulted in diverse meaning. David Held's definition is among the most used; he describes globalization as:

> a process (or set of processes) which embodies a transformation in the spatial organization of social relations and transactions**-** assessed in terms of their extensity, intensity, velocity and impact**-** generating transcontinental or

---

[142] Marc Ferro in Paul Darby, *Africa Football and FIFA: Politics, Colonialism and Resistance* (Oxon: Frank Cass Publishers, 2002) at p. xiii

[143] Makau W. Mutua, 'What is TWAIL?' American Society of International Law, Proceedings of the 94th Annual Meeting, pp. 31-39, 2000.

[144] William K. Carroll, 'Hegemony, Counter-hegemony, Anti-hegemony' (2006) SOCIALIST STUDIES/ÉTUDES SOCIALISTES, Vol. 2, No. 2, p.9 at 16

> interregional flows and networks of activity, interaction, and the exercise of power.[145]

The idea of transformation of social relations and the ability to encourage the rapid growth of complex interconnections and interrelations beyond national forces makes such a definition appealing to scholars.[146] Some scholars welcome globalisation as an avenue for the emancipatory evolution of non-state actors from rigid statist international law.[147] According to this position, the activities of non-state actors in globalisation transcend state borders. However, it has been argued that such activities threaten state sovereignty.[148] Based on the latter premise, it is believed that non-state actors influence the making of customary international law as a result of their widespread practices.[149]

Globalisation could become a vehicle for the continuous reproduction of dominant state practices and *opinio juris* in international law. Third World scholars insist that, despite good aspects of globalization which may be beneficial to the people in the Third World, it also serves as a tool of suppression, formalisation and the reinforcement of hegemonic powers, especially under the pretext of waging war on

---

[145] David Held *et al*., 'Rethinking Globalization'*, in* David Held and Anthony McGrew (Eds.) *The Global Transformation Reader: An Introduction to the Globalization Debate* (2nd edn.) (Cambridge-Malden: Polity Press, 2000) 60 at p. 68.

[146] Christiana Ochoa, 'The Individual and Customary International Law Formation' (2007) VIRGINIA JOURNAL OF INTERNATIONAL LAW, Vol. 48, No. 1, pp. 119-186.

[147]Ali Khan, 'The Extinction of Nation-States', (1992) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 7, no. 2, 197-234.

[148] Saskia Sassen, 'De-Nationalized State Agendas and Privatized Norm-Making' in *Public Governance in the Age of Globalization* (Karl-Heinz Ladeur ed., Hants: Ashgate, 2004) pp. 51-67; Till Müller, 'Customary Transnational Law: Attacking the Last Resort of State Sovereignty', (2008) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, Vol. 15, Issue 1, p.19.

[149] Till Müller, 'Customary Transnational Law: Attacking the Last Resort of State Sovereignty', (2008), see note 147.

terror.[150] The reinforcement of hegemonic practices is exemplified in the attempts to establish a particular approach to global governance based on American primacy in world politics after the September 11 attacks.[151] Also, American presidents' resolute reliance on American military dominance and ideological leadership as the sole foundation for ensuring global security allegedly confirms Western dominance in globalisation.[152] These American strategies, as seen in 'the war on terror,' raises suspicion against the motives of the United States' government that begs for the clarification of discrepancies therein.

Some aspects of global governance are believed to have emanated from the liberalist view within the sphere of Westphalian optimists.[153] Proponents of this view assert that the dominance and leadership of the United States of America is imperative for the achievement of successful outcomes in global crises.[154] Although these advocates downplay the defining role of war and military power, they believe that there is no persuasive alternative to American organisation and inspirational capabilities. Such liberalist views elevate the position of the United States to the centre of global issues. Other members of the international system (for instance, the Third World) are

---

[150] Balakrishnan Rajagopal, 'Counter-hegemonic International Law: Rethinking human Rights and development as a Third World Strategy', (2006) THIRD WORLD QUARTERLY, Vol. 27, No. 5, pp. 767-783.

[151] Richard Falk, 'International Law and the Future' *in* Richard Falk *et al International Law and the Third World: Reshaping Justice* (London and New York: Routledge-Cavendish, 2008) p. 23.

[152] Richard Falk, 'International Law and the Future' *in* Richard Falk *et al International Law and the Third World: Reshaping Justice* (2008) see note 151 at p. 25; Project for new the New American Century: *Rebuilding America's Defenses, Strategies, Forces and Resources for a New Century*, 2000 available at http://www.informationclearinghouse.info/pdf/RebuildingAmericasDefenses.pdf [accessed on 29 September, 2014]; White House, 'National Security Strategy of the United States of America, 2002' available at http://www.state.gov/documents/organization/63562.pdf [accessed on 29 September, 2014].

[153] Richard Falk, 'International Law and the Future' *in* Richard Falk *et al*, *International Law and the Third World: Re shaping* Justice (2008) see note 151 at p. 25.

[154] Anne-Marie Slaughter, *A New World order* (Princeton: Princeton University Press, 2004); Zbigniew Brzezinski, *The Choice: Global Domination or Global Leadership* (New York: Basic, 2004).

expected to consent to the hegemonic practices arising from United States dominance in global matters.

The neoliberal perception of globalisation in the world market also contributes to hegemonic tendencies in the international legal system.[155] It introduces a central set of guiding principles of economic thought and market based on Western ideologies and practices.[156] These principles are based on deregulation, privatization and the withdrawal of the state from numerous areas of social provision. These ideas were adopted by many states from the Global North to the South. Global Northern advocates occupy influential positions in areas such as education and corporate boardrooms, as well as such international institutions as the International Monetary Fund, World Bank and World Trade Organisation. Consequently, neoliberalism became a discourse that dictates how the world is interpreted, lived-in and understood.[157] The institutionalisation of these ideas has enabled their sustenance in Nigeria following her assent to these international organisations.

The Nigerian state consents to some of these worldviews through compliance to contractual obligations as a signatory to these international institutions. However, conflict arises among its citizens in economic matters, as evidenced in the dispute between multinational corporations in the crude oil business and people of the Niger Delta region of Nigeria.[158] Also, the issue of environmental degradation and violations of human rights within the Niger Delta region of Nigeria have been brought to the

[155] David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005).
[156] David Harvey, *A Brief History of Neoliberalism* (2005), see note 155.
[157] Terry Flew, 'Six Theories of Neoliberalism' (2014) THESIS ELEVEN 122: 49; David Harvey, *A Brief History of Neoliberalism* (2005) see note 110.
[158] Augustine Ikelegbe, 'The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria' (2005) NORDIC JOURNAL OF AFRICAN STUDIES 14(2): 208-234.

attention of the international community, as seen in the case of *Kiobel v. Royal Dutch Petroleum Co*.[159] This case was a civil liability lawsuit against Shell BP (a multinational oil company) for its alleged involvement in human rights violations perpetrated by the Nigerian military regime in the mid-1990s.[160] The case was brought before the United States Supreme Court on the basis of the Alien Tort Statute (ATS), under the 1789 US statute. This statute allows US (federal) district courts to exercise subject-matter jurisdiction over civil claims brought by non-US citizens for violations of international law perpetrated abroad.[161]

Unfortunately, resistance to multinational corporations' imperialistic practices, human rights violations and other problems resulting thereof are suppressed by other Western tools of hegemony, including its legal systems and principles. This is typified in the above case, following the United States Supreme Court's affirmation of the decision of the Court of Appeal. It held that there are no specific, universal or obligatory norms of customary international law that hold corporations liable for violations of the law of nations, including international human rights violations. Although this judicial position appears to preserve the principle of sovereignty, arguably it aids hegemonic economic practices in the Third World. However, there has

---

[159] 133 S. Ct. 1659 (2013).

[160] Liesbeth FH Enneking, 'Multinational Corporations, Human Rights Violations and a 1789 US Statute- A Brief Exploration of the Case of *Kiobel v. Shell'* (2012) NEDERLANDS INTERNATIONAAL PRIVAATRECHT (3) 396.

[161] L.F.H. Enneking, *Foreign Direct Liability and Beyond – Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (The Hague: Eleven International Publishing 2012) p. 78.

been a growing consensus on the need for corporate social responsibility in economic transactions in these regions in the world.[162]

The above example of the reproduction and sustenance of hegemony through modern ideologies and institutional mechanisms arguably (un)consciously entraps victims, as they seem to appeal to the sentiments of their victims.[163] For instance, the concept of modernisation portrays the idea of development which appears progressive to most people in the Third World.[164] At decolonisation, many African states pursued development plans, as they believed that 'modernisation' brings solutions to many problems. The intention was to use such tools to hasten 'catching up' with the West in order to abolish the colonial idea of Third World backwardness.[165] For example, the New International Economic Order (NIEO) focused on reducing the income gap between the Global North and South.[166] This project has faced criticism following its

---

[162] Sita C. Amba-Rao, 'Multinational corporate social responsibility, ethics, interactions and Third World governments: An agenda for the 1990s' (1993) JOURNAL OF BUSINESS ETHICS, Vol. 12, Issue 7, pp. 553-572.

[163] The heavy dependence on Western standards, policies and their aid by Third World states have raised concerns of re-colonization of the Third World by Third World scholars. It was observed that 'colonization works surreptitiously because colonized institutions either do not realize their subservient status, or they relish the thought of acceptance by the dominating off-shore institutions. Its success also depends not just on a belief in its inevitability, but on the presumption of its necessity — a presumption often grounded in a sense of inferiority'. See Ron Macdonald & Thomas McMorrow, 'Decolonizing Law School,' paper presented at the University of Alberta, 2013 at a conference on 'The Future of Law Schools' (2014) 51:4 Alta. L. Rev. 717.

[164] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003); Mohammed Bedjaoui, *Towards a New International Economic Order* (New York: Holmes and Meier, 1979).

[165] Dianne Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 SOCIAL & LEGAL STUD. 337.

[166] Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography' (1998-99) THIRD WORLD LEGAL STUDIES, pp.1-20.

uncritical approach to the application of Western models in their development plans and is viewed as the colonial idea of a civilising mission in disguise.[167]

It has also been argued that solutions to the massive displacement of people and ecological destruction within Nigeria and other parts of the Third World are not forthcoming, despite this era of modernisation.[168] Consequently, the Third World continues to experience widespread crises and poverty.

6. CONCLUSION

This chapter discussed Nigerian socio-politics and participation in international law. It showed that Nigeria as it is known today was made up of diverse independent societies prior to colonialism. These pre-colonial societies participated in international relations and contributed to the making of (customary) international law. However, their colonial encounter with Britain subjected these people to foreign domination. The relocation of political powers from indigenous entities to British colonisers for economic reasons unsettled indigenous systems and unleashed hardship on the Nigerian people.

The creation of the Nigerian state became a preparatory ground to conform its people to European 'civilisation'. Such civilisation concentrated power in the state and the state was 'manufactured' to inherit hegemonic customs derived from European experience and culture. The demise of colonisation did not end state or foreign domination. This has resulted in the continuous struggle between the state and non-

---

[167] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003) see note 164.
[168]Arturo Escobar, 'Beyond the Third World: Imperial Globality, Global Coloniality, and Anti-Gloalization Social Movements' (2004) THIRD WORLD QUARTERLY, Vol. 25, No.1, pp. 207-230.

state actors as demonstrated in this thesis. These struggles reveal perennial conflicts between indigenous practices and imposed foreign practices, and the hardship suffered by the people. Arising from this dissatisfaction, the people (non-state actors) here employ various mechanisms to resist the Nigerian state in a bid to represent their interests, both domestically and internationally. This demonstrates the reappearance of non-state actors, and this reappearance necessitates a review of state practices and *opinio juris* as the sole legal requirements for the formation of customary international law. This leads us to the examination of customary international law in the next chapter.

CHAPTER THREE

EXAMINATION OF CUSTOMARY INTERNATIONAL LAW

1. INTRODUCTION

Custom usually involves repeated practices among a particular group of people. Although certain behaviour may become acceptable as a result of such frequent practices, it may not be legally binding. However, situations in which such practices involve the sense of an element of legal obligation to behave in a certain way, a question of law could be said to have been raised and in particular, the question of a potential source of law.[1] Globally, custom is a source of law that regulates various activities at various levels in different legal systems, including the international legal system.[2] Traditionally, the interpretation of customary international law by the International Court of Justice (ICJ), as seen, for example, in the *North Sea Continental Shelf* cases, is based on two elements: state practice and *opinio juris sive necessitatis* (simply *opinio juris*).[3] Such an interpretation clearly concentrates the creation of custom within the domain of the state; a principle based on the status once enjoyed by states as the sole subject of international law.[4]

---

[1] Tim Hillier, *Sourcebook on Public International Law* (London-Sydney: Cavendish Publishing Limited, 1998).

[2] Gbenga Bamodu 'Transnational Law, Unification and Harmonisation of International Commercial Law in Africa; (1994) JOURNAL OF AFRICAN LAW, vol. 38, p. 125; Bronislaw Malainowski, *Crime and Custom in Savage Society* (New Jersey: Rowman & Allanheld Publishers, Reprint 1985).

[3] *North Sea Continental Shelf* ICJ Reports (1969) p. 3, *Military and Parliamentary Activities in and Against Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 97(para. 183,110 (para. 211); *Asylum case*, ICJ Reports (1950) pp. 226, 276-277; *Right of Passage over India Territory*, ICJ Reports (1960) pp.6, 40; *Legality of the Threat or Use of Force*, ICJ Reports (1966) pp. 226, 253-255 (paras 65-73); Anthony D'Amato, *The Concept of Custom in International Law* (Ithaca N.Y. and London: Cornell University Press, 1971) ; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999).

[4] JL Brier, *The Basis of Obligation in International Law* (Oxford: Clarendon Press 1958).

New (and old) challenges faced by states are leading to the delegation of certain roles to non-state actors,[5] which is having an impact not only on the understanding of the functions of the state, but also on its exclusivity in the making of customary international law.[6] For instance, non-state actors such as African indigenous rulers, chiefs and community leaders exert great influence on local communities and the nation-state at large in terms of governance and resolution of conflict. [7] In Nigeria, most often, indigenous leaders, family heads and other indigenous community bodies assist in the decongestion of the Nigerian state judicial system's caseload.[8] For instance, disputes arising between individuals, as well as communities and multinational corporations which could have come to the state courts are resolved by these non-state actors, whom the people appear to accept more than the state judicial system adopted due to colonisation, which they consider as alien.[9] Over time, the practices and rulings of these non-state actors are more likely to become accepted as law than their more 'official' counterpart.

Christiana Ochoa, 'The Individual and Customary International Law Formation' (2007) 48 VA. J. INT'L L, pp. 119-186. Such period of international law is usually associated with the Peace of Westphalia. Subjectivity theory which confers legal right and obligation on an entity is discussed in details in chapter four.

[5] such as the provision of expert opinion, contribution to information gathering, standard setting and behaviour modification aspects of regulatory control on economic matters and diverse forms global crises regulatory. See Bridget M. Hutter, 'The Role of Non-state actors in Regulation.' Available at http://eprints.lse.ac.uk/36118/1/Disspaper37.pdf [accessed on 5 August 2016].

[6] Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (Aldershot-Burlington: Dartmouth & Burlington, 2001).

[7] Annette Iris Idler and James J.F. Forest, 'Behavioural Patterns among (violent) Non-state Actors: A Study of Complementary Governance' available at http://www.stabilityjournal.org/articles/10.5334/sta.er/ [accessed on 20 August 2016].

[8] Annette Iris Idler and James J.F. Forest, 'Behavioural Patterns among (violent) Non-state Actors: A Study of Complementary Governance', see note 7.

[9] Jedrezey Georg Frynas, *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (Hamburg-London: LIT Verlag, 2000).

Furthermore, resistance to hegemonic state practices by some non-state actors via grassroots demonstrations, women's networks and other such organisations within the Third World are increasing the participation of non-state actors both domestically and internationally.[10] These activities appear to loosen the state's once exclusive grip on law-making in international law. Against this background, this chapter intends to address the question of whether customary international law is evolving to include non-state actors in its formation. The exploration of this question will lay the foundations upon which to demonstrate the evolving nature of custom beyond state domination, including other subjects of international law. This development will also include an exploration of resistance to state hegemonic tendencies in the creation of customary international law, which will contribute to the central theme of this thesis.

Overall, this chapter argues that the insistence on the traditional approach to customary international law serves the hegemonic purposes of the great powers in the Global North. At the very least, the traditional approach is out of step with reality in that it fails to reflect the fact that the international system is characterised and shaped by the activities of diverse non-state actors. These observations seek a reassessment of the formation of custom to include the interests of diverse actors in the making of customary international law. Based on the above, this chapter will explore some underlying features of custom, which reveal its evolutionary character. Such features serve to create a robust international law that encourages custom making by both states and non-state actors. The inclusion of non-state actors is expected to accommodate the participation of diverse legal cultures, especially in

[10] Robert W Cox, 'Civil Society at the Turn of the millennium' in Louise Amoore (Ed.), *The Global Resistance Reader* (London & New York: Routledge, 2005) p.103.

jurisdictions where hardship is suffered due to a disjuncture between the state as a structure, its representatives and its people, as exemplified in Nigeria (and other Third World states).[11]

It merits emphasising here that the chapter does not entirely discard the contributions of states in generating customary international law. Rather, it aims to loosen the hegemonic grip of states, which hinders the effective participation of non-state actors, especially in the Third World. While exploring the activities of non-state actors in the global scene, this chapter will also showcase the current postcolonial realities of the Third World, where states and non-state actors function side by side.[12] For instance, the sources of the Nigerian legal system, as well as many other legal systems in Africa, emanate from both state and non-state actors (indigenous authorities/groups).[13] The chiefs, age grades and women's groups, among others, are involved in the generation of laws and the resolution of disputes in Nigeria, which contribute to African regional customary international law.[14] These developments by non-state actors, both in the Third World and beyond, have challenged the insistence of traditional approaches to customary international law that privileges a select few powerful states.

---

[11] Chapter two explored the struggle between the Nigerian state and its citizens from colonial to post-colonial periods due to unfavourable policies found both national and internationally; Makau Matua 'What is TWAIL?' (2000) *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 94, pp. 31-40. See also I. A. Shearer, *Starke's International Law* (11th edn.) (Sydney: Butterworths, 1994), particularly the definition of international law in p. 3 that encourages the participation of diverse actors.; Anthea Roberts and Sandesh Sivakumaran, 'Law making by Non-state Actors: Engaging armed Groups in the Creation of International Humanitarian Law' (2012) THE YALE JOURNAL OF INTERNATIONAL LAW, vol. 31:1, p.108.

[12] Balakrishnan Rajagopal, 'Counter-hegemonic International Law: Rethinking human Rights and development as a Third World Strategy', (2006) THIRD WORLD QUARTERLY, Vol. 27, No. 5, pp. 767-783.

[13] Akintude Olusegun Obilade, The Nigerian Legal System (Ibadan: Spectrum Law Publishing, 1979)

[14] Taslim O Elias, *The Nature of Customary Law* (Manchester: University of Manchester, 1956); A.N. Allot, 'What Is to be Done With African Customary Law? The experience of problems and reforms in Anglophone Africa from 1950' (1984) JOURNAL OF AFRICAN LAW, Vol. 28, Issue 1-2, pp. 56-71.

In order to illustrate the above arguments, this chapter will first explore the nature of customary international law by tracing its development. In doing this, it will be shown that custom is present in many legal traditions besides European (or Western) states, despite the current rules of customary international law having been modelled on Western traditions and norms. The inclusion of custom as a source of international law will be examined in its relation to treaties, particularly article 38 (1) (b) of the statutes of the International Court of Justice. The doctrinal definition of custom, judicial guidance towards identifying custom, its elements and criticisms will be taken into account. Underlying factors in the formation of custom to uncover flexibilities and evolutionary processes that could provide opportunities for the inclusion of non-state actors will be explored. Finally, the chapter will highlight how modern challenges and developments have necessitated the involvement of non-state actors in custom-making in contemporary times.

2. HISTORICAL DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW

Records abound in examples of the presence of custom in many societies.[15] These customs usually result from social interactions and relationships among people within a given society, raising legal obligations.[16] A prominent feature in these societies, irrespective of their geographical locations or race, is that custom develops through recurrent practice, which regulates or influences behaviour.[17] These developed

[15] Gbenga Bamodu 'Transnational Law, Unification and Harmonisation of International Commercial Law in Africa; (1994), see note 2; Bronislaw Malainowski, *Crime and Custom in Savage Society* (New Jersey: Rowman & Allanheld Publishers, Reprint 1985).
[16] Taslim Elias, *The Nature of Customary Law* (1956), see note 18.
[17] Przemysław Paul Polański, *Customary Law of the Internet: In Search of a Supranational Cyberspace Law*, (The Hague: T.M.C Asser Press, 2007).

practices are usually based on cultural, religious and other historical experiences.[18] They are also developed collectively within a given community. In these circumstances, wide acceptance and application is expected based on the representation of collective interests.

Human relationships and interactions are known to transcend beyond one's immediate borders into areas of different cultures, religions and historical experiences, especially in the field of trade.[19] In such situations, principles and applications of custom assume international dimensions. It is a reasonable assumption that such international custom surpasses national domains to become a source of binding instrument upon international actors, arising from the participation of diverse actors in the international system. As expected, such diversity would also encourage the inclusion of diverse legal traditions in the making of customary international law. However, the present international system leads international law scholars and students to a European (Western) dominant perception of customary international law which is organised around a European political theory which privileges statehood as the form of organising cross-cultural relations.

When investigating the European origins of customary international law, there is no comprehensive history readily available, possibly, due to the domination of natural law in legal thinking until the nineteenth century.[20] Paul Guggenheim gave the most detailed overview of custom between the fifteenth and nineteenth centuries in

[18]Przemysław Paul Polański, *Customary Law of the Internet: In Search of a Supranational Cyberspace Law* (2007), see note 21.
[19] Przemysław Paul Polański, *Customary Law of the Internet: In Search of a Supranational Cyberspace Law* (2007), see note 21.
[20] Anthony Carthy, 'Doctrine versus State Practice' *in* Bardo Fassbender and Anne Peters, *Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) at p.977.

1958.[21] According to his report, the concept of custom emanated first from Roman law and cannon law traditions where custom was a tacit legislation among the people.

Custom was presented by Francisco Suarez as a 'positive *ius gentium* (law of peoples) signifying a tacit will of the world'.[22] It is believed that Francisco Suarez's *1612 Tractus De legisbus ac deo legislatore* provided the first record on custom.[23] In Suarez's account, there are two elements from which customary international law could be deduced, namely consensus and compliance with reason.[24] Both elements were understood from the perspectives of positivist and naturalist philosophies.[25] During this period, consensus was viewed as the consent of the sovereign instead of that of the nation, and reason was referred to as 'God's will be revealed to man'.[26] In spite of the difference in context, the elements identified by Suarez were compared to the twentieth century ideas of state practice and *opinio juris.*[27]

Following Suarez's identification of customary international law was Hugo Grotius' description of customary international law as the 'quintessence of practice that is tacitly accepted as binding by the community'.[28] This concept became known as state

[21]Anthony Carthy, 'Doctrine versus State Practice' (2012), see note 24 at p.977.
[22] F. Suarez, 'Selections from Three Works *in* J. B. Scott (ed.), *The Classics of International* Law (Carnegie Institution Washington DC, 1917); B. Tierney, 'Vitoria and Suarez on *ius gentium,* Natural Law and Custom' *in* A. Perreau-Saussine and J. B. Murphy (eds.), *The Nature of Customary Law, Legal, Historical and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2007) pp. 101-24.
[23] Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001), see note 6.
[24] Noora Arajärvi, 'From State-Centricism to Where?: The Formation of (Customary) International Law and Non-State Actors', available at http://ssrn.com/abstract=1599679 [accessed 14 January, 2013].
[25] Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001) see note 6 at p. 2.
[26] Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001) see note 6 at p. 2.
[27] Noora Arajärvi, 'From State-Centricism to Where?: The Formation of (Customary) International Law and Non-State Actors' see note 28 at p. 4.
[28]Grotius Society, 'International Law in Development: Discussion on the Report of the Committee on Sources of International Law' (1942) GROTIUS SOCIETY TRANSLATION, Vol. 27, at 214.

practice and it is supported by a belief in its legally binding nature.[29] In this regard, express consent is a requirement for being bound by international law. However, customary international law can be deduced from implied consent based on acquiescence.[30]

Customary international law has evolved from its elementary stage, as reported by scholars such as Suarez and Grotius, to become part of international treaties.[31] Custom was listed among the sources of international law applicable to the Permanent Court of International Justice, through its first introduction in 1920, by the Advisory Committee of the Permanent Court of International Justice.[32] The initial draft treaty defined international custom as 'being practice between nations accepted by them as law'.[33] In the final draft, some changes were made and the paragraph finally

---

[29] Noora Arajärvi, 'From State-Centricism to Where? The Formation of (Customary) International Law and Non-State Actors', see note 28; Grotius Society, International Law in Development: Discussion on the Report of the Committee on Sources of International Law (1942), Grotius Society Translation, vol.27 at 214.

[30] Anthony D'Amato, *The Concept of Custom in International Law* (1971), see note 3.

[31] Christiana Ochoa, 'The Individual and Customary International Law Formation' (2007), VIRGINIA JOURNAL OF INTERNATIONAL LAW, Vol. 48, No. 1, PP. 119-186.

[32] Andrea Pellet 'Article 38' in Andreas Zimmermann et al (Eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006), p.750. The statute did not specifically use the term 'sources'. It is believed that preference for the use of the word 'evidence' is a deliberate attempt to circumvent metaphorical and ambiguous issues that the use of 'source' may pose and therefore create confusion. See Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001), see note 6. For instance, scholars use the term 'source' in different ways, and sometimes a particular writer uses the term at different times to express the concepts of cause, origin, basis and evidence. P.E. Corbett, 'The Consent of States and the Sources of the Law of Nations' (1925) BRITISH YEARBOOK OF INTERNATIONAL LAW, Vol. 6, p. 20. Based on such divergence, recommendations have been made that the term 'source' should be limited to the origin of the material content of a rule, sometimes referred to as historical source.,[32] While some scholars have chosen to apply caution in the application of the term by using the phrase 'elements that generate rules of customary international law',[32] others insist that 'source' and 'evidence' mean one and the same thing especially with reference to customary international law. See, Ian Brownlie, *Principles of Public International Law* (5th edn.) (Oxford: Clarendon Press, 1998). In most cases, its use is intended to view the process where rules of international law emerge. See, Malcolm N Shaw, *International Law* (6th edn.) (Cambridge: Cambridge University Press, 2008) p. 70; M.S. McDougal and W.M. Reisman, 'The Prescribing Function: How International Law is Made' (1980) YALE STUDIES IN WORLD PUBLIC ORDER, Vol. 6, p. 249.

[33] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), Annexe No. 3, p. 306.

read 'international custom as evidence of a general practice accepted as law'.[34] This definition was reproduced in article 38 (1) (b) of the statutes of the International Court of Justice (ICJ), 1946.[35]

The development of the above statutes coincided with the period of Western colonialism and inter-imperial rivalries.[36] At this time, many of the Third World states were under colonial rule and could not contribute towards the content of this statute. Arguably, such foundations created bias, with unequal representation affecting, above all, the people rather than state structures in the Third World. Additionally, the language of article 38 of the ICJ is said to be obsolete, following the use of the phrase 'civilised nations', which creates the impression of supremacy based on the post-war period where some states assumed themselves to have superior 'civilised' status as opposed to the 'uncivilised'.[37]

Although it is widely accepted that article 38 provides *guidance* on the sources of international law,[38] the question of whether it provides an *authoritative and exhaustive* list of sources of international law is contentious.[39] In this regard, the article's definition of (customary) international law has been criticized as being

[34] 'Draft-Scheme for the Institution of the Permanent Court of International Justice Mentioned in article 14 of the Covenant of the League of Nations presented to the Council of the League by the Advisory Committee of Jurists', Official Journal, Special Supplement No.2, Article 35, September 1920; Article 38 (1) (b) Statute of the Permanent Court of Justice.
[35] Article 38 (1) (b) Statute of the International Court of Justice. Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001), see note 6.
[36] Kirthi Jayakumar, 'Where does Article 38 Stand Today?', available on http:ssrn.com/abstract=2121012 [accessed on 03 May 2013].
[37] Kirthi Jayakumar, 'Where does Article 38 Stand Today?' see note 40.
[38] Gennadij Danilenko, *Law-making in International Community* (Dordrecht: Martinus Nijhoff Publishers 1993); VD Degan, *Sources of International Law* (The Hague: Martinus Nijhoff Publishers 1997); Oscar Schachter, *International Law and Theory in Practice* (Dordrecht: Martinus Nijhoff Publishers 1991).
[39]Maurice Mendelson, 'The International Court of Justice and the sources of International Law' in Lowe, Vaughan and Fitzmaurice, Malgosia *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996).

superfluous, clumsy, and incomplete.[40] The incompleteness of the provision is its most emphasised shortcoming and it has been argued that the article should no longer be considered as a *complete* statement of the sources of international law, rather only of the most important sources.[41]

Furthermore, the continuous presumption of article 38 of the statute of the ICJ that international law deals with states alone has been described as erroneous.[42] Recognition of non-state actors as subjects of international law challenges the idea of state exclusivity in the international legal system.[43] Human rights conventions, regional treaties governing regional alliances, and conventions addressing non-state actors all suggest the presence of non-state entities as subjects of international law.[44] Although the statute may have been intended for disputes among states, they have been criticised for falling short of the expectations of modern international law that includes non-state actors.[45]

In addition to the above criticisms, there is a concern as to whether article 38 of the statute of the ICJ provides a working definition of custom in modern international

---

[40] Maurice Mendelson, 'The International Court of Justice and the sources of International Law' in Lowe, Vaughan and Fitzmaurice, Malgosia *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings* (1996), see note 43.
[41] Jean d'Aspremont, *Formalism and the Sources of International Law* (Oxford: Oxford University Press, 2011); Joost Pauwelyn, *Conflicts of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003).
[42] Kirthi Jayakumar, 'Where does Article 38 Stand Today?' see note 40.
[43] Antônio Augusto Cançado Trindade, 'The Historical Recovery of the Human Person as a Subject of the Law of Nations' (2012) CAMBRIDGE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW **(1)**3: 8–59; Andrea Bianchi (ed.) *Non-State Actors and International Law* (Aldershot: Ashgate, 2009).

[44] Non-State Actors in International Law: Law making and Participation Rights, Second Report of the Committee, International Law Association, SOFIA Conference (2012) available at http://www.ila-hq.org/en/committees/draft-committee-reports-sofia-2012.cfm [accessed on 26 February, 2013]
[45] Kirthi Jayakumar, 'Where does Article 38 Stand Today?' see note 40.

law.[46] For instance, whether the definition of custom in article 38 (1) (b) will suffice where there are possible practices leading to legal obligations among the various subjects (rather than only states) under international law. Since the article has not expressly defined custom as constituting state practice and *opinio juris,* it could be understood that the formation of custom emanating from other subjects of international law could be viewed through this article and applied in other international tribunals. Although the definition of custom has posed problems (as discussed later in this chapter), classical international law has identified two elements of customary international law: state practice and *opinio juris sive necessitatis*.[47] These elements are explored in the section below.

3. ELEMENTS OF CUSTOM

The International Court of Justice directs its attention to the practice and *opinio juris* of states in order to establish the existence of international custom.[48] State practice is regarded as an objective element and usually involves issues such as duration, uniformity, consistency and generality of practice for its determination.[49] In the case of duration, there is no particular time frame required. In some instances, long term

[46] Christian Ochoa, 'The Individual and Customary International Law Formation (2007), see note 35; Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001), see note 6.

[47] Ian Brownlie, *Principles of Public International Law* (6th edn.) (Oxford: Oxford University Press, 2003) see note 76; Anthony Aust, *Hand Book of International Law* (2nd edn.) (Cambridge: Cambridge University Press 2010); *North Sea Continental Shelf* ICJ Reports (1969) p. 3, 44 (para 77); *Asylum case*, ICJ Reports (1950) pp. 226, 276-277.

[48] *Military and Parlimentary Activities in and Against Nicaragua, Merits*, ICJ Reports (1986), pp. 14, 97(para. 183,110 (para. 211); *North Sea Continental Shelf* ICJ Reports (1969) p. 3, 44 (para 77); *Asylum case*, ICJ Reports (1950) pp. 226, 276-277; *Right of Passage over India Territory*, ICJ Reports (1960) pp.6, 40; *Legality of the Threat or Use of Force*, ICJ Reports (1966) pp. 226, 253-255 (paras 65-73). In the case of *Libya/Malta*, the court also considered that '[it] is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states'. See *Continental Shelf (Libya Arab Jamahiriya/Malta)* ICJ Reports (1985) pp. 13, 29 (para 27).

[49] Ian Brownlie, *Principles of Public International Law* (6th edn.) (2003), see note 51.

practice is not necessary; custom may result from quick practice.[50] There is considerable flexibility in many cases involving uniformity/consistency of practice. Although complete uniformity is not required, substantial uniformity is viewed as necessary.

Opinio juris refers to the subjective (also referred to as psychological) element of customary international law dealing with the rationale behind the behaviour of a state.[51] This element is expected to accompany state practice with a sense of legal obligation.[52] That is, states will behave in a certain way based on the conviction that a state practice binds them to do so.[53]

The above two elements have evolved to align with the interest of some powerful states in the Global North, as will be demonstrated below. Such a position highlights the legal fiction of free and equal states, as powerful states insist on decisive influence in determining the content and application of custom. In view of this situation, Mohammed Bedjaoui, for example, argues that the freedom of the high seas was developed to meet the needs of wealthy states with large fleets rather than the interests of states whose shores were approached.[54] This arguably allows 'traditional custom to become an apology for the exercise of power by strong Western nations'.[55]

---

[50] Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 INDIAN J. INT'L L. 23.

[51] *Jo Lynn. Slama, 'Note: Opinio Juris in Customary International Law*,' (1990) 15 OKLA. CITY U. L. REV. 603.

[52] Ian Brownlie, *Principles of Public International Law* (6th edn.) (2003), see note 51.

[53] Malcolm N. Shaw, *International Law* (6th edn.) (2008) see note 36 at 84.

[54] Mohammed Bedjaoui, *Toward A New International Economic Order* (New York: Holmes& Meier 1979) 51-52.

[55] Mohammed Bedjaoui, *Toward A New International Economic Order* (1979), see note 58; Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 95, p. 757.

Even where persistent objection has been raised, such positions have been built on the political preferences of a few states. The issues raised in these early cases in PCIJ and ICJ cases pertained to territorial questions of sovereign states and extraction of commodities on an industrial scale – 'international' issues which were of greatest concern to the so-called developed states. These issues enabled their political and economic dominance in the international sphere. They did not, for example concern questions of self-determination, suppression under colonial rule, or economic exploitation among other things, which were (and still are) matters of interest to the Global South. This chapter explores some major cases below to illustrate the above arguments.

In the *Lotus case (France v. Turkey)*,[56] there was a collision on the high seas between a French ship (*Lotus*) and a Turkish ship (*Boz-Kourt*) in 1926. Several people aboard the *Boz-Kourt* ship drowned and Turkey alleged negligence on the part of the French officer on watch duty. The French officer was arrested when the ship reached Istanbul and was tried for manslaughter. The issue of jurisdiction was raised to determine whether Turkey had jurisdiction to try the French officer. Among the various arguments presented, France claimed the existence of a customary rule to the effect that the state (of the accused) whose flag the vessel flew had exclusive jurisdiction over the matter. Accordingly, the state of the victim (Turkey) was barred from trying the French officer. To justify this position, France referred to the absence of previous criminal prosecutions by states in similar situations, and deduced tacit consent in the practice, which therefore became a legal custom.

[56] (1927) PCIJ, Series A, No. 10, p. 18.

The Permanent Court of International Justice rejected the above arguments and declared that the existence of custom would still have been established, even if such a practice of abstention from instituting criminal proceedings could in fact be proved. The court held that 'only if such abstention were based on their (the states) being conscious of a duty to abstain would it be possible to speak of an international custom'.[57] Therefore, the crucial component of obligation was lacking and the practice remained simply that and nothing more.[58] The case pointed out state practice and *opinio juris* that could create legal obligation for the existence of customary international law.

The *Lotus case* established the principle that jurisdiction is territorial. A state exercising jurisdiction outside its territory requires coverage by international treaty or customary rule to do so. Another principle highlighted in this case is that a state has the capacity to exercise jurisdiction within its states. These principles have been created through the actions of two states (France and Turkey) and have become the practice of states in general. These two states had a crucial role in the development of (customary) international law and colonial rule which indoctrinated African states into the present international regime. The principle of territorial jurisdiction outside one's state validated colonial rule through treaties signed between colonial powers and African chiefs. For example, Britain signed treaties with some African chiefs which transferred the sovereignty of Nigeria to Britain.[59] It merits mentioning that although

[57] (1927) PCIJ Series A, No. 10. P.28.
[58] Malcolm N. Shaw, *International Law* (6th edn.) (2008) see note 36 at 85.
[59] This was discussed in chapter two.

Turkey may not have attained a hegemonic position like that of other great powers in Western Europe, in the 1920's it was involved in a global power struggle.[60]

In the *Asylum case,*[61] Haya de la Torre, a Peruvian, was sought by his government for taking part in the military rebellion in Peru on 3rd October 1949. Colombia granted him asylum at its embassy in Lima, but Peru refused to issue a guarantee of safe conduct to permit him to leave the state. Based on this, Colombia brought the matter to the ICJ, requesting a decision to recognise that Colombia was competent to ascertain Torre's offences in regards to whether they were criminal (as Peru maintained) or political, in which case asylum and safe conduct could be allowed. The court held that it had to consider the expression of a right appertaining to Colombia and a duty incumbent upon Peru.

In this case, the court made a leading pronouncement that:

> The party which relies on a custom… must prove that this custom is established in such a manner that it has become binding for the other party… that the rule invoked … is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State, granting asylum, and a duty incumbent on the territorial State.

Unlike the previous *Lotus case*, the *Asylum case* involved Latin American states and was treated as a regional custom. The *Asylum case* laid down basic rules for uniformity and consistency in the practice of states for the determination of customary

[60] Tevfik F. Nas, Tracing the Economic Transformation of Turkey from the 1920 to EU Accession (Leiden-Boston, Martinus Njihoff Publishers, 2008).
[61] (1950) ICJ Reports pp. 226.

international law. Although consistency is expected under generality of practice, universality is not required. However, there may be difficulty in the determination of the value of abstention from protest by a substantial number of states in the face of a practice followed by others. Tacit agreement or lack of interest may be inferred where there is silence.[62] Although universality is not a requirement in the formation of custom, modern international law seeks an inclusive system that will accommodate other legal traditions.[63] This gives participatory opportunities to the Third World in determination of the rules guiding their activities in international law. However, the issue of non-universality could also create an opportunity for specific custom to serve a particular region. In this regard, as the ICJ held in the *Asylum case,* the party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding for the other party.[64]

The above case was criticised as having created many uncertainties and contradictions, fluctuations and discrepancies in the exercise of diplomatic asylum.[65] It was further criticised as having resulted in many inconsistencies in the rapid succession of conventions on asylum, as the practice had been influenced by considerations of political expediency in various cases (ratified by some states and rejected by others). Although it has been argued that it is not possible to ascertain in all these any constant and uniform usage accepted as law, it is believed that the court was interested in the right to decide whether the offence was political, and whether

---

[62]Anthony D'Amato, *The Concept of Custom in International Law*, (1971), see note 3; Ian Brownlie, *Principles of Public International Law* (6th edn.) (2003), see note 51.

[63] Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012).

[64] (1950) ICJ Reports p. 276.

[65]Ian Brownlie, *Principles of Public International Law* (6th edn.) (2003), see note 51.

the matter was of urgency.[66] It could be argued that most of the cases regarding the development of general custom involved European powers but the above case was treated as regional as it did not involve any of these powers. Therefore, arguably, the customary rule here was interpreted in a restrictive manner. However, where such regional customary rules were developed in matters between a European state and non-European state, most often, it was ruled in favour of the European state, which asserted the existence of such a rule to protect their economic interests (as shown in the dispute between Portugal and India discussed below).[67]

In the *Anglo-Norwegian Fisheries case*,[68] there was a dispute between the United Kingdom and Norway regarding the method of measuring the breadth of territorial seas. The United Kingdom referred to an alleged rule of custom in which a straight line could be drawn across bays less than ten miles from one projection to another. This practice could be regarded as the baseline for the measurement of the territorial sea. This position held by the United Kingdom was contradictory to the Norwegian pattern of measurement. In deciding the matter, the court dismissed the alleged custom of the United Kingdom, pointing out that the actual practice of states did not show the creation of such custom. There was a failure to prove sufficient uniformity of behaviour.[69] In the above case, the ICJ emphasised some degree of uniformity of state practice as essential for the determination of custom and, again, these elements have been developed by a few Western states in order to protect their maritime activities.

---

[66] Ian Brownlie, *Principles of Public International Law* (6th edn.) (2003), see note 51.
[67] *Case Concerning Right of Passage over Indian Territory,* (1960) ICJ Reports p. 6.
[68] (1951) ICJ Reports p. 116.
[69] Malcolm N Shaw, *International Law* (2008), see note 36.

In the *Case Concerning Right of Passage over Indian Territory,*[70] Portugal held small coastal and inland enclaves in India. Based on this, Portugal claimed that it had a right of passage to its inland enclaves and that India had allegedly interfered with them. Here, an issue arose on whether Portugal had a right of passage over Indian territory to its enclaves. The ICJ upheld Portugal's claim that there existed a right of passage over Indian territory against India's objection to Portugal's claim over the existence of such local custom. The ICJ declared satisfaction in the existence of a constant and uniform practice allowing free passage between the parties in the past. The court stated that the practice was accepted as law by both parties, and as such had given rise to a right and a correlative obligation.[71]

This was a case between a European state (Portugal) and an Asian state (India). Portugal was of course a key player in the areas of trade and colonisation in the 15th and 16th centuries, often described as the first global sea power.[72] Nigeria's first encounter with a European state was with Portugal.[73] Portugal established sea routes to India and colonised some African states, including Angola and Mozambique. Portugal also had colonial influence in South America (Brazil) and Asia.

The development of local custom in international law through this case has been based on the protection of Portugal's practice over the interest of India, setting out the adherence of local custom over general custom. This case clearly appears to

[70] (1960) ICJ Reports p. 6.
[71] (1960) ICJ Reports p. 40; Malcolm N. Shaw, *International Law* (6th edn.) (2008) see note 36 at p. 92.
[72] Cyril Akobundu Ndoh, *Imperialism and Economic Dependency in Nigeria* (2nd edn.) (Owerri: Charismatic Forum Pub., 2000); J.D. Vincent-Smith, 'The Anglo-German Negotiations over the Portuguese Colonies in Africa 1911-14' (1974) THE HISTORICAL JOURNAL XVIII, 3, pp. 620-629; 'How Portugal became the First Global Sea Power', available at http://www.cbsnews.com/news/how-portugal-became-the-first-global-sea-power/ [accessed on 20 August 2016].
[73] See details in chapter one.

protect the interest of former colonial powers over the Third World. However, this could also be used as a form of resistance. For instance, in a situation where certain customary rules have developed within a region (for example Africa), the ICJ will be expected to attribute decisive effect to such practice in Africa for the purpose of determining those African rights and obligations against oppressive/hegemonic general custom created by colonial powers.[74] That is, such particular practice within the African region is expected to prevail over any general rule in existence to secure Africa's interests in international relations. This position will be beneficial for counter-hegemonic pursuits in the development of customary international law in certain ways. Firstly, the development of such regional custom within Africa creates the opportunity for parties (both state and non-state actors) within the region to be bound by a rule of custom that could have emanated from their interactions to the exclusion of hegemonic custom inherited at decolonisation. Secondly, it could permit the establishment of a local rule of custom among non-state actors on matters that affect them against post-colonial state domination within the region.

In the *North Sea Continental Shelf cases*, a series of disputes came to the ICJ regarding the delimitation of the area, rich in oil and gas, of the continental shelf in the North Sea.[75] These disputes involved Germany on one side and The Netherlands and Denmark on the other. Germany could not agree with The Netherlands or Denmark over respective boundary lines and the issue was brought before the ICJ. Here, the ICJ stated that state practice, 'including that of states whose interests are specially affected', had to be 'both extensive and virtually uniform in the sense of the provision

---

[74] Malcolm N. Shaw, *International Law* (6th edn.) (2008) see note 36 at p. 93.
[75] (1969) ICJ Reports p. 3.

invoked, and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved'.[76] Such position was held to be indispensable in the formation of a new rule of customary international law.[77]

Again, this case was between great powers of the European colonialists in regards to their own economic interests. Their state practices and *opinio juris* played a huge role in the development of custom affecting boundary rules for other states to follow. However, while setting out the above elements, the ICJ held that it was necessary for the practice in question to be completely rigorous in conformity with purported customary rule.[78] This position was established in the *Nicaragua v. United States case*.[79] This case concerned military and paramilitary activities conducted by the United States (US) against Nicaragua between 1981 and 1984, following the collapse of the government of President Somoza in July 1979. This incident occurred with an armed opposition led by *Frente Sandinista de Liberacion Nacional* (FSLN) in Nicaragua. At first, the US supported the new government installed by FSLN, but later claimed to have found that Nicaragua was providing logistical support and weapons to guerrillas in El Salvador. This led to the termination of US aid to Nicaragua and new plans and activities were directed against Nicaragua by the US. Following these developments, Nicaragua argued before the ICJ that these activities by the US violated international law. Here, the ICJ boldly held that the US violated customary international law by inducing threat and directly using force against Nicaragua.

---

[76] See note 73 at p. 43.
[77] (1969) ICJ Reports, p.43, 41 ILR, p. 29. See also Malcolm N Shaw, *International Law* (6th edn.) (2008) see note 36 at p. 77.
[78] (1986) ICJ Reports, p. 14.
[79] (1986) ICJ Reports, p. 14.

On the elements of state practice and *opinio juris* as constituting customary international law, the ICJ stated that

> In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, and not as indications of the recognition of a new rule.[80]

The ICJ also declared that for a new custom to emerge, not only must the acts concerned 'amount to a settled practice', they must also be accompanied by the *opinio juris sive necessitatis.* Either the states taking such action or other states in a position to react to it must have behaved in such a way that their conduct would have been evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.

Although the ICJ ruled in favour of Nicaragua, state practice and *opinio juris* were again emphasised as the determining elements for the formation of custom. Also, the case touched on the conditions which take into consideration the need for consistency of practice for the emergence of a new rule of customary international law. However, the US' earlier activity in 1945, through the Trueman proclamation with respect to Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, appears not to be in line with the above conditions to create a new rule. This proclamation stated *inter alia* that: 'Government of the United States regards the natural resources of the

[80] (1986) ICJ Reports, p. 98.

subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdictions and control.'[81] This claim was inconsistent with pre-existing international law; no state had previously made the general claim to control the seabed resources of its continental shelf beyond twelve nautical miles, yet many states followed the American position and this position achieved the status of customary rule, and by 1958, its customary status was confirmed by its inclusion in the various provisions of the Geneva Convention on the Continental Shelf.[82]

Although the new custom above was believed to be beneficial to many countries, arguably, great powers are only happy with an international regime so long as it benefits their interest over all others. This position could be exemplified by the United States' withdrawal from the jurisdiction of the ICJ, following contestations over article 36 of the Vienna Convention on Consular Relations (VCCR), which allows a national under arrest to contact a home state Consul.[83] The Optional Protocol to the Vienna Convention on Consular Relations provides that a party can sue or be sued for the violation of the above convention on consular relations in the ICJ.[84] Based on this

[81] 499 UNTS 311.

[82] Michael Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law (1999), see note 3.

[83] Vienna Convention on Consular Relations, Apr. 24 1963, 21 U.ST. 77, 596 U.N.T.S. 261; John Quigley, 'The United States' Withdrawal from International Court of Justice in Consular cases: Reasons and Consequences', available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1057&context=djcil [accessed on 20 August 2016].

[84] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24 1963, 21 U.S.T. 325, 326, 596 U.N.T.S, 488.

provision, three states: Paraguay,[85] Germany[86] and Mexico,[87] sued the United States in the ICJ for the violations of consular relations respectively. The ICJ ruled in favour of the three countries against the United States, and these decisions left the United States dissatisfied with its obligation to the convention and it subsequently withdrew from the jurisdiction of the ICJ. It has been posited that the United States withdrawal from the VCCR Optional Protocol demonstrates its unilateralist approach to international law.[88] A position the United States has adopted for its benefit in the international sphere and in the development of custom based on its position as a powerful economic and military state. Arguably, this position, leading ultimately to

[85] *The Case Concerning the Vienna Convention on Consular Relations (Paraguay v. U.S)* 1998 ICJ 128, 249, 258 (Order of April April). In this case, Paraguay sued the United States in the ICJ for the latter's failure to adhere to consular relations. Paraguay asked for an injunction to stop the United States Supreme Court from the execution of one of the former's national, Angel Breard, who was found guilty of murder in the United States. The ICJ ruled in favour of Paraguay and asked the United States Supreme Court to enforce the ICJ ruling but the United States failed to comply with the injunction and executed Breard. The ICJ continued to consider the case even after Breard's execution, but Paraguay discontinued. Due to this, there was no final judgement on the issue.

[86] *In LaGrand case (FRG v. U.S)* 2001 ICJ 466, Germany sued the United States over the latter's failure to advise on consular access to foreign nationals in a case involving two German nationals, brothers named LaGrand. These German nationals were convicted of murder and sentenced to death in the United States. Although the ICJ issued an injunctive ruling to delay the execution pending the determination of the case in the ICJ, again the United States declined and carried out the execution. Here, the ICJ held the United States liable.

[87] *In the Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.)* 2004 ICJ 12, Mexico sued the United States in the ICJ on behalf of a large number of the former's nationals. In this case, Mexico alleged that the United States failed to advice on consular access to fifty-four Mexican citizens who were on death row in the United States. The ICJ issued an injunction to stop the execution of three persons whose execution was near, on Mexico's request. Mexico also demanded that the conviction of its nationals be reviewed. The ICJ, after listening to both sides, ruled in favour of Mexico, stating that the United States should review the conviction.

Although President George W. Bush issued a Memorandum that the United States will discharge its obligation under the decision of the ICJ to review the conviction of the Mexican nationals, through a letter from the United States Secretary to United Nations Secretary General, the United States withdrew from the Optional Protocol.

[88] John Quigley, 'The United States' Withdrawal from International Court of Justice in Consular cases: Reasons and Consequences' see note 82.

the so-called American exceptionalism, began since it emerged victorious and relatively unscathed from the Second World War.[89].

Based on the above classical case analysis, it is a historical fact that the development of customary international law was made by relatively few powerful states in the West due to their economic, military and other strengths. These states also bear other similarities, such being colonial powers and having influenced the practice and behaviour of other members of the global community during and after colonisation, as explored in this thesis. These customary rules have universal application except where there is persistent objection, which again is developed by few states as discussed in the section below.

4. UNIVERSALISATION, ACQUIESCENCE AND PERSISTENT OBJECTOR IN CUSTOMARY INTERNATIONAL LAW.

Generally, custom is regarded as universally binding on members of the international system, except in the case of persistent objectors, where it is expected to afford states the opportunity to escape from the universal binding nature of customary international law, especially from those rules they find unfavourable.[90] Such a position is achieved where a state consistently and without interruption opposes the formation of a rule of customary international law.[91] It has been argued, however, that persistent objector status in customary processes faces legitimacy problems following the

[89] Michael Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law (1999), see note 3.
[90] David Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law (1996) German Yearbook of International Law, Vol. 39, p. 198.
[91] Ian Brownlie, *Principles of Public International Law* (6th edn.) (2003), see note 51.

speculative value of its function.[92] Such a position was based on the *Fisheries case*, where it is believed that the ICJ shied away from conclusive determination of the limits of persistent objector status.[93]

In spite of the opportunity that may be granted by persistent objection for a state to be excluded from customary rules, it has been argued that customary international law applies to all members of the international community, including those who protested against their creation in the first place.[94] Here, it has been posited that a pre-condition for the membership of the United Nations requires members to observe customary international law, even if they are emerging states and may not have participated in the creation of a particular customary rule. On this note, Waldock states that:

> No state has ever argued before the court that it was exempt from a general customary rule simply because it was a new state that objected to the rule. In the *Right of Passage* case, for example, it never occurred to India to meet Portugal's contention as to a right of passage to enclaves by saying that she was a new state; nor did Poland, new-born after the second world war, ever make such a claim in any of her many cases before the Permanent Court.[95]

Although Waldock made a logical statement on consideration for the universal application of custom, it is also important to consider that most of the new states were

---

[92] Ben Chigara, Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001), see note 6.
[93] (1951) ICJ Report 3.
[94] Ben Chigare, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001), see note 6. p. 40
[95] 'General Course in Public International Law' (1962) HAGUE ACADEMY RECUEIL, DES COURS, 106 (II) at p. 52

already indoctrinated into the (European model of) principles of international law during colonialism, as discussed in the previous chapters of this thesis. Decolonisation appeared to be a vehicle to further such Western ambition, as the new states were too preoccupied with the attainment of sovereignty and the need to utilise its benefits as members of the family of nations, as well as pursuing developmental projects to enable them to 'catch up' with the standards of their former colonisers.[96] Arguably, such preoccupation might either make it unnecessary for these new states to institute legal actions in international courts and tribunals to be exempted from a general custom, as suggested by Waldock, or that the time is not yet ripe for these 'new states' to engage in such pursuits (e.g. to change customary rules that they did not participate in during their creation). Besides these possibilities, the international court has not necessarily been a singular frontier for new states or the Third World to show their resistance or objection to unfavourable international rules. For instance, they engage with international organisations such as the United Nations in pursuit of self-determination.[97] This medium of resistance outside international courts or tribunals ought to be taken into consideration while evaluating the above statement by Waldock dealing with protest by non-participant states in the development of certain custom that appears unfavourable. In other words, the international court is not the only channel through which the Third World could protest against certain customary rules that do not protect their interests.

[96] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).
[97] Felix Chuks Okoye, *International law and the New African States* (London: Sweet & Maxwell, 1972).

The above positions of the West have been adduced to justify the universality of customary international law. For instance, it has been argued that states have universally accepted various ‘secondary’ procedural rules of international law by consensus.[98] Consensus, in regards to the secondary rule of customary international law, is achieved as a consequence of all states having relied on primary rules of customary international law in legal argumentation, or at least having claimed the benefits of such rules.[99] Based on the analysis of the practices of select states, the application of universality in customary international law has raised legitimacy issues over the binding nature of custom over all states.[100] The situation as such has led many scholars to abandon the idea that customary international law is binding under the theory of state consent since the theory does not explain what actually happens in the formation of customary international law.[101]

Also, scholars have tried to justify the ‘universality’ of customary international law by employing the concept of ‘inferred consent’.[102] They argue that rules of customary international law do not necessarily need to be derived from explicit consent, but may be inferred. In some cases, consent may also be inferred by way of acquiescence, as shown in the *Gulf of Maine case*.[103] In this case, acquiescence was defined as ‘equivalent to tacit recognition manifested by unilateral conduct which the other party

---

[98] Anthony D’Amato, *The Concept of Custom in International Law* (1971), see note 3.
[99] Michael Byers, *Power and the Power of Rules: International Relations and Customary International Law* (1999), see note 3.
[100] Felix Chuks Okoye, *International law and the New African States* (1972), see note 101.
[101] Jonathan Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’ (1985) BRITISH YEARBOOK OF INTERNATIONAL LAW, Vol. 56, 1, 16.
[102] Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), see note 3; Anthony D’Amato, *The Concept of Custom in International Law* (1971), see note 3
[103] *Gulf of Maine Maritime Boundary case* (71 ILR 74) 89.

may interpret as consent' and founded on the principles of good faith and equity. In other words, a state may choose not to object or actively oppose the development or change of a customary rule. If there is a clear indication that the state concerned has the capacity to choose to participate or not, the assumption is that such behaviour is accepted as forming custom.[104] Arguably, such could not be said of the new states who were initially disqualified based on lack of sovereignty or not being sufficiently independent to participate in or acquiesce to the development of customary rules. Rather, an 'alternative standard' of 'inferred consent' was developed for the new states to justify why they must obey customary rules of whose formation they did not contribute.

Suspicious of the injustice described in the above situation, and lack of appropriate legal theory to justify the imposition of customary international law on the Third World states, Michael Byers comments that:

> The best answer to this question might be that the new state, participating in the customary process and relying on customary rules, is implicitly consenting to that process as well as to all of the customary rules which have previously been through it.[105]

In a bid to lessen the negative implications of the above assertion, Byers followed this with an apologetic statement that: 'This is not as unjust as it might seem'. The assumption of the statement is that the acceptance of such rules would enable Third

---

[104] Malcolm N. Shaw, *International Law* (6th edn.) (2008), see note 36.
[105] Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), see note 3 at p. 77.

World states to change customary rules, which are oppressive. However, the possibility presented in this assumption has suffered defeat in different ways. Therefore, Third World states have continued to be encumbered by certain oppressive elements of customary international law. For instance, Nigeria, as a member of the Third World, has been bound by some customary rules irrespective of its non-participatory role in the creation of those customs and negative consequences to the strict adherence of such as exemplified below.

5. APPLICATION OF CUSTOMARY INTERNATIONAL LAW IN NIGERIA

There is a contention over the place of customary international law in the Nigerian legal system - usually based on the absence of its express provision in the constitution of Nigeria.[106] Also, there are scarce resources within the Nigerian judicial authorities for the application of customary international law. In the case of *Ibidapo v. Lufthansa Airlines*,[107] the claimant had contracted with the defendant for the latter to have custody and take care of the former's baggage containing an IBM typewriter. The baggage was brought to the defendant in Lagos for delivery to Frankfurt, Germany. The defendant failed to make delivery despite repeated demands. Based on this, there was a claim of negligence on the part of the defendant for failure to carry out the agreement. While considering international law in this case, the Supreme Court of Nigeria did not avert itself from the application of customary international law, but focused on bilateral and multilateral agreements.

[106] E. A. Oji, 'Application of Customary International Law in Nigerian Courts' (2011) NAILS LAW AND DEVELOPMENT JOURNAL, 1 (1) p. 151.
[107] (1997) 4 N.W.L.R (pt. 498) 124.

However, in the case of *Eagles Super Park Ltd v. African Continental Bank*,[108] the claimant approached the defendant for the issuance of a letter of credit in favour of Musahi Trading Company, based in Japan, for the supply of raw materials to the claimant in Nigeria. This credit was to enable the claimant to pay the cost of the raw materials to the Japanese supplier. The defendant assisted the claimant in sourcing the money required for the transaction, and the claimant paid for the charges and commission to the defendant for the transfer to be effected. However, the credit, for unascertained reasons, did not reach the Japanese supplier despite a series of letters of complaint dispatched by the claimant to the defendant concerning such failure. Based on this, the matter was brought before a Nigerian high court. Here, it was considered whether the Uniform Customs and Practice (UCP) for documentary credit was applicable in Nigeria. Although the UCP was made by the International Chambers of Commerce, with its headquarter in Paris, it was intended to be of universal application in terms of the standardization of letters of credit banking and commercial transactions. At the court of first instance, the application of UCP in Nigeria was denied. However, the Court of Appeal of Nigeria held that the UCP constitutes customary international law and can be judicially noticed and applied in Nigeria, and this Court of Appeal decision was upheld in the Supreme Court of Nigeria.

Besides the above positions, scholars have made efforts to rationalise the place of customary international law in Nigeria.[109] It has been argued that since customary international law is part of the common law of England, it has a place in the Nigerian

[108] (2006) 19 N.W.L.R. (pt. 1013) 20.
[109] C. J. S. Azoro, The Place of Customary International Law in the Nigerian Legal System: A Jurisprudential Perspective (2014) INTERNATIONAL JOURNAL OF RESEARCH, Vol. 1, Issue 3, p. 74.

legal system based on section 32 of the *Interpretation Act of the National Assembly* (Nigeria). This is by virtue of common law being part of the Nigerian legal system, provided such international custom is not inconsistent with the constitution of Nigeria. The *Interpretative Act* is an Act of the National Assembly validly made in exercise of the legislative powers conferred on that body by section 4 of the constitution of the Federal Republic of Nigeria, 1999. This brings into perspective the historical colonial legacy of the Nigerian legal system in the institution and sustenance of customary international law, as discussed in previous chapters.

Furthermore, it has been argued that the application of customary international law can be deduced through section 12 of the Constitution of the Federal Republic of Nigeria, 1999.[110] This section seeks to make international law enforceable in Nigeria. Although the section did not expressly mention customary international law, the application of customary international law in Nigeria can be deduced from this section as a source of international law applicable in Nigeria. Based on this, it could be that post-colonial Nigeria became a legitimising instrument for the acceptance of (hegemonic) customary international law. The techniques through which such hegemony has been reproduced and sustained has been demonstrated in chapter one.

In spite of the above divergent views, the universality of customary international law has remained possible in post-colonial Nigeria, irrespective of whether Nigeria participated in the formation of such customary rules or not. As argued in this thesis,

[110] E. A. Oji, 'Application of Customary International Law in Nigerian Courts' (2011), see note 106.

such a position is unfavourable in some instances and the people of Nigeria suffer its negative impact more than the state structure. This argument is in line with most of TWAIL themes, as it concerns the people in the Third World and the unfavourable decisions their state governments make.[111] For instance, the customary international law principle of *uti possidetis juris*, which preserves the boundaries of Nigeria (and other emerging states), has not been totally beneficial to the populace of certain parts of Nigeria, despite the principle's claim to maintain stability in decolonized areas. In the *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*,[112] there was a boundary dispute between Nigeria and Cameroon over the region of Bakassi. This disputed area is a peninsula on the Gulf of Guinea, lying between the Cross River estuary, near Calabar city in the west, and the Rio del estuary on the east of Nigeria. This is an oil rich area and had aroused economic interest. Historically, Britain had political control over this area and its surroundings, known as Old Calabar, due to the Treaty of protection signed between Queen Victoria and the King and Chiefs of Akwa Akpa on 10 September 1884.[113] The area became *de facto* part of Nigeria despite lack of permanent delineation, even after Southern Cameroon voted to leave Nigeria to become part of present day Cameroon.

When the above case was brought before the ICJ to determine who should have legal possession of Bakassi, the court delivered its judgement in favour of Cameroon. The

[111] Makau Mutua and Antony Anghie, 'What is TWAIL?' (2000), see note 14
[112] (2002) ICJ Reports, p. 303.
[113] Bassey Joseph Robert, 'Legal History of Boundary Creation in Africa: The Case of Nigeria-Cameroon Boundary Concerning Bakassi Peninsula (1884- 2008)' (2015) BRITISH JOURNAL OF ADVANCE ACADEMIC RESEARCH, Vol. 4, No. 1, pp. 62-77.

court instructed Nigeria to transfer possession of the area, along with a part of the Nigerian population within the area to Cameroon. This judgement was not welcomed in Nigeria. There were various forms of resistance among the Nigerian state and non-state actors. The verdict was described as biased and unfair and was seen as 'a rape and unforeseen potential international conspiracy against Nigerian territorial integrity and sovereignty' and 'part of a Western ploy to foment and perpetuate trouble in Africa'.[114] Bakassian leaders threatened to seek secession as 'the Democratic Republic of Bakassi' if Nigeria renounced its control over the area.[115] However, with United Nations support of the ICJ judgement, led by the then Secretary-General, Kofi Annan, a mediation was introduced to resolve the issue.[116] In 2006, under the leadership of President Olusegun Obasanjo, the president of Nigeria at the time, the mediation led to the withdrawal of Nigerian troops from the disputed area and subsequent transfer of said territory to Cameroon.

The decision of the ICJ based on customary international law principle of *uti possidetis juris*, created hardship for the people within the area. The inhabitants were displaced; for example, fishermen were displaced from Bakassi and settled in a landlocked area called New Bakassi which was not suitable for fishing, therefore causing economic hardship for this group of people.[117]

---

[114] Okon Edet, *Bakassi Peninsula: The Untold Story of a People Betrayed* (Singapore: Partridge Publishing, 2015).
[115] Mark Dike Delancey, Rebecca Neh Mbuh and Mark W. Delancey, *Historical Dictionary of the Republic of Cameroon* (4th edn.) (Lanham, Maryland-Toronto-Plymouth, UK: Scarecrow Press Inc., 2010) p. 54.
[116] David Seddon, A Political and Economic Dictionary of Africa: An Essential Guide to the Politics and Economics of Africa (Ist edn.) (London: Routledge, 2005).
[117]Johnbosco Agbakwuru, '2500 Displaced Fishermen Protest in Calabar' available at http://www.vanguardngr.com/2012/10/2500-displaced-bakassi-fishermen-protest-in-calabar/ [accessed on 11 July, 2016].

Although state practice and *opinio juris* of a few powerful states have continued to play relevant roles in the determination of custom, these elements have been subject to several criticisms, as will be discussed in the next session. These challenge the insistence on those elements as the sole determinants of custom-making.

6. CRITIQUE OF THE ELEMENTS OF CUSTOM

Although classical international law views state practice and *opinio juris* as constituting custom, the determination of the two elements poses some difficulties.[118] Instances can be drawn, for example, from Andrea Pellet's statement that contrary to what would seem logical, 'determining the evidence of practice is far from self-evident'.[119] In its analysis, the court simply postulates that a practice sustaining the norm exists without taking pains to demonstrate it. Pellet also illustrates that the problem begins with stating that the existence of custom as a rule can be deduced from the practice and behaviour of states. Determining when a particular line of action adopted by a state reflects a legal rule or a mere courtesy could be difficult.[120]

Jörg Kammerhofer also emphasises the difficulty of ascertaining what constitutes state practice and *opinio juris* in the determination of custom, while viewing article 38 of the ICJ as convenient but doubtful of its authoritativeness.[121] The particular uncertainties of customary international law were pointed to as systematic causes.

---

[118] Robert Kolb, 'Selected Problems in the Theory of Customary International Law', (2003) NETHERLANDS INTERNATIONAL LAW REVIEW / Volume 50 / Issue 02 / August 2003, pp 119-150.

[119] Andrea Pellet, 'Article 38' *in* Andreas Zimmermann et al (Eds.), *The Statute of the International Court of Justice: A Commentary* (2006), see note 36.

[120] Andrea Pellet 'Article 38' in Andreas Zimmermann et al (Eds.), *The Statute of the International Court of Justice: A Commentary*, (2006), see note 36.

[121] Jörg Kammerhofer, 'Uncertainties in the Formal Sources of International Law: Customary International Law and some of its Problems' (2004) EJIL Vol. 15, No. 3, pp. 523-553.

The author argues that the absence of a dominant legal culture and a written constitution expose the international system to diverse possibilities and that not even a pragmatic outlook could save the system from such uncertainties.

The notion that state practice must be accompanied by the conviction to adhere to existing rule of law is frequently viewed as having paradoxical implications.[122] For example, in the 1927 *Lotus Case*, the Permanent Court of International Justice stated that:

> Even if the rarity of the judicial decisions to be found … were sufficient to prove …the circumstance alleged … it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention was based on their consciousness of having a duty to abstain, would it be possible to speak of an international custom.[123]

The question is, how can a practice ever develop into customary rule if states must believe that the rule already exists before their acts of practice can be significant for the creation of the rule? Would it be sufficient for states to act in the mistaken belief that a rule already exists, a case of *communis error facit jus* (a shared mistake produces law)?[124]

[122] Hugh Thirlway, 'The Sources of International Law' *in* Malcolm D. Evans (Ed.) *International Law* (3rd edn.) (Oxford: Oxford University Press, 2010).
[123] *Lotus Case* (1927) PCIJ Reports, Series A, No. 9, at 18.
[124] Hugh Thirlway, 'The Sources of International Law' *in* Malcolm D. Evans (ed) *International Law* (3rd edn.) (2010), see note 122.

It has been observed that the above requirement seems to make it impossible for new customary rules to develop, since *opinio juris* would only exist in respect of those rules which were already in force.[125] In response to this criticism, it was proposed that for a new rule of customary international law to develop, the relevant actors must erroneously believe that they are already bound by that rule.[126] However, Michael Byers argues that this approach is unsatisfactory since 'it is inconceivable that an entire legal process … could be based on a persistent misconception'.[127]

Brigitte Stern also responded to the above chronology problem by stating that *opinio juris* constitutes state will, and the meeting of such wills, as manifested through state practice, is the immediate cause of legal obligations.[128] Stern further explains that the content of each 'will' and *opinio juris* depends on the power situation that exists at any given time within the international order.

Beyond the above contentions, Anthony D'Amato is of the opinion that only positive physical international acts of a state can lead to the formation of customary rules.[129] However, the notion that only positive physical international acts of the state constitute the element of practice for the purposes of the formation of custom is

---

[125] Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), see note 3 at p. 131.
[126] François Geny, *(Methode d'interpretation et sources en droit prive positif* (2nd ed.) (Paris: Librairie Generale de Droit et de Jurisprudence, 1919).
[127] Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), see note 3 at p. 131.
[128] Brigitte Stern, *in* Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), see note 3 at p.132.
[129] Anthony D'Amato, *The Concept of Custom in International Law*, (1971) see note 3.

described as too narrow an approach to reflect the present realities of the international system as noted below.[130]

In 1969, the General Assembly passed Resolution 2574, which declared a moratorium on seabed mining. Through this resolution, developing countries regarded unilateral deep seabed mining as unlawful. However, some influential Western states opposed this view by regarding the resolution as a mere statement of political principle and intent.[131] They argued that what states say do not correspond to what they do.[132] They also argued that individual states' statements are more likely to clash over time than that of their actual practice.[133] This could be regarded as an effort to maintain the domination of those powerful Western states in the development of customary international law and it seems unattractive to the world public, as noted by Isabelle Gunning. She argues that:

> If only physical acts are recognised, less powerful or less technologically and economically advanced nations will have little voice in the development of custom. If, for example, the only way to participate in the development of a new custom on coastal fishing rights is to have the technological and monetary capability to seize or destroy trespassing ships, only those nations with

[130] Anthony D'Amato, *The Concept of Custom in International Law*, (1971) see note 3. For criticism of the notion, see Noora Arajärva, 'From State-Centricism to Where?: The Formation of (Customary) International Law and Non-State Actors', available at http://ssrn.com/abstract=1599679 [accessed on 4 May, 2013].
[131] RR Churchill and AV Lowe, *The Law of the Sea* (3rd edn) (Manchester: Manchester University Press 1999) 227
[132] Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), see note 3.
[133] G Fitzmaurice, 'The Principles of International Law Considered from the Standpoint of the Rule of Law', 1957 Recuiel Des Cours, vol. 92 No.2, p.1; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), see note 3.

sufficient resources will have a voice. Such a view undermines and perpetuates the inequality between industrialised nations and less developed countries.[134]

The difficulties adduced by scholars were captured by the president of the International Court of Justice, addressing the issue of the Court's approach to customary international law. The president explained that 'authors are correct in drawing attention to the prevalent use of general statements of rules in the Court's modern practice, although they take the point too far by insisting on theorizing this development'.[135] The president also highlighted that, in practice, the court does not take into consideration such inquiry in every case and that it would be sufficient to also consider the views of bodies such as the International Law Commission.

It has been argued that the inconsistency in the determination of customary international law by international tribunals has contributed to speculation about the justifications for accepting or rejecting certain principles as international norms of customary international law.[136] This position is brought to bear through the friction between traditional and modern custom; while the former develops slowly through state practice, the latter can arise rapidly based on *opinio juris*.[137] This has further heightened the critique on custom, as Georges Abi-Saab states that:

---

[134] Isabelle R Gunning, 'Expanding the International Definition of Refugee: a Multicultural view', (1989-90) FORDHAM INTERNATIONAL LAW JOURNAL, vol. 13, p. 156 at 158.

[135] Michael Wood, Special Rapporteur, First report on formation and evidence of customary international law, International Law Commission Sixty-fifth session Geneva, 6 May-7 June and 8 July-9 August 2013, available at http://legal.un.org/docs/?symbol=A/CN.4/663 [accessed on 23 June 2016].

[136] Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001), see note 6.

[137] A notable feature of the latter is that custom has the ability to enable the progressive development of contemporary concerns of the society, for example, through 'instant' custom to address modern conflicts. In a bid to offer a defense to custom by seeking reconciliation between traditional and modern approaches, Anthea Robert built on the work of Kirgis and Tasioulas. John Tasioulas's argument is that the sliding scale can be rationalized on the basis of Ronald Dworkin's interpretive theory of law, which balances a description of what the law has been with normative considerations of what the law should be.[137] It is believed that this perspective shows why the court may be less exacting in requiring state

> We are calling different things custom; we are keeping the name but expanding the phenomenon. After all, custom, if considered from a technical point of view, is not so much the rule; it is a procedure of creating the rule. These procedures are changing...[138]

The challenges and changes to the formation of custom are highlighted by the roles of non-state actors in the international sphere. The inclusion of non-state actors in the Third World is expected to encourage effective participation and representation of their interests, alongside that of their states, to reflect their particular experience dominated by colonialism.

7. NON-STATE ACTORS AND CUSTOMARY INTERNATIONAL LAW

This section is classified into three parts. Firstly, it discusses the justification for the inclusion of non-state actors in the formation of customary international law. Secondly, it identifies the possible custom-making actors in the Third world, for the purpose of this thesis. Here, it will look at both states and non-states actors as members of the international community that could contribute to the formation of custom in the Third World. Finally, it explores the areas of international law that non-states appear to make impact in custom-making.

---

practice and *opinion juris* in cases that deal with important moral issues. Roberts argues that rearticulating the theoretical foundation of custom in a more principled and flexible fashion will provide international actors with a coherent theory to appreciate custom. It will also help to justify the traditional and modern approaches to custom as two aspects of a single source of law, rather than characterize one approach as illegitimate and the choice between them as undermining the integrity of custom. See, Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001), see note 54; Frederic L. Kirgis, Jr., 'Custom on a Sliding Scale' (1987) 81 AJIL 146; John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', (1996)16 OXFORD J. LEGAL STUD. 85.

[138] Comment of Georges Abi-Saab in the discussion on the sources of international law in A. Cassese and J.H.H. Weiler, (1988) *Change and Stability in International Law-Making*, Florence, European University Institute, p. 10.

a.) JUSTIFICATIONS FOR THE INCLUSION OF NON-STATE ACTORS IN CUSTOM-MAKING

It has been posited that the extinction of states is foreseeable based on the shift of international activities towards non-state actors.[139] The absolute extinction of states may be an extreme prediction, given the continued domineering nature of states in international affairs.[140] Yet, arguably, the shift towards the importance of non-state actors creates opportunity for actual participation of non-state actors in the making of customary international law.[141] Lung-Chu Chen, therefore, argues that the insistence on the traditional model of international law, which holds that states are its lone subjects, is now simply outmoded, if it ever was accurate.[142] Christian Okeke adds that maintaining that international law regulates the affairs and relations of states alone ignores both reason and reality.[143] Okeke argues that if developments in the substance of international law that occurred in the first half of the twentieth century have so transformed the character and content of the international legal system that it can no longer be satisfactorily presented within the framework of classical concepts, then the developments in the latter half of the century demand an expanded concept of international law. On the expansion of the international legal system, various scholars have argued extensively for the inclusion of non-state actors in the formation of customary international law. For

[139] Ali Khan, 'The Extinction of Nation-States', (1992) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 7, No. 2, P.197.
[140] Malcolm N Shaw, *International Law* (6thh edn.) see note 36 at p. 197; Javad Babajani Roodi, 'The Role of the Third World in International Law, (2012) LIFE SCIENCE JOURNAL, Vol 9, No. 4, p.5035 at 5037
[141] Christiana Ochoa, 'The Individual and Customary International Law Formation', see note 35.
[142] Lung-Chu Chen, An Introduction to Contemporary International Law: A Policy-Oriented Perspective 79 (1989), see pp 76-81.
[143] Christian Okeke, 'International Law in the Nigerian Legal System' (1996) CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL p. 319.

instance, Ben Chigara argued that international tribunals consistently invoke the views of international actors other than the state to assist in the determination of state practice and *opinio juris*.[144] He argues that there is a threat to the legitimacy of customary international law in view of article 38 (1) (b) if the state is seen as the sole actor that can instigate and provide evidence for the purpose of custom-making. Also, he raised concerns over the adoption of article 38 (1) (b), which was originally drafted in 1920 and adopted into the current statute of the ICJ without changes to reflect the present international legal system.

Arguments for the expansion of sources of custom aim to reflect the present realities in international law, as well as tackle modern challenges. For example, Isabelle Gunning proposes a more expansive approach to the custom-creating-process, which should be modified to accept the contributions of transnational organizations and non-governmental organizations.[145] Such a proposal was geared towards the expansion of the customary definition of 'refugee' to include forced migrants fleeing war and civil strife.

Christiana Ochoa presents some arguments to justify the inclusion of non-states actors, especially individuals, in the making of customary international law through international law doctrine, which sees individuals as subjects and participants in the international system.[146] Ochoa also highlights human rights doctrine, which is directed towards individuals, to argue the need for the participation of individuals/non-state

[144] Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001), see note 6 at pp. 325-326.
[145] Isabelle R. Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights,' (1991), see 138.
[146] Christiana Ochoa, 'The Individual and Customary International Law Formation', see note 35.

actors in the formation of customary international law. Furthermore, contributions from globalisation, cosmopolitanism and transnationalism make the inclusion of non-state actors in the formation of customary international law more of a reality.[147]

The dynamic and flexible nature of custom appears to enable such inclusion of non-state actors in the process of law creation.[148] Arguably, such dynamism creates opportunities for different subject matters and areas' in order to determine custom, as well as an inclusive international legal system that can accommodate a wide range of contributors, both state and non-state actors, from diverse legal traditions in the making of custom.[149] Also, the flexible nature of custom (arising from issues such as lack of specific time frame, and exact number of practices) and the intervention of international judges in cases concerning custom reveal the flexible and evolutionary character of custom. Such interventions arise from the need to identify or declare the existence of custom, crystallise evolving rules and generate or constitute a rule whereby the court's pronouncement becomes practice that forms into a rule of customary international law.[150] These tasks help to address ambiguities, vagueness and unforeseeable contemporary issues.[151]

In view of the above, judicial decisions and the teachings of publicists of various nations, according to article 38 (1) (d) of the statute of the International Court of Justice, aid the determination of rules. Although the primary function of international

---

[147] Christiana Ochoa, 'The Individual and Customary International Law', see note 35.
[148] Anthony D'Amato, *The Concept of Custom in International Law*, (1971), see note 3.
[149] Robert Kolb, 'Selected Problems in the Theory of Customary International Law', (2003), see note 122 at p. 128.
[150] Alan Boyle and Christine Chinkin, *The Making of International Law; Foundations of Public International Law* (New York, Oxford University Press, 2007).
[151] Malcolm N Shaw, International Law (6th edn.) (2008) see note 33.

judges (an example of non-state actors) is to engage in their judicial function in order to ascertain the existence or otherwise of legal principles and rules, some scholars have argued that they also make custom.[152] In the *Tadic case*, the International Criminal Tribunal for the former Yugoslavia stated that the outcomes of 'the work of the International Committee of the Red Cross (ICRC) is "an element of actual international practice", this is an element that has been conspicuously instrumental in the emergence or crystallisation of customary rules'.[153] Besides the ability of judges to state what could constitute custom, the ability of the practices of ICRC to constitute custom is a deviation from the domineering nature of the state in the creation of custom.[154] Therefore, if judges could make custom, and the practices of ICRC also constitute custom, then the insistence on state requirement for the formation of custom is challenged.

The International Court of Justice , for instance, is not bound to apply its precedents, but it has stressed that it has been called to render justice that is not abstract, 'but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability'.[155] In view of this statement, the court acknowledged the provision of article 59 of its statutes, but stated that there was no reason why the court could not apply its previous decision in the Judgement of 11th

[152] Alan Boyle and Christine Chinkin, *The Making of International Law; Foundations of Public International Law* (2007), see note 150 at p. 268.
[153] *I.C.T.Y. Appeals Chambers, Prosecutor v. Tadic*, IT-94-1-APR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995 at 109; Noora Arajärvi, 'The Role of the International Criminal Judge in the Formation of Customary International Law', (2007) see note 41 at p. 13.
[154] Noora Arajärva, 'The Role of the International Criminal Judge in the Formation of Customary International Law' (2007) see note 28.
[155] Andrea Pellet, 'Article 38' *in* Andreas Zimmermann et al (Eds*.), The Statute of the International Court of Justice: A Commentary* (2006) see note 36; *Continental Shelf (Libyan Arab Jamahiriya/Malta*) ICJ Reports (1985) pp. 13, 39 (para. 45)

June 1998 on the preliminary objections of Nigeria in the *Land and Maritime Boundary case.*[156]

Following the above application of precedent by the ICJ, it could be argued that what constitutes custom could be greatly influenced by the constitution of the court. Such an argument was manifested in the *North Sea Continental Shelf case*, where the court focused heavily 'on evidence of actual practice in the real world' and the court later relied heavily 'on resolutions of the United Nations, other intergovernmental organisations, and treaties in the *Nicaragua case'*.[157] Therefore, the composition of the international court affects the sensitivity of the Court, particularly concerning factors that could be taken into consideration when appreciating the existence of a customary rule.[158]

Also, there are occasions where jurists have played relevant roles in the development of international law. Such provisions in the first instance point to the role of jurisprudence in the development of international law. For instance, the teachings of publicists have influenced the concept of custom as criticisms, such as lack of theoretical explicitness of the International Court of Justice, have paved way for publicists to contribute to the constitution of custom.[159] There is no doubt that Suarez and Grotius played significant roles in directing the understanding of the constitution of custom from Western perspective.[160] They demarcated custom from natural law,

---

[156] ICJ Reports (1998) pp. 275, 292 (para. 28); Andrea Pellet, 'Article 38' *in* Andreas Zimmermann et al (Eds*.), The Statute of the International Court of Justice: A Commentary* (2006) see note 36.
[157] Andrea Pellet, 'Article 38' in Andreas Zimmermann et al (Eds*.), The Statute of the International Court of Justice: A Commentary* (2006) see note 33. at p. 761
[158] Andrea Pellet, 'Article 38' in Andreas Zimmermann et al (Eds*.), The Statute of the International Court of Justice: A Commentary* (2006) see note 36 at p. 761, see commentary on footnote 614
[159] Anthony D'Amato, 'Trashing Customary International Law' (1987) 81 AJIL 101.
[160] Ben Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001) see note 6.

and presented custom as positive law, which impacted on the formulation of interstate relations which was aimed at the equality of sovereign states.[161] Subsequent writings featured equality of sovereign states exclusively within Europe.[162] Such writings affected the relationship between Europe and non-European nations that were regarded as 'lacking sovereignty'. Therefore, the custom that mattered was that which evolved from European states.[163] However, Third World writers are re-evaluating the Western model of 'statehood' in the international system and taking into consideration their own realities.[164]

Furthermore, legal scholars are contributing to and shaping the conception of customary international law from a Third World perspective.[165] For example, Taslim Elias argued that Africans, particularly pre-colonial African peoples, contributed to the development of diplomacy that is not different from customary international law, but such contributions are neglected in positivist conception of international law.[166] Such arguments reveal the way custom could be formed from the Third World perspective

---

[161] Michael P Scharf, 'Seizing the "Grotian Moment" Accelerated Formation of Customary international Law in Times of Fundamental Change' 2010) CORNELL INT'L L. J. vol. 43, p. 439; Benedict Kingsbury, 'A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull' (1997) 17 QUINNIPIAC L. REV. 3, p. 10.

[162]Bardo Fassenbender and Anne Peters (Eds.) *The Oxford Handbook of the History of International Law* (2012), see note 67.

[163] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 HARV. INT'L L. J. 1

[164] Makua Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry', (1995) MICHIGAN JOURNAL OF INTERNATIONAL LAW, Vol. 16, p.1113.

[165] TWAIL perspective on human rights demonstrates resistance to Western hegemony on the idea of human rights and in the process develops a trend in human rights discourse from non-Western position. See Balakrishnan Rajagopal, 'Counter-hegemonic International Law: Rethinking human Rights and development as a Third World Strategy' (2006), see note 16; Makau Wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 VA.J. INT'L L. 339; Bonny Ibhawoh, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State (2000) HUMAN RIGHTS QUARTERLY, Vol. 22, No. 3, pp. 838-860; Akwasia Idoo, Africa: Democracy Without Human Rights?', (1993) 15 HUM. RTS. Q. 703, 713.

[166] Taslim O Elias, *The Nature of Customary Law* (1956), see note 18.

while challenging the Western model of custom (which constitute state practice and *opino juris)*.

Furthermore, the media is creating more awareness and influencing the participation of non-state actors in policy matters, which have had an impact on the constitution of state practice and *opinio juris*.[167] A detailed analysis of this position was explored in chapter one. All these circumstances are affecting and gradually shifting the traditional position of state monopoly on the formation of customary international law to a more inclusive system that incorporates non-state actors and diverse legal traditions in the Third World. Consequently, custom-making within the present international system appears to consider diverse participants. The next session further considers such position by exploring custom-making actors in the Third World.

b.) IDENTIFICATION OF CUSTOM-MAKING ACTORS IN THE THIRD WORLD

Identification, as a concept in customary international law could be approached from diverse positions.[168] It is often viewed in relation to the 'formation and evidence' of customary international law as shown in the recent works of the International Law Commission (ILC). According to Michael Wood, Special Rapporteur of the ILC, the term 'formation' expounds the process by which customary international law develops, whereas, 'evidence' illustrates the identification of such rules.[169] However, such

[167] Achilles Skordas, 'Hegemonic Custom' *in* Michael Byers (ed.), *United States Hegemony and the Foundations of International Law* (Michael Byers and Georg Nolte (eds), (New York, Cambridge University Press, 2008) 317.
[168] George D Kyriakopoulos, 'Formation of international Custom and the Role of Non-state Actors' *in* Photini Pazartzis *et al* (eds.) *Reconceptualising The Rule Of Law in Global Governance, Resources, Investment and Trade* (Oxford and Portland, Oregon: Hart Publishing, 2016), p. 43.

[169] ILC, 'First Report on Formation and Evidence of Customary International Law' (Sixty-fifth session, 2013) UN Doc A/CN.4/663, para 13 et seq.

distinction is criticised to be of limited value as it is believed that the process of the formation of customary international law and its consolidation as a rule of positive international law are two sides of the same coin, suggesting that the concept of custom refers to both the law-making process, as well as the outcome of that process leading to a regional or universal legal binding norm.[170]

In view of the above, this section explores the identity of possible actors which could propel the law-making process and the end result/rules that could lead to legally binding rules of regional and/or universal custom. According to the traditional approach, the understanding of custom-making actors (or any other form of international law-making) is derived from legal positivism based on the voluntarist approach to international law.[171] This position was also established by Permanent Court of International Justice in the *Lotus case* where the court stated that 'the rules of law binding upon states, therefore, emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law'.[172] With regards to this position, states' participation in the making of customary international law is certain (in public international law) on the acquisition of statehood

---

[170] P M Dupuy, 'Formation of customary International Law and General Principles' *in* D Bodansky, J Brunee and E Hey (eds.) *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2008), p. 451.

[171] Georg Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), at 2, 48–49; Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: Verlag von C.L. Hirschfield, 1899), at 32, 81; Ratner and Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers', 93 AJIL (1999) 291. However, legal positivism and voluntarist approach to international law have faced criticism, often on the perception that all legal facts are determined by social facts alone. See, Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010) EUR J INT LAW 21 (4): 967-995. A definition of what these social facts could be, are also contested among the positivists. See, H. Kelsen, *Reine Rechtslehre* (2nd edn) (Vienna: Franz Deuticke, 1960), at 196.

[172] PCIJ Rep A no. 10, 18.

and the law creating role attached to such status based on their consent.[173] Here, states within the Global North and South fall within this category. Therefore, post-colonial states in the Third World are expected to fall within the purview of modern statehood and are deemed to be engaged in the making of customary international law, either through their express or implied consent.[174] Although this thesis explores the 'weak' participatory role of post-colonial states in custom-making in the international system as being detrimental to these regions, all post-colonial states are identified as international actors and are expected to contribute to the development of customary international law like their counterparts in the Global North.

However, it has been argued that modern approach to international custom appear to deviate from voluntarists approach following its emphasis on the expression of collective unconsciousness in the international society.[175] This brings to perspective the speedy development of international custom through multilateral treaties and declarations by international fora such as the United Nations General Assembly,[176] the need to accommodate human rights principles and other reasons enumerated in this chapter that justify the necessity for the inclusion and participation of non-state actors

[173] Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), see note 3. In spite of the dominance of state participation resulting in the reliance on state practice and *opinio juris* as the determinants of custom, it has been observed that references to *opinio juris* appear to indicate more of a belief than consent in some instances. See the analysis of *North Sea Continental Shelf case* (1969) ICJ Reports, para 77 and the *Gulf of Maine case,* T. Treves, 'Customary International Law' *in Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012) p. 18.

[174] Antony D'Amato, *The Concept of Custom in International Law* (Ithaca N. Y. and London: Cornell University Press, 1971).

[175] George D Kyriakopoulos, 'Formation of international Custom and the Role of Non-state Actors' (2016), see note 1.

[176] Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001), see note 55.

in the making of international custom. Based on the foregoing, both state and non-state actors are relevant in the international system.

The significance of the role of non-state actors in the representation of the interests of both Third World and non-Third World regions respectively in custom-making cannot be overlooked, despite contentions over the role of non-state actors in international law.[177] Although non-state actors are regarded as subjects of international law, not every non-state actor is viewed as having the capacity to contribute to (customary) international law-making on every issue, as stated by the ICJ in the *Reparation case*, in view of the court's guidelines in this regard.[178] United Nations is an example of non-state actors with legal capacity under international law in this case. In this regard, international/regional courts/tribunals could in the identification of relevant actors that could/participate in custom-making as observed in the *Tadic case* discussed above. Despite these seemly helpful guidelines, TWAIL strongly advocates for a more inclusive system by identifying the ordinary people in decision-making.[179] Pulling on these diverse positions, regional peculiarities are brought into focus in the identification of non-state actors for the purpose of custom-making. Within the Third World, relevant non-state actors that could possess the capacity to influence the development of customary international law include armed groups, nationalists, indigenous groups, social movements, mass/social media,

---

[177] Mario Prost, T*he Concept of Unity in Public International Law* (Oxford: Hart Publishing, 2012). The contentions are elaborated in chapter four of this thesis.

[178] *Reparation for Injuries Suffered in the Services of the United Nations, Advisory Opinion*, (1949) ICJ Reports 174.

Jan Klabbers, *An Introduction to International Institutional* Law (2nd edn.) (Cambridge: Cambridge University Press, 2009).

[179] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003), see note 96.

scholars, among others. The activities of some of these non-state actors relevant to this are discussed in details in chapter five.

In view of the above, customary practices leading to binding obligations could not be said to be strictly tied to a particular actor (states, for example) as in traditional customary international law portrayed through the ICJ's interpretation of article 38 of its status in various case-laws. Rather, the possibilities of evidence of custom emanating from relationships among non-state actors, and those arising between states and non-state actors, suggest a reappraisal of the interpretation of article 38 of the ICJ. Although the statute appears biased according to diverse scholars, as noted in this thesis,[180] the identification of custom-makers beyond state purview gives a counter-hegemonic perspective of article 38 of the statute of the ICJ. This position brings to perceptive, at least, a literary interpretation of article 38 as practices and *opinio juris* in favour of diverse participants in custom-making in the international sphere (pending any future amendment to the statute to reflect the modern realities characterised by diverse subjects and legal traditions). This would give credence to the long-time advocacy of such literary interpretation by scholars for effective participation of non-state actors in custom-making.[181] In spite of such possibilities, it is believed that non-state actors may not necessarily be influencing all areas of international law and that the relevance of their input in international law, could

[180] For instance, the statute having come into force during the period of colonisation.
[181] Robert McCorquodale, 'An Inclusive International Legal System', (2004) 17 LEIDEN J. INT'L L. 477.

either be expressed or implied by the authority of states.[182] These issues are discussed below.

c.) NON-STATE ACTORS' INFLUENCE ON CUSTOM-MAKING IN INTERNATIONAL LAW.

The contributions of non-state actors to custom-making are usually argued within the area of international humanitarian law and human rights law, following the publicity attached to the practices and codes of conduct of diverse armed groups in these areas of law.[183] In some cases, armed groups have published their codes of conduct, as well as issued internal codes and drafted constitutions containing international humanitarian law provisions. For instance, there was the enactment of a Revolutionary Women's law by the *Ejército Zapatista de Liberación Nacional* (EZLN) of Mexico. In other instances, some armed groups have signed Memoranda of Understanding with both regional and international organisations on specific matters of international humanitarian law; for instance, the Memorandum of Understanding between the Justice and Equality Movement (JEM) and United Nations regarding the Protection of Children in Darfur.[184] This memorandum pertains to the procedures and framework of the Darfur Peace Agreement with regards to the lasting impact its conclusion and implementation will have on the children of Darfur. Here, JEM reaffirmed its commitment to guarantee the protection of children in this region with

---

[182] Anthea Roberts and Sandesh Sivakumaran, 'Law-making by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2011) THE YALE JOURNAL OF INTERNATIONAL LAW, Vol. 37:1, p. 108.

[183] Anthea Roberts and Sandesh Sivakumaran, 'Law-making by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2011), see note 182.

[184] http://reliefweb.int/sites/reliefweb.int/files/resources/3864EE07BF38473C852577670066EA08-Full_Report.pdf [accessed on 18 January 2017].

regards to the principles of human rights and international humanitarian law by refraining from recruiting or using children for military operations, whether as combatants or in other roles. This agreement appears to give a degree of participation in the rules guiding the region and, as such, compliance is expected from both parties.

Furthermore, some of the practices of armed groups have been collected and listed in the customary international humanitarian law study conducted by the International Committee of the Red Cross (ICRC).[185] Although the legal status of these armed groups' materials has raised some contention, the practices of the Chinese People's Liberation Army (CPLA), Farabundo Martí National Liberation Front (FMLN) and the Royalists in Yemen have been taken into account by the ICTY in the determination of customary rules applicable to non-international armed conflicts.[186]

In view of the contentions surrounding the legitimacy of customary rules created by non-state actors, some authors have approached such rules from a quasi-custom based perspective and made some suggestions to mitigate the concerns raised.[187] For instance, Anthea Roberts and Sandesh Sivakumaran made the following three suggestions. Their first recommendation is that armed groups should be bound by existing customary international law, as exemplified in the customary rights and obligations of new states. Here, it is advocated that armed groups should be bound by existing customary international law obligations. In spite of the intentions that could

[185] Jean-Marie Henckaerts and Louise Doswald-Beck, ICRC Customary International Humanitarian Law (Cambridge: Cambridge University Press, 2005).
[186] Anthea Roberts and Sandesh Sivakumaran, 'Law-making by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2011), see note 182.
[187] Anthea Roberts and Sandesh Sivakumaran, 'Law-making by Non-State Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2011), see note 182; Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2014) 18.

be associated with this position, it re-emphasises the perceived domination of a few states within the Global North, as discussed in this thesis. Therefore, this is unlikely to be an option for counter-hegemonic pursuit by non-state actors in the Third World.

The above authors also proposed the creation of new custom, or a change of existing custom, through some form of consensus between armed groups and states. This proposal appears progressive, as it tends to incorporate the interests of diverse parties; both states and non-state actors are involved in a particular issue.

The last proposal by Anthea Roberts and Sandesh Sivakumaran is that owing to the centrality of states in international law, the practice of armed groups (non-state actors) should not be treated equally. This argument was based on traditional notions of custom based on statehood. Although states dominate the international sphere, this situation does not necessarily include the majority of states within the diverse regions of the international community. Insistence on such a position only sustains the hegemony of a few states within the Global North to the detriment of the Global South. However, the above authors advocated for some form of participatory role in the creation of customary norms without ceding all or equal power to armed groups. Most often, the participatory roles of non-state actors include international humanitarian law, as noted above, human rights law, environmental law, international criminal law, trade law, and peace and security law.[188]

The relevance accorded to the customary rules emanating from various non-state

[188] Anne Peters, Lucy Koechlin and Gretta Fenner Zinkernagel, 'Non-State Actors as Standard Setters: Framing the Issue of an Interdisciplinary Fashion' *in* Anne Peters et al (eds.) *Non-State Actors as Standard Setters* (Cambridge: Cambridge University Press, 2009) pp. 1-32.

actors is sometimes hinged on legitimacy, which has been viewed from two perspectives by some scholars; as an empirical or social fact.[189] Here, it could be viewed that the non-state actors who are creating norms of customary international law are constituted by states at a 'constitutional moment' and/or that the non-state actors in question promote certain global political and justice ends, such as the protection of human rights, eradication of poverty, and protection of the environment, among others.[190] The position of the state in allocating such powers to non-state actors, such as international organization (for instance, the United Nations) appears to represent the traditionalist statist position in favour of a few powerful states, as discussed in this thesis. However, such statist positions have faced resistance in most parts of the Global South due to the weakness of the states in this region (for example, post-colonial African states). In this regard, it could be argued that the customary practices developed by non-state actors arising from this region do not necessarily need the express or implied authority of the post-colonial states. Rather, the practices of non-state actors have become the standard of both national and international relations within this region, derived possibly from the people/indigenous community.[191]

[189] Steven Wheatley, 'Democratic Governance beyond State: The Legitimacy of Non-State Actors as Stand Setters' *in* Anne Peters et al (eds.) *Non-State Actors as Standard Setters* (2009) see note 13 at pp. 215-240. It has also been argued that the authority exhibited by a non-state actor in the international system could depend on the nature of the non-state actor. For instance, authority could be achieved through the transfer of powers from a state to non-state actor as in the case of supranational actors. See, D B Hollis, 'Why State Consent Still Matters- Non-state Actors, Treaties and the Changing Sources of International Law' (2005) 23 BERKELEY JOURNAL OF INTERNATIONAL LAW 138.
[190] Steven Wheatley, 'Democratic Governance beyond State: The Legitimacy of Non-State Actors as Stand Setters' (2009) see note 14 at p. 224.
[191] Dieter Neubert, 'Local and Regional Non-State Actors on the Margins of Public Policy in Africa' in Anne Peters et al (eds.) Non-State Actors as Standard Setters (2009) see note 13 at pp. 35-60.

8. CONCLUSION

This chapter first explored customary international law from a historical perspective. It was argued that there are other legal traditions besides those of Western states that developed their own common practices with legal implications. However, the colonial encounter largely meant that the custom of other legal traditions was suppressed, not just domestically but also in the international sphere. The end of colonialism granted a new status to Third World states as they were admitted to the family of nations with the capacity to participate in international law. It was generally believed that Third World states would simply inherit the customary rules which were already in existence during the colonial period. Third World states have made various attempts to resist such Western domination, inter alia by raising the issue in the General Assembly.

Although the formation of custom has been within the purview of states, the changes in the international legal system that encourage the participation of non-state actors in international activities demonstrate that the traditional view focused on only states no longer represents the reality of contemporary international law, nor that of the Third World. Non-state actors are contributing to the international system and, as such, their participation in the custom-making process has become inevitable. This chapter explored the flexible nature of custom and showed that its elements make space for the possible participation of non-state actors. Such accommodation would encourage more effective participation of the Third World via side by side participation of states and non-state actors in international relations for the purpose of the development of international law-making. In order to achieve this goal, questions concerning the legal capacity of non-state actors to participate in

international law might be raised. Such questions tend to determine whether the non-state actors, as explored in this thesis, have the legal capacity to participate under international law. This question leads to the discussions of the next chapter, which centres on the legal personality of non-state actors in the international legal system.

CHAPTER FOUR

THE LEGAL PERSONALITY OF NON-STATE ACTORS UNDER INTERNATIONAL LAW

1. INTRODUCTION

This chapter explores the legal capacity of non-state actors for the purpose of international law making. It broadly examines non-state actors in the international legal system, and later narrows down to conceptualise non-state actors in the Third World for the purpose of counter-hegemonic pursuits in international law-making. This chapter employs a historical analysis, as well as the principles of self-determination, in the evaluation of the potential of non-state actors in international law-making. The chapter argues that non-state actors formed part of the emerging law of nations (particularly from an African perspective), whereas the emergence of the Westphalian state system suppressed the active participation of these same non-state actors. However, contemporary issues, such as the need for equality, self-determination, and human rights, amongst others, have created channels for the re-emergence of non-state actors. Such a situation enables further arguments for the role of non-state actors in the making of customary international law, which forms the central theme of this thesis.

In previous chapters, it was shown that the positivist idea of statehood in international law was a means to exclude some members of the international system, especially those in the Third World, and to privilege colonial powers. Although states continue to remain relevant, the capacity to make claims, treaties and other binding

international agreements can no longer be an exclusive privilege of states.[1] Also, the weak nature of post-colonial African states, the challenges of legitimacy and their inability to address gaping fiscal deficits (among other issues) have all led the ordinary people to disregard the privileges of statehood attributed to African states.[2] Therefore, the activities of the ordinary people, social movements and other non-state actors in the international system have become imperative in the confrontation of these challenges.[3] Such participation by non-state actors creates an inclusive system where various participants, including both state and non-state actors, relate with one another in order to meet their needs.[4]

In support of the above position, the definition of international law by Shearer captures the capacity to possess the above rights and influence international activities beyond a state monopoly. According to him,

> International law may be defined as that body of laws which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore, do commonly observe in relations with each other, and which includes also:

---

[1] Roland Portmann *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010).

[2] Michael Bratton, 'Beyond the State: Civil Society and Associational Life in Africa' (1989) WORLD POLITICS, Vol. 41, No. 3, pp. 407-430.

[3] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

[4] U. O. Umozurike, *Introduction to International Law* (Ibadan: Spectrum Law Publishing, 1993); Christian N. Okeke, 'The Use of International Law in the Domestic Courts of Ghana and Nigeria' (2015) 32 ARIZ. J. INT'L & COMP. L. 371.

> (a) the rules of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with States and individuals; …[5]

Shearer's definition of international law recognises non-state actors as members of the international community. This position is vital to this chapter, although it is believed that they do not have the *same* rights and obligations.[6]

In view of the above, this chapter explores the legal capacity of non-state actors and their contribution to international law-making. It will highlight the fact that there are neither conventional nor customary rules precluding non-state actors from law-making under international law.[7] This argument is essential for the participation of non-state actors in the making of international law, especially in African regions where the state is seen as an agent of hegemony, as argued in previous chapters.

This chapter begins by exploring the diverse conceptions of legal personality and an examination of the historical presence of non-state actors in international law. A critical enquiry into accepted historical narratives is necessary, as it has been observed that authors appear to choose divergent pathways in beginning their narratives on the commencement of international law, therefore already privileging certain narratives of progress over others. This chapter will also demonstrate the re-emergence of non-state actors and their contemporary roles in the international sphere. Furthermore,

---

[5] I. A. Shearer, *Starke's International Law* (11th edn.) (Sydney: Butterworths, 1994), particularly p. 3

[6] Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn.) (Cambridge: Cambridge University Press, 2009).

[7] H. Lauterpacht, *International Law and Human Rights* (London: Stevens & Sons Limited, 1950).

this chapter will examine self-determination and the conceptualisation of non-state actors in the Third World.

2. CONCEPTIONS OF LEGAL PERSONALITY IN INTERNATIONAL LAW

The legal personality of an entity is crucial; without it, an entity cannot function in a given legal system.[8] It enables an entity to claim certain rights and perform specific duties.[9] Legal personality, under international law, is used in the same way as in municipal law.[10] However, while both legal systems attribute rights and duties to denoting legal personality, international law goes beyond these qualities to include the competence to create law with regards to the decentralised nature of the international system.[11] This is of importance to this thesis in regards to who has the legal capacity to create international custom. In response to the question of who can create or contribute to the formation of (customary) international law, there have been diverse views on the legal capacity to do so.

One of the major views on international legal capacity is that such features are exclusively reserved for states.[12] The attainment of international personality is only based on statehood. Such a position denies any other entity in the international legal system the opportunity to have any right or obligation. It was regarded to be synonymous with Eurocentric models of state systems. This position was prominent during the colonial period, when African colonies (and other members of Third World)

---

[8] Malcolm N. Shaw, *International Law* (6th edn.) (Cambridge: Cambridge University Press, 2008).
[9] Malcolm N. Shaw, *International Law* (6th edn.) (2008), see note 8.
[10] Roland Portmann *Legal Personality in International Law* (2010), see note 1.
[11] Roland Portmann *Legal Personality in International Law* (2010), see note 1.
[12] M. Siotto Pintor, 'Les sujets du droit international autres Etats' (1932) RECUEIL DES COURS, Vol. 41, p. 2; F.S Dunn, 'The Legal Rights of Individuals' (1941) PROCEEDING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, Vol. 35, p. 14.

were not regarded as states and therefore had no right to participate in the making of (customary) international law.[13] Besides these colonial entities, any other entity outside the state did not have the competence to make law in the international legal system. This position is rarely advocated for in contemporary times.[14]

Another conception of international personality is based on the recognition of the state as the original, primary or 'normal' subject of international law, but there are also rules accommodating non-state actors.[15] This view differentiates the structural character of the legal personality of the state from other entities, which are seen as secondary international persons.[16] Here, the question of what constitutes the actual meaning of 'normal' is raised. It has been argued that the term 'normal' could mean that the bulk of international norms are controlled by the state, or it may be that the structure of the state is seen as 'normal'. It could also be that the qualification of the 'normal' personality of the state may have arisen as a quasi-unanimous agreement among writers on international law, while a dissenting number might have proposed the term 'personality' in a broader sense.[17] However, it is contended that the possibility of influence on any decision to accept this dominant doctrine depends on the weight being ascribed to the teachings of the court.[18]

---

[13] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

[14] Roland Portmann *Legal Personality in International Law* (2010), see note 1.

[15] M. Siotto Pintor, 'Les sujets du droit international autres Etats' (1932) see note 12.

[16] Roland Portmann *Legal Personality in International Law* (2010), see note 1.

[17] Hans Aufricht,'Personality in International Law, (1992) THE AMERICAN POLITICAL SCIENCE REVIEW, Vol. 37, No. 2, p. 217. See p. 234 for further argument on 'normal'.

[18] Article 38 (4) of the Statute of International Court of Justice; Hans Aufricht, 'Personality in International Law' (1943) see note 17 at p. 235.

There is also the view that international legal personality is individualistic.[19] In this regard, only individuals are the 'real' subjects of international law, whereas the state is 'fictitious'. It has been argued that international law involves relations among individuals rather than a conceived notion of inter-state relations.[20] The proponents of this view disagree with the traditional theory regarding the legal personality of the state and argue that the state is 'unreal' because, as an abstract entity, it cannot have a will of its own; it is, rather, dependent on the individuals who comprise it. Therefore, the state is regarded as mere fiction, and logically unable to form the subject of scientific analysis. However, this position has been criticised as anarchic individualism, particularly because the potentialities of legal organisation by means of corporate structures is overlooked.[21] In spite of these criticisms, it is contended that the whole fiction of the state is like every other corporation composed of human beings, and its objective is the welfare or the common goal of those constituting it.[22] In this regard, the activities and greatness of a state are dependent on its people. Neither the mere territory itself nor the status of the organisation is separate or distinct from its people. The state is seen as nothing but a group of politically organised people exercising jurisdiction. Consequently, the state is not seen as a person but an entity that owes its origin and continuous existence to the people. However, this position has been criticised following the argument that the will of a state and its actions may differ from those of its individual citizens, and that it is only declared will that counts as a rule in

[19] Roland Portmann *Legal Personality in International Law* (2010), see note 1.
[20]Hans Aufricht, 'Personality in International Law' (1943) see note 17.
[21]Hans Aufricht, 'Personality in International Law' (1943) see note 17, particularly p. 232- 233; H. Kelsen, *Hauptprobleme der Staaterechstlehre* (2nd edn.) (Ttibingen, 1923) p. 72
[22] Hans Aufricht, 'Personality in International Law' (1943) see note 17.

international relations.[23] Also, the denial of the peculiar corporate character of a state has been criticised, as it could lead to a confusion between its structural and functional approaches. Although it might be an abstract entity, the state has real effects on the international plane. However, there is the political question of whether a state that neglects the personality of its individual nationals fulfils the true mission of an ideal state.

Furthermore, the notion of international personality is viewed as formal, and as such presents international law as an open system.[24] There is no presumption of who is a legal person. Consequently, international personality assumes a secondary position, where every entity is an international person and the addressee of the norms of international law according to the general principles of interpretation.

The above four conceptions of international legal personality are based on the dichotomy of subjectivity and objectivity. Subjectivity, in international law, is often associated with the notion of international legal personality, which confers certain rights, such as the right to enter into international agreements; the right to send and receive legations; and the capacity to bring and receive international claims.[25] These rights are usually treated as indicators and do not necessarily need to be all present at the same time, as shown in the International Court of Justice's Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the United Nations*.[26] This inquiry

---

[23] Hans Aufricht, 'Personality in International Law' (1943) see note 17.
[24] Roland Portmann *Legal Personality in International Law* (2010), see note 1.
[25] Ian Brownlie, *Principles of Public International Law* (4th edn.) (Oxford: Oxford University Press, 1990) particularly p. 58; Amir A. Majid, *Legal Status of International Institutions: SITA, INMARSAT and EUROCONTROL Examined* (Aldershot: Ashgate Publishing Group, 1996); Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn.) (2009) see note 6.
[26] *Reparation for Injuries Suffered in the Services of the United Nations*, Advisory Opinion, (1949) ICJ Reports 174.

concerned reparations for injuries suffered in the service of the United Nations following the events that befell agents of the United Nations. Here, the UN General Assembly referred the ICJ to its resolution dated December 3rd 1948, while asking whether:

> I. In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (*a*) to the United Nations, (*b*) to the victim or to persons entitled through him?
>
> II. In the event of an affirmative reply on point I (*b*), how is action by the United Nations to be reconciled with such rights as may be possessed by the state of which the victim is a national?

In giving its opinion, the ICJ highlighted the existence of at least two of the rights earlier mentioned (the right to enter into treaties and the right to bring claims).

Subjectivity is sometimes regarded as a status conferred by the academic community, whereas legal personality is a status conferred by the legal system.[27] Although the notion of subjectivity could be combined with or separated from legal personality, scholars usually aim to present these ideas in line with the legal capacity to act under international law. On the other hand, the objectivity theory tends to portray the lack

[27] Jan Klabbers, 'The Concept of Legal Personality' (2005) JUS GENTIUM, pp. 35-66.

of such legal capacity to act within the international legal system.[28] The dichotomy in question has faced criticisms.[29] Such subjectivity/objectivity theory is believed to favour certain voices over others.[30] Contributing to these contestations, Klabbers described subjectivity as a status conferred by the academic community, and one that was by definition inaccurate and sketchy.[31] Therefore, the role of non-state actors under international law is deemed to be too complex to be compressed into a subjective/objective classification.[32]

In view of the forgoing, it has been advocated that the 'participatory theory' should be employed as a lens through which to view the role of non-state actors under international law.[33] The proposal relies on the notion that international law is a decision-making process. This process is dynamic, not static. Values such as power, wealth, prestige and the notions of vindication and justice are promoted by participants who make their claims through a variety of techniques, ranging from force to diplomacy and public persuasion.[34] Diverse decision makers, such as Foreign Office Legal Advisers, international arbitration tribunals and courts, among others, are

---

[28] George Manner, 'The Object Theory of individuals in International Law' (1952) 46 AM. J. INT'L L. 428 at page 428-430; S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971).

[29] Roland Portmann *Legal Personality in International Law* (2010), see note 1; P.K. Menon, 'The International Personality of Individuals in International Law: A Broading of the traditional Doctrine (1992) 1 JOURNAL OF TRANSNATIONAL LAW AND POLICY 151; Hans Aufricht (1943) 'Personality in International Law, (1992), see note 17.

[30] Charlesworth and Chinkin, *The boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000)

[31] Jan Klabbers, *An Introduction to International Institutional Law* (2nd edn.) (2009), see note 6.

[32] James Crawford, 'Forward- Agents of Change: Individuals as a Participant in the Legal Process' (2012) 1 (3) C.J.I.C.L. p. 1.

[33] Rosalyn Higgins, 'Conceptual Thinking about individuals in International Law' (1978) BRITISH JOURNAL OF INTERNATIONAL STUDIES, Vol. 4, Issue 1, p.1; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994).

[34] Rosalyn Higgins, 'Conceptual Thinking about Individuals in International Law' (1978) see note 33 at p. 5; Rosalyn Higgins, *Problems and Process: International Law and How We Use* It (1994), see note 33 at pp. 48-55.

expected to pronounce authoritatively upon these claims.[35] Here, the participants include both state and non-state actors competing for various interests in the international plane. For example, while the state may be interested in sea space, boundaries or treaties, individuals may be interested in the physical excesses of others, their treatment abroad, fairness in international business transactions, the protection of their human rights and the environment.[36]

Although many scholars applaud the participatory theory in international law, it is criticised for its lack of an objective definition of a participant.[37] The proposal is seen to grant the power to be a participant to every entity that has some form of international relations without guidance. There are no suggestions for who can or cannot be a participant. Besides this criticism, it has been argued that the participatory theory fails to proffer answers to questions relating to the subjects of international law.[38] Despite these criticisms, the participation theory has been described as compelling and practical,[39] as well as capable of evaluating the activities of entities falling within the broad legal principles expressed by the ICJ in its *Reparation for Injuries* opinion.[40]

---

[35] Rosalyn Higgins, 'Conceptual Thinking about individuals in International Law' (1978), see note 33 at p. 5.
[36] August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (Ed.) *Non-State Actors and Human Rights*, Oxford: Oxford University Press, 2005); Rosalyn Higgins, 'Conceptual Thinking about individuals in International Law' (1978) see note 33 at pp. 5-6.
[37] Alexander Orakhelashvili, 'The Position of Individuals in International Law' (2000-2001) 31 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL, p. 241.
[38] Alexander Orakhelashvili, 'The Position of individuals in International Law' (2000-2001) see note 37 at pp. 248-24.
[39] Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Groningen: Intersentia, 2001) pp. 50-61.
[40] (1949) ICJ Report 174.

In spite of the contributions of the above views in the identification of (customary) international law-makers, they appear to have a Eurocentric bias flowing from their European background. These views tend to exclude the legal traditions of the Third World, especially Africa, in the making of (customary) international law, although the participatory theory appears robust and accommodating to African participants. The heavy reliance of some views on the state having exclusive power to make international laws privileged colonial powers and legitimised their exploitation of colonies, as earlier noted in this thesis. Such positions privilege hegemonic states in the determination of custom. However, interactions in the international legal system have never been restricted to the state, as traditional international law attempts to claim.[41] Colonial powers, for instance, related and transacted businesses heavily with so called 'non-state actors' in the Third World.[42] Trade and treaty formation were carried out by indigenous chiefs, some middle men and other groups of non-state actors. Colonising states relied on non-state actors, such as the British and Dutch East India companies, to achieve their economic exploitation and respective states' colonial rule.[43] These trading companies asserted sovereign rights over non-European peoples who were 'deprived' of sovereignty by the same international law. The companies controlled their territories through company charters that allowed them to trade, and granted the power to coin money as well as make peace and war with the 'natives'.[44] Trading companies also, in some instances, even displaced states in

---

[41] M. Sornarajah, *The Investment Law on Foreign Investment* (3rd edn.) (Cambridge: Cambridge University Press, 2010).
[42] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), see note 13.
[43] M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longman, Green & Co., 1929).
[44] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) see note 13 at p. 68.

economic competition in the International system exemplified in the English East India Company's displacement of the Portuguese.[45]

In view of the power exercised by the above trading companies, it has been argued that private powers, such as multinational organisations, have played dominant roles in shaping international law for quite some time, although this has seemingly gone unnoticed in traditional theory.[46] The area of international foreign investment law, for instance, has challenged the old notion that only states are effective determinants of the content of international law.

It is important to note that although the above-mentioned trading companies are regarded as non-state actors, they are overall hegemonic in nature and detrimental to the aspirations of the Third World, largely due to their economic exploitation of the region.[47] However, their participation in the international sphere questions the traditional notion that customary international law is derived solely from state practice and *opinio juris*.

Besides the subjectivity/objectivity dichotomy, the participatory theory appears flexible and robust to the extent of accommodating various entities with international relations. In Africa, for example, there have always been diverse actors, from pre-colonial to post-colonial times, and have been in continuous international relations in the international sphere, as demonstrated in chapter two of this thesis. In view of this,

---

[45] Devashish Krishnan, 'India and International Investment Laws' *in* Bimal N. Patel (ed.), *India and International Law: Introduction*, (Vol 2.) (Leiden-Boston: Martinus Nijhoff Publishers, 2008) p. 277.
[46] M. Sornarajah, *The Investment Law on Foreign Investment* (3rd edn.) (2010), see note 41.
[47] M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (1929), see note 43; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), see note 13.

non-state actors from both the Global North and South appear to have opportunities to participate in the making of (customary) international law, and their place in international law is discussed below.

3. THE POSITION OF NON-STATE ACTORS IN THE EMERGING LAW OF NATIONS

The history of international law raises a plethora of questions. The choice of where to begin has the impact of placing more emphasis on one actor over others in international law as noted earlier. For instance, some scholars begin their narratives with Hugo Grotius, the so-called father of modern international law.[48] Other authors begin their narratives from the nineteenth century, focusing on international law as the law of nations. However, these approaches to international law should be taken with caution, following concerns that such Eurocentric narrations of international law are incomplete.[49] This position is based on the perception that a Eurocentric narration neglects other legal traditions. In addition, such a Eurocentric narration is said to disregard the domination and colonisation of non-Europeans as an irrelevant event in a (continuing) history of international law. It has been suggested, rather, that authors should adopt a starting point in order to also accommodate non-Europeans in the history of international law.[50] Since this thesis is based on the place of the Third World (with Africa as the example) in international law, it is necessary to inquire as to

---

[48] Arthur Nussbaum, *A Concise History of Law of Nations* (New York: Mcmillian, 1947); Gerhard Von Glanhn and James Larry Taulbee, *Law Among Nations: An Introduction to Public International Law* (10th edn.) (London-New York: Routledge, 2016); *Law of War and Peace* (1625) by *Hugo Grotius* - De Jure Belli ac Pacis ... Translated into English by Francis W. *Kelsey (Oxford: Clarendon press, 1925 Reprint).*

[49] Bardo Fassbender and Anne Peters, 'Introduction: Towards a Global History of International Law' *in* Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) p. 1.

[50] Bardo Fassbender and Anne Peters, 'Introduction: Towards a Global History of International Law' *in* Bardo Fassbender and Anne Peters, *The Oxford Handbook of the History of International Law* (2012) see note 49, p. 1 at 3

whether African non-state actors participated in international affairs before the colonial encounter, as well as before legal positivism. It is purported that the exclusion of non-state actors constitutes a distortion through legal positivism.[51] The rise of modern states during the reign of legal positivism in the nineteenth century advantaged the state and displaced non-state actors.

In respect to Africa's background, Stephen Neff describes a successful, silent, ritualistic trade between the Carthaginians and an unnamed North African 'tribe' beginning in the sixth century BC.[52] During this period, the Carthaginians (in modern day Tunisia) usually arrived in the unknown North African tribal area by ship. They took the goods that they arrived with and left them by the shore and returned to their ships. As a practice, members of the unnamed North African tribe would inspect the goods left by the Carthaginians. After inspection, they would open negotiations by leaving some gold in exchange for the goods. Then, the Carthaginians would return from their ships to see how much gold had been placed by the unnamed tribes-folk. If the Carthaginians were satisfied with the amount of gold offered, they would take the gold and leave, but if they were not satisfied, they would leave the gold and return to their ships again. Usually, more gold would be added to the previous offer. This process of negotiation would continue until both parties were satisfied. According to Neff's narration, if international law actually began at this time, then its origin goes back as far as, if not prior to, the beginning of historical records.[53] In any event, it is

[51] David Northrup, *Trade Without Rulers: Pre-colonial Economic Development in South-Eastern Nigeria* (Oxford: Clarendon Press, 1978).
[52] Stephen C. Neff, 'A Short History of International Law,' *in* Malcom D. Evans (ed.) *International Law* (3rd edn.) (Oxford: Oxford University Press, 2010) p. 1.

[53] Stephen C. Neff, 'A Short History of International Law,' *in* Malcom D. Evans (ed.) *International Law* (3rd edn.) (2010), see note 52.

apparent that there has been a long history of cross-border activities between the societies of Africa involving non-state actors.

Another example can be demonstrated through Nigeria's early relationships with European traders, which mainly involved 'indigenous' chiefs and other middlemen who controlled trade matters and practices during pre-colonial times.[54] These groups of non-state actors formed network systems to participate in cross border trade involving other Africans and Europeans, which could be referred to as international trade. The intricacies of these networks have demonstrated the complexity of some decentralised political systems, as exemplified by the Igbo society of south-eastern Nigeria.[55] These trade networks expanded across Igbo society.[56] Expansion was not regulated by a central authority, but in some instances through religious institutions. For instance, the Arochukwu area (one of the Igbo communities) operated an *ibini okpa* oracle whose powers included resolving disputes and settling warfare. Arochukwu people were also known to have travelled widely, establishing trade alliances in interested territories, and to have developed a specialised decision-making apparatus.[57] This presents an existing legacy of non-state actors' legal capacity and contends that 'international law' is not exclusively state-centred in the Eurocentric sense.[58]

---

[54] David Northrup, *Trade Without Rulers: Pre-colonial Economic Development in South-Eastern Nigeria* (1978), see note 51.
[55] Susan Keech McIntosh, 'Pathways to Complexities: An African perspective' *in* Susan Keech McIntosh (ed.) *Beyond Chiefdoms: Pathways to Complexity in Africa* (Cambridge: Cambridge University Press, 1999).
[56] David A Northrup, *Trade without rulers: Pre-colonial economic development in South-eastern Nigeria* (1978), see note 51.
[57] Susan Keech McIntosh, 'Pathways to Complexities: An African perspective' in Susan Keech McIntosh (ed.) *Beyond Chiefdoms: Pathways to Complexity in Africa* (1999) see note 55.
[58] Antônio Augusto Cançado Trindade, 'The Historical Recovery of the Human Person as a Subject of the Law of Nations' (2012) 1 (3) C.J.I.C.L. pp. 8-59.

Therefore, the assertion of the state as being sovereign and all-powerful in the nineteenth century was not only seen as a distortion,[59] but it has also been viewed as a platform from which non-Europeans were dispossessed.[60] Such dispossession could be illustrated through Vitoria's jurisprudence on the relationship between the Spaniards and Indians.[61] While he appeared to present the legal equality of all people,[62] arguably, he didn't necessarily include non-Europeans following his assertion that Indians needed to fulfil certain requirements based on the 'universally' applicable practices of the Spaniards.[63] Vitoria's analysis highlighted cultural differences in international relationships and the hierarchical imposition of one culture over another, as seen in the colonial experience. This colonial encounter affected many non-European entities, and appeared to shift the focus onto the ability to participate in international activities in conformity with European state-like organisation. This chapter views this shift as a period of suppression of non-state actors (both in the Global North and South) in the evolution of international law, as the state took pre-eminence in both regions, particularly during the nineteenth century.

The nineteenth century was characterised by positivism, the universalisation of international law and the supremacy of the state, as well as colonialism.[64] As discussed

[59] Antônio Augusto Cançado Trindade, 'The Historical Recovery of the Human Person as a Subject of the Law of Nations' (2012), see note 58.
[60] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 HARV. INT'L L.J. 1.
[61] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), see note 13.
[62] Pieter Hendrik Kooijmans, *The Doctrine of the Legal Equality of States: An Inquiry into the Foundations of International Law* (Leyden: A. W. Sijthoff, 1964).
[63] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) THIRD WORLD QUARTERLY, Vol. 27, No. 5, pp. 739-753.
[64] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) see note 60 at p. 2.

in chapter one, statehood was devised as a tool for the conquest of non-Europeans who were regarded as 'stateless', 'lacking sovereignty' and 'uncivilised'.[65] In spite of the relationships between the Europeans and non-Europeans (for example the valid contracts between African chiefs and Europeans), statehood was held supreme. Following the existence of a valid legal relationship involving non-state actors, the insistence on a European model of state is contestable.

One of the above contestations arises from the effect of state domination on other actors in the international sphere. For instance, it has been argued that the personification of the state and the endowing of its 'will' reduced the rights of non-state actors to those which were conceded to them by the state.[66] This shift reflected voluntarist positivism based on state consent or the 'will criterion' in international law, while denying *ius standi* to non-state actors as it became a law among sovereigns.[67] It was further asserted that the positivist doctrine suppressed the idea of the emancipation of non-state actors such as individuals, as well as their recognition as subjects of international law. This suppression and state supremacy validated the abuses perpetuated in the name of the state. However, by the mid-twentieth century, the quest for self-determination, decolonisation movements by various colonies against hegemonic states, as well as the inclusion of diverse non-state actors over time in addressing international issues appeared to have (re)instated non-state actors in the international system, as discussed below.

---

[65]Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), see note 13.
[66] Antônio Augusto Cançado Trindade, 'The Historical Recovery of the Human Person as a Subject of the Law of Nations' (2012) see note 58 at p. 12.
[67]Peter Pavel Remec, *The Position of the Individual in International Law according to Grotius and Vattel* (The Hague: Martinus Nijhoff, 1960).
1960).

4. RE-EMEREGENCE OF NON-STATE ACTORS AND THEIR CONTEMPORARY ROLES IN THE CREATION OF (CUSTOMARY) INTERNATIONAL LAW

The traditional theory of personality in international law faces the need for the inclusion of non-European legal traditions, as well as the recognition of increased activities of non-state actors in response to various challenges, such as competence, responsibilities, legitimacy, existence, and sovereignty.[68] Non-state actors, such as international organisations, non-governmental organisations, private security contractors, and individuals (e.g. indigenous community leaders, groups of women,) are continuously contributing to possible solutions to the named challenges.[69]

Also, the concerns of democracy and the desire to protect the masses against totalitarianism via international law have further fortified the position and personality of non-state actors in the current international law.[70] There is also a desire to protect and promote human rights, which serves as a goal in itself, as well as a means to promote other goals, including poverty alleviation, anti-corruption, prevention of terrorism and resource distribution.[71] Contemporary international lawyers view this as a paradigm shift 'from the law of nations to the law of the world'[72] or a 'humanization of international law'.[73]

---

[68] Matthias C Kettemann, *The Future of Individual in International Law: Lessons from International Internet Law* (The Hague: Eleven International Publishing, 2013); Ben Chigara, Legitimacy Deficit in Custom: A Deconstructionist Critique (Hants & Burlington: Dartmouth- Ashgate, 2001).

[69] Mathias C. Kettemann, *The Future of Individuals in International Law: Lessons from International Internet Law* (2013) see note 68 at p. 2.

[70] Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

[71] Matthias C. Kettemann, *The Future of Individuals in International Law: Lessons from International Internet Law* (2013) see note 68.

[72] Angelika Emmerich-Fritsche *Vom Völkerrecht zum Weltrecht* (Duncker & Humblot Berlin, 2007).

[73] Theodor Meron *The Humanization of International Law* (Leiden-Boston: Martinus Nijhoff Publisher, 2006).

The (re)emergence of these non-state actors was given prominence by the International Court of Justice in the Advisory Opinion in *Reparations for Injuries Suffered in the Service of the United Nations,*[74] where the ICJ recognised non-state actors as subjects of international law with certain rights and duties. In view of this position, it has been argued that the acquisition of this status has transformed non-state actors (e.g. individuals) from an object of international compassion into a subject of international law, and that this thereby confers rights and duties enforceable in international law.[75] The proponents of this position contend that there is nothing in the structure of international law that prevents this result from being achieved.[76]

It has been argued that the above structural transitions result from 'the need to manage and address practical problems rather than resulting from any deliberate attempt to effect a structural transformation'.[77] It has also been advanced that, although there is no smooth shift from state-centric to more inclusive international law, the international legal system of the twenty-first century has undoubtedly become less state-centric than that of the nineteenth century.[78]

In view of such wide participation of non-state actors in the international legal system, it could be argued that their competence to make (customary) international law is solidified. In this regard, it has been argued that:

---

[74] (1949) ICJ Rep 174.

[75] Hersch Lauterpacht, *International Law and Human Rights* (1950) see note 7.

[76] Hersch Lauterpacht, *International Law and Human Rights* (1950) see note 7; Robert McCorquodale, 'Individuals and the International Law' *in* Malcolm Evans (Ed), *International Law* (3rd edn.), (Oxford: Oxford University Press, 2010).

[77] Kate Parlett, 'Individuals and Structural Change in the International Legal System' (2012) 1 (3) C.J.I.C.L. pp. 60-80.

[78] Kate Parlett, 'Individuals and Structural Change in the International Legal System' (2012) see note 77 at p. 73- 80.

> Most of us are performing … decision roles without being fully aware of the scope and consequences of our acts. Because of this, our participation is often considerably less effective than it might be. Every individual cannot, of course, realistically expect or demand to be a decisive factor in every major decision. Yet the converse feeling of pawn-like political impotence, of being locked out of effective decisions, is an equally unwarranted orientation.[79]

In support of this position, Anthea Roberts and Sandesh Sivakumaran argue that it has become compelling to reconsider the possibility and desirability of non-state actors playing diverse roles in the making of international law.[80] These scholars present their case through the lens of armed group activities in the creation of international humanitarian law. They argue that any normative evaluation of whether non-state entities (for example, armed groups) could participate in law-making should be based on an analytical framework. This could be judged from the perspective of the international community as a whole, rather than a position solely dependent on states. Their argument is based on the *Reparation for Injuries Advisory Opinion*, where the ICJ found the United Nations to be a subject of international law, it stated that '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and that their nature depends on the needs of their community.'[81] Based on that case, these authors argue that the traditional statist doctrine is both 'descriptively out-dated and normatively questionable.' In view of the

---

[79] Myres S. McDougal et al., 'Theories about International Law: Prologue to a Configurative Jurisprudence' (1968) 8 VA. J. INT'L L. 188 at p. 19.3

[80] Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging armed Groups in the Creation of International Humanitarian Law' (2012) THE YALE JOURNAL OF INTERNATIONAL LAW, vol. 31:1, p.108.

[81] *Reparation for Injuries Suffered in the service of the United Nation*, *Advisory Opinion*, (1949) ICJ Report at p.178.

above, they propose that armed groups should remain bound by existing responsibilities but be given certain roles in the norm creation process, as well as the capacity to recognise existing duties and to undertake new ones. Such roles could include unilateral declarations, hybrid treaties (bilateral or trilateral treaties and multilateral treaties) and quasi-customs. The proposals of Roberts and Sivakumaran are built on existing practices, and they have the potential to enhance armed groups' knowledge of, and compliance with, international humanitarian law. More importantly, they argued that these proposals are capable of providing a framework through which other non-state actors may engage in the creation of international law.

The International Law Association Committee on the Formation of (General) Customary International Law has also asserted that the conducts of non-state actors contribute to international law-making.[82] This position is viewed through the customary processes in its extended sense, although such law-creating power is limited to acts carried out on behalf of the state, or adopted or ratified by it. Another International Law Association committee report on non-state actors in international law-making, published in 2012, also explored the extent to which non-state actors have engaged in international law-making. The committee acknowledged that non-governmental organisations have initiated intergovernmental law-making and that in many cases, these have resulted in treaties.[83] The committee also stated that sometimes such initiatives have resulted in the crystallisation of binding customary

[82] Final Report of ILA London Conference (2000) Committee on Formation of Customary (General) International law available at http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376 accessed on 18 April, 2014] at p. 16.
[83] ILA Second Report of the Committee on 'Non-State Actors in International Law: Law making and Participation Rights' (2012) available on http://www.ebookezz.net/pdf/539me15/ [accessed on 16 September, 2014].

international norms, as well as norms *of jus cogens*, particularly in the areas of international human rights, humanitarian law, protection of the environment, human security, and state responsibility.[84]

Furthermore, certain non-state actors, such as pirates, mediators and scholars, are changing the parameters of the traditional state outlook on international law, and thus impacting on international law-making.[85] While some of these non-state actors are influencing decision making, others are, technically, creating norms and rules through their individual expertise in confronting global challenges.[86] For example, it has been posited that the activities of Somali pirates are producing responses creating new models of co-operations and soft laws. These have resulted in a range of shifts, such as 'the move from a military approach to law enforcement operations, unilateral enforcement to international authorisation and then to transnational co-ordinating bodies; and from maritime operations in the Gulf of Aden to various land-based operations, mostly including law and prison reform'.[87]

Mediators are also playing a significant role in the creation of substantive and procedural frameworks in peace and law-making processes. In order to set out the discourse, it has been asked whether mediators are mere facilitators of a dialogue and negotiation process in a politically and legally set framework, or whether in their

[84] ILA Second Report of the Committee on 'Non-State Actors in International Law: Law making and Participation Rights' (2012) see note 83 at p. 9.
[85] Douglas Guilfoyle, 'Somali Pirates as Agents of Change in International Law-making and Organisation' (2012) 1 (3) C.J.I.C.L. pp. 81-106.
[86] Ben Chigara, Legitimacy Deficit in Custom: A Deconstructionist Critique (2001), see note 68.
[87] Douglas Guilfoyle, 'Somali Pirates as Agents of Change in International Law-making and Organisation' (2012) see note 85 at p.81.

efforts to terminate a conflict, they actively create a sustainable peace process.[88] Also, it has been asked whether the mediators' duties dominate such processes by procedurally and substantively imposing peace agreements and predetermining the rules for the transition process in the course of their duties. While addressing these questions, examples have been drawn from the offices of the United States Special Envoy Richard Holbrooke and United Nations Secretary General in peace negotiation processes for Bosnia and Herzegovina, and Kosovo, as case studies. It was argued that the role of a mediator goes beyond facilitating a dialogue between belligerents by 'actively shaping the procedural frameworks and substantive aspects of negotiations by designing, offering or even dictating frameworks and solutions to parties'.[89] It was also argued that sometimes, mediators offer professional expertise and assist with the development of a code of conduct and promotion of standards and norms. It has, however, been noted that in the course of such duties, there might be elements of external and structural constraint. However, it was pointed out that the *office* of the mediator might be translated into practice by individual mediator skills. This actively contributes to peace and law-making processes, and ultimately to the development of (international) law.

Article 38 (1) (d) of the Statute of the International Court of Justice provides for publicists' contributions to international law. An individual acting in this capacity could assist the Court in dispensing its duties.[90] Such assistance includes the employment of

[88] Cindy Daase, 'The Law of the Peacemaker: The Role of Mediators in Peace Negotiations and Law making' (2012) 1 (3) C.J.I.C.L. pp. 107-135.
[89] Cindy Daase, 'The Law of the Peacemaker: The Role of Mediators in Peace Negotiations and Law making' (2012) see note 88 at p. 134.
[90] Michael Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (2012) 1 (3) C.J.I.C.L. pp. 136-161.

publicists in the determination of widespread (state) practice, the interpretation of treaty provisions, the demonstration of general principles of law, and the explanation of certain practices of the court itself.[91] While it is appreciated that there are criticisms regarding the choice of certain authors, particularly Western scholars over their non-Western counterparts, it is undeniable that these non-state actors have contributed to the making of international law.[92] It has also been posited that, by way of critiques at law conferences, academics engage directly with the practice and development of (international) law.[93] The various roles enumerated above ultimately re-enforce the law-creating power of non-state actors in international law. The expert opinions of individuals in certain international matters through institutions such as the World Health Organisation and Atomic Energy Agency also arguably contribute to international law-making.[94]

Furthermore, the influence of non-state actors through non-governmental organisations is contributing to the development of international humanitarian law. For example, the International Committee of the Red Cross (ICRC) plays a significant role in matters relating to labour conditions, the Geneva Conventions of 1949 and the 1977 Protocols. Here, states may entrust the fulfilment of their duties to the ICRC,[95] as well as cooperating with the ICRC during conflicts,[96] before any proposed

---

[91] Michael Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (2012) see note 90 at p. 152-154.

[92] K. Jayakumar, 'Where does Article 38 Stand Today?', available on http:ssrn.com/abstract=2121012 [accessed on 03 May 2013].

[93] Aoife O'Donoghue, 'Agents of Change: Academics and the Sprite of Debate at International Conferences' (2012) 1 (3) C.J.I.C.L. pp. 275-297.

[94] Ben Chigara, Legitimacy Deficit in Custom: A Deconstructionist Critique (2001), see note 68; Robert McCorquodale, 'Individuals and the International Law' *in* Malcolm Evans (Ed), *International Law* (3rd edn.) (2010) See note 76 at p. 304.

[95] Common Article 10, 11 of the Geneva Conventions.

[96] Article 81 Geneva Prisoner of War Convention.

amendment to the Protocols by a state can be acted upon.[97] The roles of non-state actors are unquestionably growing, and have become imperative in the development of international law-making in contemporary times.

Whereas the above explorations demonstrate the legal personality of non-state actors and their contributions to international law, the principle of self-determination further necessitates the participation of diverse groups and actors in the international legal system, as explored below.

5. SELF-DETERMINATION AS A TOOL FOR THE PARTICIPATION OF NON-STATE ACTORS IN THE INTERNATIONAL LEGAL SYSTEM

Self-determination is a principle of customary international law and has been regarded as a *jus cogens* and a peremptory norm.[98] Self-determination is incorporated into treaties such as Article 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[99] The principle usually gives rise to diverse views when invoked in relation to 'extremist' political posturing, ethnic chauvinism and indigenous peoples' rights.[100] The principle

---

[97] Robert McCorquodale, 'Individuals and the International Law' *in* Malcolm Evans (Ed), *International Law* (3rd edn.) (2010) see note 76 at pp. 302 – 306 for further participation of the NGOs in the creation and development of international law.

[98] Héctor Gross Espoell, 'Self Determination and Jus Cogens' *in* Antonio Cassese (ed.) *U.N. Law/Fundamental Rights: Two Topics in International Law* (The Netherlands: Sijthoff & Noordhoff, 1979) at p. 167; Ian Brownlie, *Principles of Public International Law* (4th edn.) see note 8; James Crawford, Brownlie's Principles of Public International Law (8th edn.) (Oxford: Oxford University Press, 2012).

[99] Robert McCorquodale, 'Individuals and the International Law' *in* Malcolm Evans (Ed), *International Law* (3rd edn.) (2010) see note 76.

[100] Louis René Beres, 'Self-Determination, International Law and Survival on Planet Earth' (1994) ARIZ. J. INT'L COMP. L. 1; Asbjorn Eide, 'In Search of Constructive Alternatives to Secession' *in* Christian Tomuschat ed. *Modern Law of Self-Determination* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993) 139; Daniel Patrick Moynihan, *Pandemonium: Ethnicity in International Politics* (Oxford: Oxford University Press, 1993).

of self-determination appears to be a platform for the participation of the Global North and South, as well as for state *and* non-state actors in the international legal system. For instance, in the Global North, President Woodrow Wilson linked the principle of self-determination to Western liberal democratic ideals and the aspirations of European nations.[101] Also, self-determination has been linked to Marxist tenets of class liberations.[102] In the Global South, Third World employment of the right to self-determination was built on two competing tendencies in the anti-colonial bloc at the United Nations. On one hand, self-determination has been viewed as 'universalistic' and having democratic undertones. On the other hand, the principle is strictly based on the anti-colonial struggle, while being indifferent to democracy.[103]

Most often, the above perceptions and applications of self-determination are within the statist purview, and states (unsurprisingly) resist the invocation of self-determination by some regions within their jurisdiction.[104] In spite of the diverse views on the principle of self-determination, the principle has effectively been invoked as a tool of resistance against discrimination, cultural domination, suppression of democratic participation, and the legacies of empire.[105] The will of the people has therefore been acknowledged as essential, even under the traditional understanding

---

[101] S. James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2000).
[102] John Stalin, *Marxist and the National-Colonial Question* (Proletarian Publishers, 1975 Reprint); Walker Connor, *The National Question in Marxist-Leninist Theory and Strategy* (Princeton N. J: Princeton University Press, 1984).
[103] Roland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2010).
[104] S. James Anaya, *Indigenous Peoples in International Law* (2000), see note 101.
[105] Edward M. Morgan, 'The Imagery and Meaning of Self-Determination,' (1998) N.Y.U. J. INT'L & POL. VOL. 20, p. 355; S. James Anaya, *Indigenous Peoples in International Law* (2000), see note 101.

of international law. For example, Judge Nagendra Singh in the *Western Sahara Opinion* stated that:

> The consultation of the people of a territory waiting decolonisation is an inescapable imperative… Thus even if integration of territory was demanded by an interested state, as in this case, it could not be had without ascertaining the freely expressed will of the people – the very *sine qua non* of all decolonisation.[106]

As a consequence, what has been termed a 'conscience of humanity' was awakened in international law in respect of the legal status of indigenous peoples.[107] The Human Rights Council of the United Nations established a Working Group on Indigenous Populations in 1982. This committee, made up of many representatives of indigenous peoples, drafted the United Nations Declaration on the Rights of Indigenous Peoples 2007. It was noted that the creation and development of this declaration was largely outside the sole control of states.[108]

The idea of 'peoples' in self-determination discourse has produced diverse interpretations.[109] However, it has been advocated that each interpretation should be able to incorporate the values of diverse cultures, or *local* authorities, as well as the need to support increasing linkages, commonalities and interdependencies among

---

[106] *Western Sahara, Advisory Opinion*, 1975 ICJ 12; Robert McCorquodale, 'Individuals and the International Law' *in* Malcolm Evans (Ed), *International Law* (3rd edn.) (2010) see note 79 at p 300.

[107] J Anaya, *Indigenous Peoples in International Law* (2nd edn.) (Oxford: Oxford University Press, 2004); Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Groningen: Intersentia, 2001).

[108] Robert McCorquodale, 'Individuals and the International Law' *in* Malcolm Evans (Ed), *International Law* (3rd edn.) (2010), see note 76 at p. 301.

[109] S. James Anaya, *Indigenous Peoples in International Law* (2000) see note 101 particularly at pp. 77-80.

people, economies and spheres of power, even where secession and independent statehood are achieved.[110] This is aimed at collective efforts to tackle group challenges, which may lead to the rearrangement of the terms of integration or to a reconsideration of decisions.

Generally, the idea of self-determination allows for diverse cultural perceptions and is invoked by both states and non-state actors for effective and equal participation in international affairs. Although international treaties arising from its application are often directed by states, the quest of decolonisation, human rights and the principle of equality have increasingly made self-determination applicable and beneficial to all segments of humanity. Consequently, non-state actors, such as indigenous peoples, are encouraged to pursue their aspirations and participate in the making of international laws that affect them.[111] Such diverse participation reflects the present reality in the international system made up of both state and non-state actors.

Having explored the legal capacity of non-state actors in a broad sense, the next section will first enquire into what and who is commonly perceived as a non-state actor with a view to examine non-state actors from a Third World perspective.

6. CONCEPTUALISING NON-STATE ACTORS FROM THIRD WORLD PERSPECTIVES

The definition of a non-state actor involves diverse views from scholars.[112] According to the International Campaign to ban Landmines, 'non-state actor' refers to armed

---

[110] S. James Anaya, *Indigenous Peoples in International Law* (2000) see note 101 at p. 79.

[111] Robert McCorquodale, 'Individuals and the International Law' *in* Malcolm Evans (Ed), *International Law* (3rd edn.) (2010) See note 76 at p. 301.

[112] Bas Arts, Math Noortmann and Bob Reinalda (eds.) *Non-state actors in International Relations* (Aldershot: Ashgate, 2001); Panel, 'Human Rights and Non-state actors' (1998) 11 PACE INT'L L. PROC.;

opposition groups that act independently of any recognised government.[113] These groups could include rebel groups, liberation movements, irregular armed groups, insurgents, guerrillas and *de facto* territorial governing bodies. There are about one hundred and ninety recognised non-state actors by this definition globally. Notably, the definition does not include non-armed groups such farmers and many smaller, loosely organized groups.[114] This view demonstrates that the ideology, objectives, strategies, level of organization, support base, legitimacy and degree of international recognition of non-state actors varies – particularly depending on the interests served by its definition.

The European Commission defines non-state actors as groups or organisations independent of the state and created willingly by citizens for either profit or non-profit purposes.[115] These groups or organisations aim to promote or defend certain interests and their actions are believed to influence the implementation of policies and defend interests. Examples of these groups and organisations could include trade unions, cultural associations, church associations and universities, among others.

Another definition of non-state actors captures 'all those actors that are not (representatives of) states, yet that operate at the international level and are potentially relevant to international relations'.[116] Although this definition appears

---

Richard A Higgott et al. (eds.) *Non-state actors and Authority in the Global System* (London- New York, 2000).

[113] Margaret Buse, 'Non-state Actors and their Significance' available at http://www.jmu.edu/cisr/journal/5.3/features/maggie_buse_nsa/maggie_buse.htm [accessed on 12 August 2016].

[114] Margaret Buse, 'Non-state Actors and their Significance' see note 113.

[115] Philip Alston (ed.) *Non-state Actors and Human Rights* (Oxford: Oxford University Press, 2005).

[116] Bas Arts, 'Non-state Actors in Global Governance: Three Faces of Power', Max Planck Project Group on Common Goods, Bonn, Germany, April 2003 available at https://www.coll.mpg.de/pdf_dat/2003_04online.pdf [accessed on 15 August 2016].

broad, it has been viewed to have a potentially restrictive set of requirements which tailors it to fit traditional patterns of international relations scholarship.[117] Here, a non-state actor is expected to be sizeable;[118] its constituency is required to be substantial and cover several countries, granting (in) formal access to political arenas by governments or International governmental organisations, as well as prove to be consequential to international politics.[119] However, these requirements are likely to deny qualification to many of the Landmine Campaign's 190 groups mentioned above.[120] This lends credence to the need for diversity in the conceptualisation of non-state actors.

Daphne Josselin and William Wallace define non-state actors as including a diverse range of organisations with networking activities that have transnational dimensions.[121] These organisations usually emanate from civil society, and they are autonomous from central funding and control. There is no requirement for stringent commitment to a particular cause, but the actors behave in particular ways that affect political outcomes within one or more states or within international institutions. This definition has been viewed as comprehensive, following its potential to accommodate a highly diverse range of participants who could influence socio-political and economic outcomes.[122]

---

[117] Philip Alston (ed.) *Non-state Actors and Human Rights* (2005), see note 115. .

[118] E. Morss, 'The New Global Players: How They Compete and Collaborate (1991) WORLD DEVELOPMENT, Vol. 19, No. 1, pp. 55-64.

[119] Bas Arts, 'Non-state Actors in Global Governance: Three Faces of Power', see note 116 at p. 5.

[120] Philip Alston (ed.) *Non-state Actors and Human Rights* (2005), see note 115.

[121] Daphne Josselin and William Wallace (eds.), *Non-State Actors in World Politics* (Hampshire-New York: Palgrave, 2001); Philip Alston (ed.) *Non-state Actors and Human Rights* (2005), see note 1175.

[122] Philip Alston (ed.) *Non-state Actors and Human Rights* (2005), see note 115.

Furthermore, non-state actors, according to international law, include entities or persons involved in terrorist acts, as set out in Resolution 1373 (2001) following the attacks of 11 September 2001 in the United States.[123] This definition further points to the diversity within an understanding of the categorization of non-state actors. This group signifies a negative dimension, whereas the previous groups/organisations have at least a positive undertone and are seen to influence political decisions and policies.

In view of the several definitions of non-state actors above, the separation of those groups from 'states', as known in the Eurocentric sense, is prominent.[124] This definition ignores the understanding of statehood from a Third World perspective. While some scholars have argued that states existed in the 'African sense' prior to colonialism,[125] legal positivism denies the existence of statehood in pre-colonial/colonial Africa.[126] Therefore, if the ascertainment of non-state actors is to be based on the criteria of the present international law regime, then all political entities in Africa were non-state actors prior to their independence as states. This position, however, suffers a legitimacy deficit as analysed from the TWAIL perspective in the previous chapters. More so, indigenous Nigerian political systems operate centralised and decentralised systems respectively. In each indigenous system, diverse participants, such as age grades, community leaders, associations of men and women, among others, play various roles towards a common good and these indigenous

[123] Security Council Res. 1373 (2001), para. 2 (a).

[124] James Crawford, *The Creation of States in International Law* (2nd edn.) (Oxford: Oxford University Press, 2007).

[125] See Jeffrey Ira Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton: Princeton University Press, 2000).

[126] See discussions in chapter one; see also, Antony Anghie, *Imperialism, Sovereignty and The Making of International Law* (2005), see note 13.

systems have been viewed not to be inferior to the positivist idea of statehood.[127] Sometimes, these Third World non-state actors mentioned here act as checks to perceived abuse of power by their states.[128]

Consequently, in order to conceptualise non-state actors from a Third World perspective, the traditions and their diverse experiences, ranging from pre-colonial to post-colonial periods, cannot be neglected. For example, Africans have continually been described as a communal society.[129] Such communalism is claimed to be based on solidarity and a drive to achieve a common good which plays a significant role in resisting hegemony or other forms of oppression. Some writers, Blyden for example, argued that Western systems are incompatible with some fundamental institutions of African society, such as family, community and cooperative efforts.[130] The communal attribute appears to be a distinguishing world view of Africans. Such attributes of solidarity enabled resistance to colonial domination and the eventual political independence of many African states.[131] This attribute, therefore, is vital in the counter-hegemonic pursuits of non-state actors in international law-making.[132]

---

[127] Felix Chuks Okoye, *International Law and the New African States* (London: Sweet & Maxwell, 1972); Kenneth Onwuka Dike, *Trade and Politics in the Niger Delta 1830-1885: An Introduction to the Economic and Political History of Nigeria* (Oxford: Clarendon Press, 1956).
[128] Taslim Olawale Elias, *The Nature of African Customary Law* (Manchester: Manchester University Press, 1956).
[129] Kwasi Wiredu, 'An Oral Philosophy of Personhood: Comments on Philosophy and Orality' (2009) *RESEARCH IN AFRICAN LITERATURES,* Vol. 40, No. 1, pp. 8-18.
[130] M Yu Frenkel, 'Edward Blyden and the Concept of African Personality' (1974) AFRICAN AFFAIRS, Vol. 73, No. 292, pp. 277-289.
[131] Elizabeth Isichei, *A History of Nigeria* (New York: Longman Inc., 1983).
[132] Antonio Gramsci, *Selections from Prison Notebooks of Antonio Gramsci* (edited and selected by Quintin Hoare and Geoffrey Nowell Smith) (London: Lawrence and Wishart, 1971); Robert W Cox, 'Civil Society at the turn of the new millennium: Prospects for the alternative world other' in Louise Amoore (ed.) *The Global Resistant Reader* (Oxon: Routledge, 2005) p. 103.

The colonial encounter and post-colonial experiences play significant roles in understanding entities that are non-state actors in the Third World and their roles in the region. For instance, the institution of Eurocentric model of statehood in Africa has multiple outcomes. It rendered all pre-colonial participants in African political systems 'non-state actors', as they did not qualify as states and this action resulted in their suppression in the production of (customary) international law.[133] New types of non-state actors, such as nationalist movements, emerged, as well as the proliferation of non-state actors in the region.[134] This new sets of non-state actors in colonial and post-colonial Africa sometimes share similarities with their Western counterparts following their institutionalisation according to a Western ideology. This could be said of the African Union, for example, which resembles the European Union in some respects. Both Unions are regional organisations made up of a collection of states with the aim of protecting their respective regional interests.

Although non-state actors perform diverse functions in Africa and the Third World, a significant feature common among these various non-state actors is their resistance to hegemony in post-colonial states, as well as resistance to powerful states in the Global North. These diverse non-state actors have continued their existence to the present day in the Third World by pursuing common interests, for example, the emancipation of the Third World from colonisation and neo-colonisation, as well as from the Eurocentric character of international law.[135] However, TWAIL scholarship is

---

[133] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999), see note 60.
[134] Elizabeth Isichei, *A History of Nigeria* (1983), see note 131; Brian Larkin, *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (USA: Duke University Press, 2008).
[135] TWAIL scholars are making huge impact in this area. See, Remi Bachand, 'Non-State Actors in North American Legal Scholarship: Four Lessons for Progressive and Critical International Lawyer, p. 97 *in* Jean

sceptical of the role of some non-state actors in the Third World (such as international organisations) in the achievement of counter-hegemony in the international system.[136] Such TWAIL hesitation is hinged on the alignment of the sovereignty of Third World states to European standards to ensure a continuous trade relationship with Western powers.[137]

Although TWAIL scholarship is sceptical of some institutions in the counter-hegemonic goal of the Third World due to the belief that those institutions sometimes act as agents of 'Western hegemony', there are times that such institutions have played significant roles. The Bandung Conference, for instance, pulled together Third World states to address new and changing regional principles and practices that place obligations on their people.[138] The conference articulated the normative basis of a regional and international order marked by 'tolerance of diversity, mutual accommodation and the softening of ideological conflicts and rivalries'.[139]

The TWAIL definition (if there can be such a unified position at all) on non-state actors is broader than the more traditional definitions discussed earlier, as it also incorporates actors such as farmers and community leaders. This wide understanding is for resistance purposes. Balakrishnan Rajapogal argues that social movements are

---

d'Aspremont (ed.) Participants in International Legal System: Multiple Perspectives on Non-State Actors in International Law (London- New York: Routledge, 2011) p. 97.

[136] S. Pahyja, 'The Post-coloniality of International Law' (2005) HARVARD INTERNATIONAL LAW JOURNAL 46.

[137] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), see note 13.

[138] Seng Tan and Aimtav Acharya (eds.) *Bandung Revisited: The Legacy of the 1955 Asia-Africa Conference for International Order* (Singapore: NUS, 2008) p. 1.

[139] Seng Tan and Aimitav Acharya (eds.) *Bandung Revisited: The Legacy of the 1955 Asia-Africa Conference for International Order* (2008) see note 138 at 14.

imperative to reverse the extant bias in favour of the 'global' over the 'local'.[140] Rajagopal posits that social movements are organised around multiple identities, such as gender, ethnicity and environment, among others, and that telling their stories is a simple process of narrating a history from the grassroots.

In view of the above, the conceptualisation of non-state actors in the Third World for counter-hegemonic purposes in international custom making is likely to involve both institutional and non-institutional bodies of non-state actors due to the colonial experiences that have encouraged their co-existence. However, the participation of non-state actors built on Western ideology is viewed with suspicion. Therefore, post-colonial states and institutionalised groups cannot be totally entrusted to influence custom-making for the benefit of the Third World. Consequently, all the groups enumerated above are relevant in influencing international custom that would reflect the views and interests of the Global South.

7. CONCLUSION

The contributions of non-state actors to the development of international law, as illustrated above, cannot be over-emphasised. These contributions reflect the realities of contemporary international law. This chapter noted that non-state actors have always been part of the making of international law, but that the rise of legal positivism caused distortions in the evolution of international law, constraining this role. Such distortion resulted in the oppression of non-state actors in the history of international law, especially between the nineteenth century and the beginning of the

---

[140] Balakrishnan Rajapogal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003), see note 3.

twentieth century. However, the mid-twentieth century witnessed the re-emergence of non-state actors, as their roles in the development of international law are continually eroding the position of supremacy enjoyed by states therein (sometimes for better, sometimes for worse). Non-state actors, in the course of their activities, are *de facto* contributing to international law-making.[141] In this regard, non-state actors in the Third World have continued to share in the responsibilities of their states. Based on this, the insistence on law-making by states exclusively is challenged. The next chapter extends this argument in its examination of specific non-state actors from the Third World and their contribution to custom-making.

[141] Robert McCorquodale, 'Individuals and the International Law' *in* Malcolm Evans (Ed), *International Law* (3rd edn.) (2010) See note 76; University of Cambridge, 'Agents of Change: As a Participant in the Legal Process' (2012) 1 (3) C.J.I.C.L.; ILA Second Report of the Committee on 'Non-State Actors in International Law: Law making and Participation Rights' (2012) see note 83.

CHAPTER FIVE

ASSESSING THIRD WORLD RESISTANCE: EMERGING FRONTIERS OF CUSTOMARY INTERNATIONAL LAW?

1. INTRODUCTION

> I have listened to your words but can find no reason why I should obey you—not the smallest … to be your subject that I cannot be. If it should be war you desire, then I am ready…I am sultan here in my land. You are sultan there in yours.[1]

Resistance by the Third World, particularly Africa, to Western domination since the colonial encounter is not new. The above response by Maceba, an East African chief to Herman Von Wissemen's order asking the former to submit to colonial rule is illustrative. Shaka Zulu of South Africa, King Jaja of Opobo- Nigeria, Chief Dosumu of Lagos- Nigeria, and Mau Mau group resistance in Kenya, among many others, also resisted foreign dominance. Unfortunately, many such Third World resistance narratives are mostly suppressed in international law scholarship.[2] Arguably, such suppression of resistant narratives appears to suggest that Africans and other members of the Third World consented to Western hegemony and its resultant hardship. Contrary to such suggestions, resistance to Western domination has continued to mount even in post-colonial times and is pushing through changes in the

[1] This was written in 1890 by Macemba, an East African chief in response to Herman Von Wissemen's order asking the former to submit to colonial rule. See John Karefeh Marah, *African People in the Global Village: An Introduction to Pan African Studies* (Lanham-New York-Oxford: University Press of America, 1998) at p. 60.

[2] Most times, such resistance stories are told by Third World scholars.

international legal system. This chapter intends to explore such Third World resistance and its ability to effect changes to the making of customary international law solely based on the Western model of state practice and *opinio juris.*

Resistance could be said to be the action taken to challenge dominant, traditional ideologies, *status quo* or hegemonic tendencies, which are perceived to create inequality, oppression, exploitation and similar damages.[3] Such action, which could be either passive or active, usually results in changes to the above persistent unpleasant conditions. Resistance has been explored in diverse ways in order to understand how it operates in different societies, as well as to identify the elements that enable its success.[4] For example, Antonio Gramsci identified the 'spirit of solidarity' as an important counter-hegemonic force in effecting such shifts.[5] Gramsci's notion of hegemony played a significant role in understanding the nature of hegemony, its reproduction and sustenance in the making of customary international law, as explored in chapter one of this thesis. This chapter will also employ certain key elements from Gramsci's perception of counter-hegemony, such as solidarity and education, among others, to explore various moments of resistance by non-state

---

[3] Balakrishnan Rajagopal, 'International Law and Social Movements: Challenges of Theorizing Resistance' (2002-2003) 41 COLUM. J. TRANSNAT'L L. 397; Antonio Gramsci, *Selections from Prison Notebooks of Antonio Gramsci* (edited and selected by Quintin Hoare and Geoffrey Nowell Smith) (London: Lawrence and Wishart, 1971).

[4] Jocelyn A Hollander and Rachel L Einwohner, 'Conceptualising Resistance (2004) SOCIOLOGICAL FORUM, VOL. 19, NO. 4 pp. 533-554. Also, see the section dealing with the term 'resistance' in chapter one of this thesis for further analysis; Louise Racine RN, 'Applying Antonio Gramsci's Philosophy to Postcolonial Feminist Social and Political Activism in Nursing' (2009) NURSING PHILOSOPHY, Vol. 10, Issue 3, pp. 180-190.

[5] *Antonio Gramsci, Selections from Prison Notebooks of Antonio Gramsci (1971)* see note 3*;* Robert W Cox, 'Civil Society at the turn of the new millennium: Prospects for the alternative world other' *in* Louise Amoore (ed.) *The Global Resistant Reader* (Oxon: Routledge, 2005) p. 103.

actors in the Third World to demonstrate their disapproval of Western imposition in the international legal system.

Although Gramsci's notion of resistance is arguably Eurocentric, his assertions on solidarity are vital in order to understand resistance movements, including African counter-hegemonic efforts.[6] In most parts of Africa, especially among the Western parts of the continent such as Nigeria and Ghana, solidarity is an integral feature of life. This is associated with the communal system prevalent in this part of the continent, as demonstrated in the previous chapter. Arguably, the mutual support and social cohesion in these African groups and other members of the Third World have continued to aid their resistance to Western domination. An early example of this is the Women's war of 1929.[7] This group of Nigerian women fought the colonial imposition of a tax on women during that period. Importantly, one of the female leaders of this group strongly supported the community in their challenge to the taxation rather than aligning with her husband, who was working for the colonial authorities at the time. (A detailed analysis of this resistance will be discussed in a

---

[6] Although Gramsci had little effect on colonial struggle, it is believed that he had influenced post-colonial theory. He made no direct response to Italian invasion of Libya in 1911, Albania in 1915 and Turkey from 1919 to 1923, he was believed to have offered a revolutionary perspective on the future of the revolt and emancipation of the colonies. In this regard, Gramsci pointed to the economic exploitation of the colonies by the European capitalist and argued that the overthrow of capitalism should begin in the colonies through the colonial population. Gramsci stated this could be achieved through the deprivation of raw materials and foodstuffs to the European industrial bourgeoisies. Such act of course would require the unity of the interests of the colonial population to be achieved. See Robert J C Young, 'Il Gramsci Meridionale' in Neelam Srivastava and Baidik Bhaltacharya (Eds.) *The Postcolonial Gramsci* (New York and London: Routledge, 2012) p. 17 particularly p. 19. Gramsci's perspective on 'national-popular' takes into consideration the nation-people that is built on human agency. It is believed that such human agency could change the history of a society that is characterised with class inequalities, and such could be applied to the Third World which is predominated with such human agencies as seen in the examples of peasants. Such perception by Gramsci has been viewed as innovative contribution to postcolonial studies and international relations. See Joseph Francese, 'Introduction, "Gramsci Now"' *in* Joseph Francese (ed.) *Perspectives on Gramsci, Politics, Culture and Social Theory* (New York and London: Routledge, 2009) p. 1.

[7] U.E. Umoren, 'The Symbolism of the Nigerian Women's War of 1929: An Anthropological Study of Anti-Colonial Struggle' (1995) AFRICAN STUDY MONGRAPHS, 16 (2), pp. 61-72.

later part of this chapter). Also, the continuous growth of third world scholarship, such as Third World Approaches to International Law (TWAIL), Pan Africanism, Negritude and similar bodies/persons (including armed groups, passive and active mass protesters, and transnational organisations) portray solidarity among non-state actors in the Third World. Such forms of solidarity also demonstrate the capacity to resist and overcome hegemonic tendencies on the international stage.

The evaluation of the different types of resistance employed by Third World non-state actors forms the basis of this chapter. It will investigate whether these resistance activities have developed into compelling patterns or norms that could contribute the making of customary international law by these non-state actors in the Third World. Although the Western state structure appears necessary and obvious in the formation of traditional customary international law, the preceding chapters in this thesis demonstrate the hegemonic nature of such a position. Importantly, the employment of non-state actors as counter-hegemonic in the Third World, particularly in Nigeria and its surrounding post-colonial states, is made imperative, as their socio-political experiences and culture are quite unique and differ from that of their Western counterparts. For instance, the role of non-state actors such as nationalists, judges and social movements cannot be disregarded in Third World struggles against Western domination and their contributions towards identifying and defining binding practices that could give rise to legal obligations within the Third World.[8]

[8] Balakrishnan Rajagopal, 'International Law and Social Movements: Challenges to Theorizing Resistance' (2002-2003) see note 3.

This chapter intends to demonstrate that the resistance and practices of some Third World non-state actors are effecting changes in their daily lives as well as their transnational relationships, and this could influence the formation of customary international law beyond state monopoly. It will first identify some tools of resistance used by the Third World, such as solidarity, education, composition of post-colonial national legal systems and social movements. Although solidarity is treated as a separate subheading, the other elements also rely on some degree of solidarity for their success. The chapter will also conceptualise customary international law from an African perspective. In addition, it will assess the moments of resistance that serve as a lens through which to understand counter-hegemonic discourse in the participation of Third World non-state actors in (customary) international law-making. In carrying out these tasks, it is noteworthy that scholarship within this area is scarce. Consequently, this research is further made relevant in writing the Third World into customary international law-making.

2. THIRD WORLD TOOLS OF RESISTANCE TO WESTERN HEGEMONY IN INTERNATIONAL LAW

During the early development of international law, resistance by mass action groups was not considered relevant, except when such movements were directed towards the right of self-determination.[9] In most cases, at that formative stage, traditional international law embraced only the victor as a 'legitimate representative of state

[9] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

sovereignty'.[10] Such a 'traditional' position sanctioned the colonialists' suppression of Third World legal claims in anticolonial nationalist movements for independence under international law.[11] For instance, in Kenya, the *Mau Mau* resistance to British domination could not fit into the principles of classical international law. It was regarded as a 'rebellion' by natives and international law had no vocabulary to accommodate such acts. Therefore, such forms of anticolonial resistance were treated as criminal acts and dealt with through the doctrine of emergency.[12]

The attainment of independence by many Third World states brought with it another form of resistance by the Third World: international law that was mainly institutionalised and carried out by the Third World states themselves.[13] This form of resistance canvassed for the economic development of developing countries through the New International Economic Order in the United Nations.[14] However, these subsequent forms of resistances have been criticised for their heavy reliance on some tools of traditional international law, such as sovereignty and the quest for development.[15] These tools have been viewed to be in line with Western capitalist

---

[10] Nathaniel Berman, 'Sovereignty in Abeyance: Self-Determination and International Law', (1988) WISCONSIN INTERNATIONAL LAW JOURNAL 7, 51; Balakrishnan Rajagopal, 'The Case for the Independent Statehood of Somaliland', (1992) AMERIAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW, Vol. 8, 653.
[11] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003) see note 9 at p. 11.
[12] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003) see note 9 at p. 11.
[13] Vivenne Jabri, *The Postcolonial Subject: Claiming Politics/ Governing others in Late Modernity* (New York and Canada: Routledge, 2013).
[14] Mohammed Bedjaoui, *Towards a New International Economic Order* (New York: Holmes and Meier, 1979); Robert Cox 'Ideologies and the NIEO: Reflections on some recent literature' (1979) INTERNATIONAL ORGANIZATION 33 (2): 257-302.
[15] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003) see note 9 at p. 89.

ideas of a ‘civilising mission' in the guise of development as they carry with them the influence of Western dominance.

In spite of the above challenges to Third World struggles, the persistent resistance by Third World peoples at different levels, both domestic and transnational, appears to enforce a departure from the manner in which traditional international law treated Third World resistance. Such movements have influenced the position of scholarship in modern international law. For example, Balakrishnan Rajagopal argues that it is impossible to discuss the transformation of the international legal order in modern times without considering Third World movements.[16] He asserts that Third World interactions could no longer be evaluated within the statist or liberal rights paradigms, and he acknowledges that many social movements within the Third World reject Western models while offering emancipatory promises that accommodate farmers, women, environmentalists and other perceived oppressed people within the local community. The struggles of social movements as a counter-hegemonic discourse demonstrate how non-state actors can attain autonomy and self-realization for the Third World. Although there might have been individual resistance to oppressive foreign dominations, most often non-state actors present a united force to demonstrate their disapproval, leading us to the next discussion on solidarity. As stated earlier, solidarity cuts across the other tools employed by non-state actors, such as education, media, legal systems, and social movements. These elements will be discussed under distinct subheadings.

---

[16] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003) see note 9 at p. xiv.

a.) SOLIDARITY

Solidarity is a term that suggests co-operation between individuals, including diverse groups of non-state actors as well as states.[17] This is usually as a result of their facing a common problem and the belief in resolving such an issue as a united front instead of a more individualistic approach. Sometimes, the notion of cooperation, shared responsibility or commitment to not harm each other as a description of solidarity is considered a rather flat and narrow definition that could diminish the political value of solidarity.[18] Beyond these arguments, solidarity is believed to be 'a value-driven principle' alongside 'a strong ethical underpinning'.[19]

The historical origin of solidarity under international law is usually attributed to the French revolution of the eighteenth century, in spite of its vast application in diverse legal traditions and experiences.[20] Particularly in 1793, the Assemblée Nationale gave every citizen the guarantee that they would receive subsistence in case of need.[21] These French laws were earlier associated with *fraternité*, and later with 'solidarity', which introduced an entirely new concept dealing with political and economic inequalities. Within this sphere, solidarity was seen as a democratic and modern solution to the predicaments of mass poverty, especially in connection with industrialisation and the demand for political inclusion. The French Revolution has

---

[17] Robert John Araujo, International Law Clients: The Wisdom of Natural Law (2000) FORDHAM URBAN LAW JOURNAL, Volume 28, Issue 6, 1750.

[18] Philipp Dann, 'Solidarity and the Law of Development Cooperation' *in* Rüdiger Wolfrum and Chie Kojima (eds.) *Solidarity: A Structural Principle of International* Law (Heidelberg: Springer, 2009) p. 61.

[19] Karel Wellens, 'Revisiting Solidarity as a (Re-) Emerging Constitutional Principle: Some Further Reflections' *in* Rüdiger Wolfrum and Chie Kojima (eds.) *Solidarity: A Structural Principle of International* Law (2009), see note 18 at p. 3.

[20] Alan Forrest, *The French Revolution and the Poor* (New York: St. Martin's Press, 1981).

[21] Philipp Dann, 'Solidarity and the Law of Development Cooperation' *in* Rüdiger Wolfrum and Chie Kojima (eds.) *Solidarity: A Structural Principle of International* Law (2009), see note 18 at p.55.

been referred to as a bourgeois revolution, although this assertion has also faced some contest.[22] The attribution of French origin might be as a result of another form of hegemony, but such reference is challenged, as Africans also confront political and economic inequalities in their own societies, both in indigenous and post-colonial situations.[23] A 'People's Revolution', for instance, is employed as a backup procedure to remove an incompetent or tyrannical *oba* (Yoruba King in Nigeria) when the council of chiefs fails to do so.[24] Such revolution is termed *kirikiri:* it involves a mob parade throughout the town and ends at the affected *oba's* residence with hurled dirt, stones and abuse.[25] In the event that the *oba* fails to leave his office or commit suicide, as discussed in chapter two of this thesis, a select group of men will seize and kill him. This form of revolution has been viewed to be genuine African revolution.[26] The unity of interest among the Yoruba people of Nigeria involved in such confrontations and dethronement of their oppressors is deemed relevant for investigating solidarity in a polarised international sphere.

The introduction of solidarity into international law raises some challenges. As observed in the Third World discourse in this thesis, terms that have 'universal appeal or application' often have a Western underpinning. Most often, such perception asserts a privileging of the West over the Third World. Phillipp Dann draws inference

[22] Ricardo Duchesne, 'The French Revolution as a Bourgeois Revolution: A Critique of the Revisionists' (1990) THE FRENCH REVOLUTION AND MARXISM Vol. 54, No. 3, pp. 288-320.
[23] George Ayittey, *Indigenous African Institutions* (2nd edn.) (Arderley, N.Y.: Transnational Publishers, 1945).
[24] This have been in existence before the British colonial encounter as discussed in chapter two of this thesis. In some part of the Yoruba kingdom, the king is referred to Alaafin.
[25] S. Kenneth Carlston, *Social Theory and African Tribal Organisation* (Urbana, IL: University of Chicago Press, 1968) see p. 182.
[26] The Gikuyu's *itwika* among the Bantu speaking people of Kenya is also an example of revolution in Africa. See George Ayittey, *Indigenous African Institutions* (2nd edn.) (1945), see note 23.

from such Western perceptions of international solidarity in respect of universality in matters of justice. Dann inquires whether it is possible 'to reconcile the rather collectivist idea of solidarity with sovereignty – i.e. the independence based structure of international law'.[27] Pursuing such 'universalised' solidarity in relation to classical customary international law has been seen to hinder the participation of the Third World in the development of international custom. Rather than follow such a route, this chapter employs Gramsci's notion of solidarity, that is, a uniting force against hegemonic rule, in order to shift the *status quo* to accommodate the Third World in the formation of customary international law.[28]

One of the earliest forms of Third World solidarity in the present international system was demonstrated at the Bandung conference of 1955. Twenty-nine newly decolonised states of Africa and Asia participated in that conference to discuss matters of common interest resulting from colonial subjugation by Western Europe.[29] The aim and objectives of the conference were:

a) To promote goodwill and cooperation among the nations of Asia and Africa, to explore and advance mutual interests, and to establish and further friendliness and neighbourly relations;
b) To consider the social, economic and cultural problems and relations of the countries represented;

[27] Philipp Dann, 'Solidarity and the Law of Development Cooperation' *in* Rüdiger Wolfrum and Chie Kojima (eds.) *Solidarity: A Structural Principle of International* Law (2009) see note 18 at p.58.
[28] Robert W Cox, 'Civil Society at the turn of the new millennium: Prospects for the alternative world other' *in* Louise Amoore (ed.) *The Global Resistant Reader* (2005) see note 5.
[29] Richard Wright, *The Colour Curtain: A Report on the Bandung Conference* (New York: World Publishing Company, 1956).

c) To consider problems of special interest to Asian and African peoples, e.g., problems affecting national sovereignty and of racialism and colonialism;

d) To view the position of Asia and Africa, and their peoples, in the contemporary world, and the contribution they can make to the promotion of world peace and cooperation.[30]

However, the successes of these objectives have remained contestable.[31] Such doubts arise from the fact that the meeting did not end the Cold War, nor provide a permanent solution to intra-regional conflicts.[32] In spite of these reservations, the Bandung conference has been celebrated as the 'first intercontinental conference of coloured peoples in the history of mankind' and, the 'unity of purpose' it served to promote cannot be overlooked.[33] The conference articulated the normative basis of a regional and international order marked by 'tolerance of diversity, mutual accommodation and the softening of ideological conflicts and rivalries'.[34] The solidarity that pulled together the states concerned in this conference provided a benchmark for judging the progress of multilateral diplomacy among Third World

---

[30] Ang Cheng Guan, 'The Bandung Conference and the Cold War International History of Southeast Asia' *in* See Seng Tan and Aimitav Acharya (eds.) *Bandung Revisited: The Legacy of the 1955 Asia-Africa Conference for International Order* (Singapore: National University of Singapore Press, 2008) p. 27 at 28.

[31] Luis Eslava, Michael Fakhri & Vasuki Nesiah (Eds), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press, 2015- Forthcoming); Adekeye Adebajo: 'From Bandung to Durban: Whither the Afro-Asian Coalition' *in* See Seng Tan and Aimitav Acharya (eds.) *Bandung Revisited: The Legacy of the 1955 Asia-Africa Conference for International Order* (2008) see note 30 at p. 105; Rahul Mukherji, 'Appraising the Legacy of Bandung: A View from India' *in* See Seng Tan and Aimitav Acharya (eds.) *Bandung Revisited: The Legacy of the 1955 Asia-Africa Conference for International Order* (2008) see note 30 at p. 160.

[32] Ang Chen, 'The Bandung Conference and the Cold War International History of Southeast Asia' (2008) see note 30.

[33] Jamie Mackie, *Bandung 1995: Non-Alignment and Afro-Asian Solidarity* (Singapore: Editions Didier Millet, 2005).

[34] Amitar Achararya and See Seng Tan, 'The Normative Relevance of the Bandung Conference for Contemporary Asian and International Order' *in* See Seng Tan and Aimitav Acharya (eds.) *Bandung Revisited: The Legacy of the 1955 Asia-Africa Conference for International Order* (2008) see note 30, p. 1 at 14.

states. That conference was viewed as a remarkable feat of organisational success achieved by the Third World, as well as the medium for adopting new and changing regional principles and practices that compel obligation to their people.[35]

In addition, the individuals who attended the conference added to the importance of the meeting. These persons included Ali Sastroamidjojo, Prime Minister of Indonesia - subjected to exile, prison and war; Jawaharlal Nehru, Prime Minister of India - who spent many years in prison; Nkwame Nkrumah, Prime Minister of the Gold Coast - ex-political prisoner, and others who had suffered similar fates and were willing to unite against common enemies.[36] Therefore, it could be argued that although the Bandung conference was a gathering of Afro-Asian states, it was also a gathering of a group of individuals (non-state actors) who aimed to provide counter-hegemonic alternatives to Western ideologies.

The Bandung conference was not the only Third World solidarity effort to unite their forces against Western hegemony; several other Afro-Asian solidarity movements have taken place. Some of these solidarity movements include the meeting held in Cairo in 1957, that of Conakry, Guinea in 1960, to discuss the post-colonial futures of these Afro-Asian states, and another in Moshi, Tanganyika in March 1963 when the Latin American region was invited to join in the struggle against Western domination.[37] The introduction of Latin America to the solidarity struggle later

---

[35] Amitav Acharya, 'The Normative Relevance of the Bandung Conference for Contemporary Asian and International Order' *in* See Seng Tan and Aimtav Acharya (eds.) *Bandung Revisited: The Legacy of the 1955 Asia-Africa Conference for International Order* (2008), see note 30 at p. 1.

[36] Richard Wright, *The Colour Curtain: A Report on the Bandung Conference* (New York: World Publishing Company, 1956).

[37] Manuel Barcia, '"Locking horns with the Northern Empire": Anti-American Imperialism at the Tricontinental Conference of 1966 in Havana' (2009) JOURNAL OF TRANSATLANTIC STUDIES, Vol. 7, No. 3, pp. 208-217.

resulted in a Tricontinental conference.[38] Although the significance of the Tricontinental conference has been queried, it has been argued that the conference increased the number of guerrilla movements in Africa and Latin America leading to the independence of countries such as Guinea Bissau, Angola, Mozambique, and Zimbabwe.[39] Today, regional organisations are arguably contributing to the emancipatory struggles of the Third World. The African Union, for instance, comprising independent African states, is united by the following objectives:

> … to rid the continent of the remaining vestiges of colonization and apartheid; to promote unity and solidarity among African States; to coordinate and intensify cooperation for development; to safeguard the sovereignty and territorial integrity of Member States and to promote international cooperation within the framework of the United Nations.[40]

Although institutions such as the African Union, among others, have continued to show their desire to protect the Third World, there are reservations over the mode of operations in these international organisations.[41] These concerns stem from their heavy reliance on the Western model of statehood, sovereignty and other practices that appear to compromise the self-determination of the Third World. Most often, other non-state actors, such as ordinary people, become relevant in the emancipatory

[38] The Tricontinental Conference of African, Asian, And Latin American Peoples (A Staff Report) available at http://www.latinamericanstudies.org/tricon/tricon1.htm [accessed on 26 January 2016].

[39] Manuel Barcia, '"Locking horns with the Northern Empire": Anti-American Imperialism at the Tricontinental Conference of 1966 in Havana' (2009), see note 37.

[40] Available on http://au.int/en/about/nutshell [accessed on 06 July, 2015].

[41] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003) see note 9.

goals of the Third World and this makes them significant in TWAIL scholarship and this thesis.

While discussing solidarity in various resistance moments and movements as counter-hegemonic moves in this chapter, attention is drawn to how different types of non-state actor, such as intellectuals, women, and community leaders, amongst others, resist 'strict Western practices'. In some instances, there is a demonstration of pre-existing indigenous principles that are deeply impressed on the people which cannot be set aside. Consequently, compromise within this indigenous domain requires the consent of the people and community. Such negotiation allows the people to engage in the creation of new norms or shape some legal principles to accommodate their interests as evidenced in the matters of human rights discussed below. Such resistance allows the non-state actors concerned to participate in the shaping of certain norms that could influence customary international law through education, media and indigenous systems, as well as social movements, as explored below.

b.) EDUCATION AS A TOOL OF RESISTANCE

Under this subheading, two issues are to be considered: pedagogy and scholarship.

PEDAGOGY

Education is an important instrument that could play a dual role in sustaining and dislodging hegemonic practices. While there is the tendency for Western education to encourage the implantation and sustenance of hegemonic practices characterised by traditional customary international law, critical (as well as alternative non-Western) pedagogy could play vital roles in resisting suppressive traditional approaches in

international law. Resistance in education is therefore required as a matter of 'mortal urgency; on the one hand to arrest cultural erosion and on the other to consolidate a culture of resistance'.[42] In pursuit of these goals, Universities now present modules that critique classical understandings of international law. In 2008, Mohsen Al Attar, for example, designed a course titled 'From Colonialism to Globalization: How International Law Made a Third World' at the Faculty of Law of the University of Auckland.[43] The course offers a narrative that details 'a broad historical arc that included the naked exploitation of the earliest European invaders,' while abandoning the conventional image of international law.[44] It reveals the improvisation of international law as legitimizing the discourse for colonial invasion.[45] The course presents the intensifying globalized world order through the spread of neoliberal ideology to the realpolitik of empire manifesting itself in the manipulation of international financial institutions and the foreign aid industry.[46]

The process of imparting the above themes also defers from the stereotyped teacher/giver to student/recipient relationship prevalent in the teaching of law generally.[47] The TWAILian pedagogy, applied in this instance, encourages the active participation of students. Questions are not only raised by the lecturer, students also

---

[42] Mohsen Al Attar and Vernon Ivan Tava, 'TWAIL Pedagogy-Legal Education for Emancipation' (2010) PALESTINE YEARBOOK OF INTERNATIONAL LAW, Vol. 15, No. 5.
[43] Mohsen Al Attar and Vernon Ivan Tava, 'TWAIL Pedagogy-Legal Education for Emancipation' (2010) see note 42.
[44] Walter Rodney, *How Europe Underdeveloped Africa* (London & Tanzania: Bogle-L'Ouverture Publications 1972).
[45] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005). Students were also introduced to the works of Mutua and Chimni which dominated the TWAIL methodology that applied in the studies.
[46] Joseph E Stigltz & Andrew Charlton, 'Aid for Trade' (2006) Int'l Law J. Dev. Issues at p. 1.
[47] Christine Schwobel-Patel, 'Teaching International Law Critically- Critical Pedagogy and Bildung as Orientations for Learning and Teaching' *in* Bart Van Klink and Ubaldus De Vries (eds.), *Academic Learning in Law: Theoretical Positions, Teaching Experiments and Learning Experiences* (Cheltenham, UK- Massachusetts, USA: Edward Elgar Publishing Ltd, 2016), p. 99.

raise questions and debate among themselves. These encourage critical thinking rather than mere conformity. The new approach also encourages solidarity in the rethinking of the understanding of international legal theories. The module, 'From Colonialism to Globalization: How International Law Made a Third World' provides a dialogic and democratic approach to teaching and learning, and a reflection on the place of justice in international law that were arguably unlikely within the conventional model.[48]

One of the significant consequences of the TWAIL pedagogical counter-hegemonic approach on the subject matter in relation to students was their admission of the acquisition of a 'skill-set'. This skill-set enabled students to step outside the narrow structures of positivistic jurisprudence and First World morality. Responding further to the TWAIL approach, the students admitted that:

> Gradually, we came to view the idea and practice of resistance not as a problem to be solved, but as a dimension to be understood. … Though difficult and uncomfortable, the reward of this type of intellectual work is worthwhile: the first steps on the journey in 'decolonizing' our own minds.[49]

Based on the above pedagogy, Al Attar argues that education is about liberating minds and freeing creative thoughts.[50] He asserts that education is a tool that produces new leaders and empowers them to effect change that will benefit the Third world.

---

[48] Mohsen Al Attar and Vernon Ivan Tava, 'TWAIL Pedagogy-Legal Education for Emancipation' (2010) see note 42.

[49]Mohsen Al Attar and Vernon Ivan Tava, 'TWAIL Pedagogy-Legal Education for Emancipation' (2010) see note 42 at p. 36-37.

[50] Mohsen Al Attar, 'Moving the centre of International Legal Education' (2011) TRADE, LAW AND DEVELOPMENT, Vol. III, No. 1, p. 266.

Therefore, he calls for resistance to the mechanical way of teaching students and requests a critical examination that allows students to question the structures of domination. He believes that the effectiveness of this new approach would depend on each individual. Similarly, Edward Blyden had earlier advocated for a drastic transformation of the African educational system that teaches Africans how to think rather than imitate Europeans.[51] Other Africans joined Blyden in such decolonisation movements by presenting African cultural consciousness as a favourable perspective, while attacking colonial authorities at the same time, especially during the period 1890-1914.

The new approach to critical thinking, teaching and understanding of international law, and other subjects, dismantles the traditional notions of the principles and practices of international law, challenging the Eurocentric foundation of international law. Also, it seeks and situates non-Europeans in international relations. Importantly, critical approaches to international law as a theory and methodology becomes the vehicle of action to resist the imposition of Western notions of state practice and *opinio juris* as the only determinant for the formation of customary international law. Insistence on such imposition contradicts the reality of other legal traditions as well as modern international law that is characterised by different competing actors. Consequently, the making of international customary law is, arguably, no longer the exclusive preserve of the European doctrine of state practice and *opinio juris*. It

[51] M Yu Frenkel, 'Edward Blyden and the Concept of African personality' (1974) AFRICAN AFFAIRS Vol. 73, No. 292, pp. 277-289.

touches on how law, particularly custom, is made in other societies and how such custom is incorporated into international relations.

Indeed, critical pedagogy is essential in unsettling colonialism and its effects in the reproduction of hierarchies that privilege the Global North over the Global South.[52] In this regard, revolutionary pedagogy that imparts on Nigerians, Africans and other diverse actors in the Third World their participatory roles in international law-making is crucial and urgent if they are to have a significant impact. Such a regime change will not only critique, but also provide alternative patterns and ideologies in the educational process for the understanding of the formation of customary international law. Decolonising the education system in a country like Nigeria could raise numerous questions of how this could be achieved. Such questions could include:

i. Whether such a revolution would entail the incorporation of Nigerian indigenous modes of education only;
ii. Whether it involves the combination of Nigerian indigenous and present post-colonial systems;
iii. Whether various indigenous societal experiences arising from diverse legal systems, centralised and decentralised, predating British colonisation would be taken into consideration; or

[52] Christine Schwöbel-Patel, 'Teaching International Law Critically-Critical Pedagogy and *Bildung* as Orientations for Learning and Teaching' Bart van Klink and Ubaldus de Vries (eds.) *Academic Learning in Law: Theoretical Positions, Teaching Experiments and Learning Experiences* (2016), see note 47.

iv. Whether such a revolution will employ both Nigerian as well as other African and non-African systems of education and scholarship.

These questions and more compel Nigerians to consider and devise ways to *de-teach* 'perceived negative' colonial legacies and teach the present generation to assert themselves in the international legal system rather than being what this thesis has termed 'perpetual-recipient-heirs' of hegemonic systems for the purpose of contributing to what may constitute customary international law. In making this revolutionary move, it is possible that each option may raise its own complexities. Such complexities are likely to arise due to the diverse socio-cultural nature of the Nigerian state, as well as the various stages of political development that it has witnessed.

In the first option, the teaching of international law in Nigeria from indigenous systems will bring into play the learning processes how the various ethnic groups in Nigeria disseminate information. Indigenous Nigerian (and other African) educational systems are usually an information base for the community; they also facilitate communication and decision-making.[53] They rely heavily on oral transmission through beliefs, community laws, community values, dances, folklore, proverbs, stories, myths, local languages, and taxonomy.[54] Education within Nigerian indigenous communities is believed to be holistic, a way of life, a life-long process. In fact, the seriousness attached to the longevity of education and learning could be described as endless. The

[53] Michael Omolewa, 'Traditional African Modes of Education: Their Relevance in the Modern World' (2007) INTERNATIONAL REVIEW OF EDUCATION, Vol. 53, No. 5/6, pp. 593-612.
[54] L. Grenier, *Working with Indigenous Knowledge: A Guide for Researchers* (Ottawa: International Development Research Centre, 1998), particularly p. 2.

Yoruba ethnic group in Nigeria, for instance, sees learning as a continuous event as portrayed in the saying '*m' ajokun m'aje ekolo, ohun ti won ba n je l'orun ni ki o ma a ba won je*'.[55] This teaching translates literally as 'do not eat worms or millipedes, but carefully adopt the practices of your new abode'. It denotes caution and the need to be prudent in order to be able to adapt to changing circumstances. Impliedly, the saying teaches flexibility, caution and adjustment to inevitable changes. In other words, changes in circumstance require tactical application of knowledge. Learning does not end in one's present life time, as he or she is expected to acquire knowledge to be able to adapt in the place after death.[56] Relating this to the teaching of international law, it may raise the question of how indigenous knowledge could be applied in order to achieve a desirable outcome following the colonial/post-colonial experiences that will benefit Nigerians in custom-making.

The oral tradition, described above as one of the characteristics of African education, raises concerns in modern times. The oral tradition may fade with time, thereby leaving later generations without concrete information or evidence to rely on.[57] Although this is a logical criticism, it has been variously and arguably said that this could be a way to discredit African systems which rely heavily on oral traditions. However, there are ancient writings in some African societies, especially the Northern part of Africa.[58] These could provide the desired 'concrete evidence' in the present times. Although written evidence is desirable, it is also burdened with its own pitfalls.

---

[55]Michael Omolewa, 'Traditional African Modes of Education: Their Relevance in the Modern World' (2007) see note 53 at p. 596. Translated also by Michael Omolewa on the same page.

[56] This is significant as most parts of African philosophy believe in immortality, that is, continuous existence in spirit world after death in the present life.

[57] T. O. Elias, *The Nature of African Customary Law* (Manchester: Manchester University Press, 1956)

[58] http://www.taneter.org/writing.html [accessed on 31 August 2016].

Such evidence could be biased based on the author's idiosyncrasies, lost or destroyed as a result of war, fire or other forms of disaster, thereby rendering any available oral evidence inevitable to assist in understanding possible contributions of Third World non-state actors in international custom-making.

Diverse cultures in Nigeria could also be a cause for concern while considering the choice of a particular indigenous system that should be adopted in the teaching of international law. Similarly, where these indigenous systems are successfully implemented in present post-colonial Nigeria, they are likely to pose peculiar challenges. This could be as a result of the colonial encounter, which has left the country with the burden of running indigenous and Western systems concurrently.

In spite of the above concerns, there appears to be strong, unified, common characteristics in Nigerian indigenous (and other African) educational goals. These are centred on producing students who are respectful, sensitive and responsive to the needs of both family and community, as well as being able to integrate into 'wider society'.[59] Arguably, such common features raise the chances of minimising controversies in the development or adoption of Nigerian indigenous educational methods in the teaching of international law. This leaves the question of how such methods could be revolutionised to produce a counter-hegemonic legal education, particularly in the field of international law in Nigeria. Such a position would enable

[59] Norbert Nikiema, 'Adult Education and Local Knowledge in Africa' *in* Michael Omolewa *et al* (ed.) *History of Adult Education in Africa* (Florida-Cape Town: Pearson Publishers, 2009); Michael Omolewa, 'African Thought' *in* F.A. Irele and B. Jeyifo, Entry on Education for the *Encyclopaedia of African Thought* (Oxford: Oxford University Press, 2007); Michael Omolewa, 'Traditional African Modes of Education: Their Relevance in the Modern World' (2007) see note 53; B. Aliu Fafunwa, *History of Education in Nigeria, 1842-1939: An Historical Analysis* (Ikeja: Longman, 1978).

the incorporation of non-state actors in the formation of customary international law to benefit Nigeria and other members of the Third World.

Returning to the remaining three issues that may arise in decolonising legal education (particularly in international law) as enumerated earlier; they are likely to pose similar challenges arising from the reality of colonisation and subsequent decolonisation leading to Western influences in the current Nigerian legal education. Such influences include proposals on the teaching, dissemination and appreciation of international law from a Western perspective.[60] It has been argued that the study of international law in Nigeria should assume greater importance both for young Nigerian lawyers and the general public in order to assert Nigeria in the shaping of modern international law.[61] The proponents of this argument summarise the objectives for teaching international law in Nigeria in the following ways:

> (i) To expose students to a clear understanding of the facts of inter-dependence, namely that in the contemporary world states and other subjects of international law do not exist in isolation, but rather must necessarily be interdependent;
>
> (ii) To teach students to appreciate the universal principles and rules designed to ensure normal relations between states and other subjects of international

[60] Lassa Oppenheim, 'The Science of International LAW: Its Task and Method', (1908) 2 AM. J. INT'L L. pp.323-324; UN Doc. A/45/430/Add.2 at 14, G.A. Res. 1816 (1962),
[61] Christian N Okeke, 'International Law in the Nigerian Legal Education' (1997) 27 CAL. W. INT'L L. J. 311.

law, irrespective of the differences in their [legal status], economic, political and social systems;

(iii) To educate students in the spirit of humanism, democracy and respect for the sovereignty of all nations and peoples;

(iv) To make students constantly aware of the need to fight for the extermination of the remnants (traces) of colonialism and all forms of racial and national oppression.[62]

The above objectives are pursued from both formal learning in Nigerian universities and informal learning through some international law bodies and associations.[63] Such objectives demonstrate the colonial encounter and the zeal to reconcile its past for future advancement. Although these goals are commendable, it is doubtful that such objectives can fulfil the aspiration to assert a Nigerian voice in international law making (particularly customary international law). Although one may agree with the first objective in teaching international law in Nigeria, based on the understanding that states do not live in isolation but co-operate in order to tackle their challenges, teaching such interdependency raises questions regarding whose principles, practices and opinions would be considered.

The second and third objectives in teaching international law provide a clue towards answering the above question of whose principles, practices and opinion should be considered in such interdependencies. Notably, the principles relied upon are

[62] Christian N Okeke, *The Theory and Practice of International Law in Nigeria* (Enugu: Fourth Dimension Publishing Co. Ltd, 1986) at pp. 277-278.
[63] Christian N Okeke, *The Theory and Practice of International Law in Nigeria* (1986) see note 62.

'universal principles and rules' which have faced severe criticisms by Third World scholars due to their perceived Western bias.[64] These criticisms arise from the application of international principles of Eurocentric origins as universal, which this thesis considers to be a form of manufactured consent. Such global application of a select few European states has been challenged and regarded as lacking wide representation of the diverse legal traditions of the international system.[65]

The fourth objective leaves an individual burden on every international law teacher and student: the responsibility of being proactive in a counterhegemonic legal education in Nigeria, as well as other nations of the Third World. Such counter-hegemonic drive provides the opportunity to incorporate all the actors involved in law-making and influencing decisions within Nigeria and the African region to direct their legal education beyond the Western model of state practice and *opinio juris* as the only determinants of custom-making. This counter-hegemonic move is necessary to reflect the reality of law-making in Nigeria and the African region, which evidences both state and non-state actors as participants.

SCHOLARSHIP

Third World scholarship has developed over time to counter Western negative perceptions of the Third World that led to their exclusion in international law-making

[64] Chapter one dealt with the idea of consent from Gramsci's perspective and it was applied to customary international law.

[65] Arnulf Becker Lorca, Eurocentricism in the History of International Law in Bardo Fassender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), see note 45.

under classical international law.[66] In this regard, African societies were thought of as stateless, lacking sovereignty and incapable of participating in international decisions. Over time, Third World resistance scholarship has challenged such negative perceptions and justified the participation of non-Westerners in the international legal system. These Third World scholarships cut across many disciplines, including law, anthropology and fiction. African writers have tried to affirm their faith in their native culture and defend it against Western intrusion and prejudices.[67] In some African fiction, this is done through the use of symbols to distinguish African cultures from 'alien' cultures. It is sometimes believed that there are exaggerations in the use of symbols to portray African culture as positive and that of the 'alien' as negative.[68] However, it is also argued that such styles of writing are intended to avert cultural annihilation.[69] Those writers often assert African cultural practices and condemn the disruptive nature of Western intervention that justifies colonialism as a means to change African culture for good. In this regard, these African writers insist that Africans did not need Europeans to change or improve on their ideas, if and when necessary. For example, Chinua Achebe, a Nigerian writer, illustrates such a position in his novel *Things Fall Apart.*[70]

Things Fall Apart is read and studied in many English speaking countries in Africa. The novel is set in a pre-colonial Nigeria and it highlights the struggle between indigenous African societies, particularly the Igbo society of south-eastern Nigeria and

---

[66] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 HARV. INT'L L. J. 1.
[67] Tanure Ojaide, 'Modern African Literature and Cultural Identity' (1992) AFRICAN STUDIES REVIEW, Vol. 35, No. 3, pp. 43-57.
[68] Christopher Okigbo, *Labyrinths* (London: Heinemann, 1971).
[69] Tanure Ojaide, 'Modernn African Literature and Cultural Identity' (1992) see note 67 at p. 46.
[70] Chinua Achebe, Things Fall Apart (Oxford: Heinemann Educational Publishers, 1958).

colonialism. Through Okonkwo, the protagonist of the novel, the author explores strictly held Igbo cultural values and responses to the changing nature of Igbo society following the emergence of the 'white man' and his foreign rule and Christian religion. Okonkwo, who was a warrior and respected man in his community, insists on taking pride in observing the Igbo life-style, which is predominantly patrilineal, and values personal hard work to attain fame, wealth and respect, as well as obeying all communal rules, which emanated from within. Later in the novel it is shown that the changes due to Western encounters that were encroaching into Igbo society are unbearable for Okonkwo. Particularly, he feels betrayed by the conversion of his son to Christianity. In the midst of these challenges, Okonkwo, being a warrior and respected man in his community, is determined to protect the customs of pre-colonial Igbo society, and he advocates for war against the Western government. He kills an indigenous leader, who was a representative of the foreign government. In addition to his resistance, Okonkwo hangs himself to avoid being tried by a colonial government. Although such an act was condemned due to Igbo teachings against suicide, it can be seen as a resolute (or alternatively desperate) act of protection of African culture and laws.

In the midst of the events of Okonkwo's life and community, Okonkwo has a friend named Obierika who steps in occasionally to advise him on personal issues. Oberika is an influential man like Okonkwo, but they differ in terms of temperament and approach to issues. While Okonkwo could be described as rash and rigid, following his response to communal values and threats to such beliefs, Obierika examines the community's way of life in order to determine the suitability of such values or rules to

his community. The author uses Obierika to contribute to critical and resistance scholarship by portraying the capacity of Africans to direct their affairs without the need for external assistance or determination. Chapter Thirteen of the novel highlights certain cultural practices in this society, such as the killing of twins, exiling a person for unpremeditated killing, and human sacrifices, which are perceived as obnoxious by Christian missionaries. Okonkwo's accidental killing of a kinsman during a burial rite is described. The killing of a kinsman was a crime, intended or not. Consequently, Okonkwo and his family are sent into exile and his house is burnt. In order to demonstrate the African capacity of self-reappraisal, Obierika questions why a man should suffer so much for an accidental killing. In the course of such assessment, Obierika also mourns the deaths of his wife's twins, whom he was forced to kill, wondering what crime they committed. Such critiques by Africans themselves challenge the credit to the Western 'civilizing mission' through the Christian missionaries that condemned such practices. It has been argued that the disregard for African culture and the failure of Christian missionaries to appreciate and integrate African indigenous beliefs within Christianity has led to the current rejuvenation of African indigenous religious beliefs and practices in Africa.[71]

Similarly, Third World non-state actors, through TWAIL scholarship, have continued to play a significant role in identifying and challenging the perceived distortions characterised in classical international law. Antony Anghie, through his work titled *Imperialism, Sovereignty and the Making of International law*, is a notable example in

[71] Tugume Lubowa Hassan, 'Attitudes of Christian missionaries towards African traditional religious beliefs in East Africa during the British colonial rule' (2015) AFRICAN JOURNAL OF HISTORY AND CULTURE, Vol. 7 (10) pp. 193-199.

this regard.[72] His work inquired into the relationship between colonialism and international law, and how international law legitimised colonial exploitation, as well as developed mechanisms to prevent claims for reparations. Anghie argues that colonialism was central to the constitution of international law, as many basic doctrines of international law, especially sovereignty, were formulated out of the attempt to account for the relationships between the European and non-European worlds in the colonial confrontation. Similarly, the civilising mission maintained the dichotomy of the Global North and South divide. His work aims to make contributions by writing alternative histories of resistance to colonial power and rethinking a system of international law that could make provisions and secure promises of further international justice for the Third World.

James Thuo Gathii also states that TWAIL scholarship breeds an 'emerging amalgam of shifting approaches to international legal theory that is particularly Third World'.[73] He opines that TWAIL scholarship insists on the engagement of different traditions in international law. While challenging classical international law, many Third World scholars within this sphere also believe in the emancipatory promise of international law.[74] For instance, Antony Angie states that his continued hope for the empowerment of the marginalised can be achieved through the reconstruction of international law.[75] He believes that the Third World cannot abandon international

[72] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), see note 45.
[73] James Thuo Gathii, 'Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory' (2000) SYMPOSIUM ISSUE FORWARD, Vol. 41, No. 2, p. 263 at 273.
[74] Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' JOURNAL OFLAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA - VERFASSUNG UND RECHT in ÜBERSEE (VRÜ), Vol. 45(2), 2012, pp. 195-221.
[75] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), see note 45.

law now, as law plays a significant role in the public sphere and in the interpretation of many international events. Therefore, TWAIL scholarship, from this perspective, is more interested in overcoming the inequalities in international law rather than absolute replacement.[76]

One of the ways that Third World non-state actors, such as scholars, have sought to overcome some of the inequalities mentioned above is through the notion of international human rights. The theme, widely portrayed in most Third World scholarship, is the resistance to Western notions of human rights law.[77] The attitude of scholars from the Global South is that human rights should possess the features of diverse legal cultures if it is to derive legitimacy within its area of operation.[78] Supporting such arguments from an African perspective, Makua Mutua canvassed for what he termed an 'African cultural fingerprint' which would incorporate African experiences and values by focusing on social cohesion, duties and groups, as well as communal solidarity.[79] It could be argued that such scholarly resistance aids the identification or understanding of what constitutes the practices of human rights from

[76] Luis Eslava and Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' JOURNAL OFLAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA, 2012, see note 73; Karin Mickelson, 'Co-Opting Common Heritage: Reflections on the Need for South-North Scholarship', *in* Obiora Chinedu Okafor and Obijiofor Aginam (eds), *Humanizing Our Global Order: Essays in Honour of Ivan Head* (Toronto 2003) p.112; Ibironke T. Odumosu, Locating Third World Resistance in the International Law on Foreign Investment (2007) INTERNATIONAL COMMUNITY LAW REVIEW Vol. 9 p. 427; B S Chimni, 'Permanent Sovereignty over Natural Resources: Toward a Radical Interpretation' (1998) INDIAN JOURNAL OF INTERNATIONAL LAW Vol. 38, p. 208; B S Chimni, 'Globalization, Humanitarianism and the Erosion of Refugee Protection', (2000) JOURNAL OF REFUGEE STUDIES 13 (3) p. 243.

[77] Balakrishnan Rajagopal, 'Counter-hegemonic International Law: Rethinking human rights and development as a Third World strategy' *in* Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds.) *International Law and the Third World: Reshaping Justice* (USA & Canada: Routledge-Cavendish, 2010) p. 63.

[78] Bonny Ibhawoh, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State (2000) HUMAN RIGHTS QUARTERLY, Vol. 22, No. 3, pp. 838-860; Akwasia Idoo, 'Africa: Democracy Without Human Rights?', (1993) 15 HUM. RTS. Q. 703, 713.

[79] Makau Wa Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 VA. J. INT'L L. 339.

a non-Western perspective. If this were the case, then it could be said that such resistance establishes Third World participation in the making of international custom in the area of human rights.[80]

Furthermore, through the use of scholarship, there is resistance to classical personality theory in international law-making. State monopoly in international activities has been refuted by scholars, as noted in chapter four. The possibility of non-state actors in the formation of custom has been engaged with by such resistant discourse.[81] Equal representation of the polarised nature of the international legal system that should protect the 'locals', including women, farmers and others has been advocated for by TWAIL scholarship.[82] It has been argued that most legislations usually have serious impacts on the locals and, therefore, it should be judged on this premise.[83] These groups of non-state actors are constantly seeking their rights in both domestic and transnational systems, particularly in Africa, where the people often ignore the post-colonial state apparatus to attend to their daily socio-political and economic needs.[84] As a result, TWAIL scholars argue that the state is only one of the

---

[80] Although Third World struggles have made an impact in the international system as seen in anti-colonial movements, there are contentions in the assessment of the extent in which future international law is likely to accommodate African resistance. Scholars such as Joel Ngugi is pessimistic in this regard and advocates for total abandonment of the entire structure believed to be heavily biased in favour of Eurocentric world-view and look for an alternative. However, other scholars such as Makau Mutua are optimistic that African resistance would create a possible reform that would encourage African participation. See generally Obiora Chinedu Okafor, 'Poverty, Agency and Resistance in the Future of International Law: An African Perspective' *in* Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds.) *International Law and the Third World: Reshaping Justice* (2008) see note 77, p. 95 particularly at pp. 104-107.

[81] Christiana Ochoa, 'The Individual and Customary International Law Formation' (2007) VIRGINIA JOURNAL OF INTERNATIONAL LAW, Vol. 48, No. 1, pp. 119-186.

[82] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and the Third World Resistance* (2003) see note 9.

[83] John Charles White, Book Review: 'Alan Forrest, *The French Revolution and the Poor*. New York: St. Martin's Press, 1981.' (Winter, 1983-1984), EIGHTEENTH-CENTURY STUDIES, Vol. 17, No. 2 pp. 210-214.

[84] Robert W Cox, 'Civil Society at the turn of the new millennium: Prospects for the alternative world other' *in* Louise Amoore (ed.) *The Global Resistant Reader* (2005), see note 5 at 116.

diverse actors in the international scene.[85] Therefore, the participation of other non-state actors challenges the theory of state practice and *opinio juris* in the making of customary international law. In matters of economic relations, for example, (as observed in chapter two), non-state actors participated actively in trade relations with early Europeans. The Igbos, located in the south-eastern part of present day Nigeria, are regarded as classical examples of the high level of involvement of non-state-actors in local and international relations. Therefore, challenging the hegemonic grip of the state as sole determinant of international law-making.

c.) THE MEDIA (RADIO BIAFRA)

As observed in chapter one, in present times there are widespread opinions and practices through the use of diverse forms of media. The role of the media in forming public opinion cannot be over-emphasised. In contemporary legal arguments, the media is seen to influence, as well as contribute, to the making of customary international law.[86] Such media influences often have impact on the promotion and sustenance of hegemonic ideas.[87] However, sometimes media influence is directed against dominant powers by creating awareness and persuading the civil society to resist certain ideologies (for instance, socio-political, economic agendas and human

[85]Balakrishnan Rajagopal, 'Counter-hegemonic International Law: Rethinking human Rights and development as a Third World Strategy', (2006) THIRD WORLD QUARTERLY, Vol. 27, No. 5, pp. 767-783.
[86]Byers & Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003).

[87] Lee Artz and Yahya R Kamalpour (Eds.) *The Globalization of Corporate Media Hegemony* (Albany: State University of New York Press, 2003).

rights issues) perceived to be oppressive.[88] Radio Biafra, also known as the Voice of Biafra, appears to fit into that role.

The first operation of Radio Biafra was noted during the Nigerian Civil War, which took place from 1967 to 1970.[89] The Radio station served the Biafra side during the war, who were mainly comprised of the Igbo speaking population located in present day south-eastern Nigeria. Radio Biafra aims to propagate the idea of 'freedom', specifically that of the Igbos.[90] The view arose from the perception of Igbos who were marginalised by the Nigerian government and killed en masse in the Northern part of the country. From its inception, Radio Biafra continued to resist the post-colonial Nigerian state. The radio served as a broadcasting unit for Chukwuemeka Odumegwu Ojukwu, who led the Biafra side against the government of Nigeria. It reported the state of the war and influenced decision-making.

Although the civil war has ended in Nigeria, the reason that led to the war may, arguably, have not been completely resolved, as the agitation of the Igbos in south-eastern Nigeria continues to mount through Radio Biafra. Mazi Nnamdi Kanu currently operates the radio station.[91] The language of resistance (both in English and Igbo languages) by the broadcasters and listeners is too strong to ignore. The theme of this resistance is geared towards the Nigerian state, which is believed to be oppressive. Such group resistance transcends the boundaries of present day Nigeria. In the World

---

[88] Leah A Lievrouw, *Alternative and Activist New Media* (Cambridge: Polity Press, 2011).
[89] Tony Adibe, 'My Role in Radio Biafra-Pete Edochie' Daily Trust March 15, 2015 available on dailytrust.com.ng [accessed on 21 October 2015].
[90] Chukwuemerie Uduchumerie, 'Finally, Radio Biafra is off the airwaves' Premium Times, 15 July, 2015 available on premiumtimesng.com [accessed on 21 October, 2015]. Surrounding ethnic groups who feel oppressed by the Nigeria state also alien with this vision of Igbo emancipation as helpful towards their own emancipatory aspiration.
[91] Radiobiafra.co.

Igbo Congress, held in 2015 in Los Angeles, California, in the United States, the group brought to light their international affairs in resisting the Nigerian state. Importantly, the group relies on international law to seek their objectives. This is exemplified in their current petition against the newly elected president of the Federal Republic of Nigeria, Muhammadu Buhari, who assumed office on 29 May, 2015. The petition states that:

> The Indigenous People of Biafra (IPOB) are hounded, harassed, massacred, and incarcerated in violation of their civil and United Nations rights of Indigenous People to agitate for self-determination. Buhari is breaking international law by harassing and killing the beleaguered and marginalized peoples of Biafra in British-Nigeria.[92]

Generally, the issues raised by Radio Biafra represent resistance to the post-colonial Nigerian state due to the perceived oppression of a section of that country. Proponents of Biafra believe that their freedom will be achieved by the creation of an independent Biafra state. Also, many listeners of their programmes appear to support such agitation. Although it has been reported, on some occasion, that the station has been banned in Nigeria, it has continued to operate.[93] The extent to which the radio station might go in their agitation and its impact on the wider population is still unknown. However, the proponents of this movement are gradually shaping public opinion among the Nigerian masses. This can be attested following the mass protests

---

[92] Petitions.moveon.org [accessed on 23 October 2015].

[93] Radio Biafra mocks FG, releases frequency details, News Express, 16 July, 2015 available on http://www.newsexpressngr.com/news/detail.php?news=12946&title=Radio-Biafra-mocks-FG,-releases-frequency-details [accessed on 27 October, 2015].

in major cities in south-eastern Nigeria following the arrest of Nnamdi Kanu, the leader of the Radio Biafran movement, which led to his early discharge by the federal high court Abuja, Nigeria. [94]

Similarly, social media has become a channel of widespread revolutionary reactions, opinions, as well as a means to resist post-colonial states.[95] For example, Twitter is used by the Nigerian public to express their dissatisfaction regarding the manner in which the Nigerian government is dealing with the Boko Harem crisis in Nigeria.[96] While some are making suggestions on how the Boko Harem insurgency could be controlled, others are demanding for a breakup of the Nigerian state to allow for the independence of various regions of the state, as they could no longer endure the destruction of lives and properties resulting from the crisis. These social media are not simply used in the same manner as old technologies to coordinate and document unfolding events, rather they now create 'live maps'.[97] For instance, through social media sources such as Twitter and YouTube, protest events were monitored and gathered by the public in Tunisia, Egypt, Syria and Yemen. The use of these social media are seen to have played a pivotal role in the success of the Arab Spring protest movements.[98]

Group actions in the Third World have been an important tool to establish

---

[94] Radiobiafra.co.

[95] Innocent Chiluwa and Adetunji Adegoke, 'Twittering the Boko Harem Uprising in Nigeria: Investigating in the Social Media' (2013) AFRICA TODAY, Vol. 59, No. 3, pp.82-102.

[96] Innocent Chiluwa and Adetunji Adegoke, 'Twittering the Boko Harem Uprising in Nigeria: Investigating in the Social Media' (2013).

[97] Patrick Meier, 'Ushahidi as a Liberation Technology' *in* Larry Diamond and Marc F. Plattner (eds.) *Liberation Technology: Social Media and the Struggle for Democracy* (Baltimore: The John Hopkins University Press, 2012).

[98] Kevin H. Govern, 'The Twitter Revolutions: Social Media in the Arab Spring' available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2093434 [accessed on 14 September 2016].

disagreement with oppressive governance and policies. They have been employed to challenge indigenous political systems, as observed in chapter two, as well as during colonial and post-colonial periods in Nigeria. They have continued to impact on systems and have been able to effect changes. Some of these changes and forms of resistance are discussed below under social movements.

d.) SOCIAL MOVEMENTS

The aftermath of the attacks on September 11, 2001 and the succeeding 'war on terror' have attracted global attention to social movements. Although terrorism is not the concern of this section, such caution is crucial in order to avoid attempts of negatively labelling Third World movements. Nevertheless, it has been argued that mass resistance from the Third World fundamentally shapes the domain of international law.[99] Some of such group resistance to Western domination, as well as its influence on international principles in Africa, include the Aba Women's war (which was carried out against 'suspicious colonial tax imposition' and oppression of women in the south-eastern Nigeria) and anticolonial movements.

i. OGU UMUNWAYI (ABA WOMEN'S WAR 1929)

In Nigeria, the indigenous systems (both centralised and decentralised) are familiar with mass movements to establish displeasure or protest against certain actions of the ruling class or customary practices. Most times, such mass protest results in a change of an 'undesirable condition'. One of such movement is the case of *Ogu*

[99] Balakrshnan Rajagopal, 'International Law and Social Movements: Challenges of Theorizing Resistance' (2002-2003) see note 3.

Umunwayi that literally translates to 'war of women' or 'women's war'.[100] The name Aba is taken from a city of the same name in south-eastern Nigeria where this war took place. The construction is derived from the Igbo language. *Ogu umunwayi* signifies the 'making of war' by women against a person or persons; or a disturbing situation. War in this context does not necessarily mean the definition of war as recognized in international law. It is a sign of protest that is peaceful in most cases.

Ogu umunwayi was the description used by the Igbos to explain the protest by women in south-eastern Nigeria against the British colonial administration in 1929. The protest has been popularly referred to in modern times as the Aba women's riot of 1929. It has been contended that the use of the word 'riot' was a Western attempt to present the protest with negative connotations, and to have control over the historical narrative.[101] Certainly, different names are given to conflicts depending on whose point of view and agenda is portrayed.

This thesis will, rather, adopt the description of *ogu umuwanyi* in the original and indigenous meaning used by the language of the women who carried out the protest. Such preference contributes to the counter-hegemonic potential of non-state actors in the Third World. Furthermore, the employment of *ogu umuwanyi* is crucial to explaining the indigenous roles of women in the decentralised indigenous political structure of south-eastern Nigeria that has remained despite the adoption of the European model of statehood. It portrays the role of the solidarity of Igbo women

[100] Judith Van Allen, 'Aba Riots or the Igbo Women's War? Ideology, Stratification and the Women's War' (1975) UFAHAMU: A JOURNAL OF AFRICAN STUDIES 6 (1) p. 11. The account here realises heavy on this literature due to its comprehensive nature.
[101] Judith Van Allen, 'Aba Riots or the Igbo Women's War? Ideology, Stratification and the Women's War' (1975), see note 100.

through networks to establish their presence and participation in the community, as well as their united ability to effect change. Indeed, records have shown that the network of Igbo women has forced changes both in domestic (that is within individual households) and community matters relating to political and socio-economic issues. Particularly, such influence is noted in women's resistance to Western imposition and how such modes of resistance have influenced the practices of other groups within Nigeria and beyond. This resistance has been seen to recur in the struggle against agents of Western hegemony, such as post-colonial states and multinational companies.[102]

During colonial times, it was believed that certain rights of women suffered under the arbitrary rule of the 'warrant chiefs'.[103] For example, the warrant chiefs took some women as wives without conforming to the customary processes that allowed women the right to refuse a particular suitor. Womens' agricultural produce and their domestic animals were forcefully taken from them. Accumulations of these incidents and the rumour of future taxation of women resulted in their overt resistance.

In 1925, British colonial officers decided to introduce direct taxation to create a Native Treasury to run the colonial administration.[104] In that year, an Assistant District officer in the Bende division of the Owerri province decided to recount household and properties to reconcile the census register. This move sparked off the belief that if

---

[102] Daniel E Agbiboa, 'Transformational Strategy or Guided Pacification? Four Years On: The Niger Delta Armed Conflict and the DDR Process of the Nigerian Amnesty Programme' (2015) JOURNAL OF ASIAN AND AFRICAN STUDIES, Vol. 50 (4), pp. 387-411.

[103] Ronke Iyabowale Ako-Nai (ed), *Gender and Power Relations in Nigeria* (Plymouth: Lexington Books, 2013).

[104] Judith Van Allen, 'Aba Riots or the Igbo Women's War?- Ideology, Stratification and the Women's War' (1975), see note 100.

women were counted they would be taxed. Although the women were reassured that they were not to pay tax, they did not trust the statement and so a meeting of women was held to take action in case their suspicion proved true. It was decided that anyone who was approached to pay tax should raise an alarm in order to alert other women who were expected to come to their rescue.

On November 23rd, 1929, a warrant chief named Okugo, also the agent of the Oloko area of south-eastern Nigeria, entered a compound and requested to count the goats and sheep belonging to a woman named Nwanyeruwa. The encounter precipitated a quarrel between the two. Nwanyeruwa reported the incident to the women's group, who became convinced that they were to be taxed. Messages were sent to neighbouring areas and the women marched in mass protest to the District office and made their demands. In response to the protest, a written assurance stating that women were not to pay tax was issued. The women also succeeded in getting Okugo a two-year imprisonment for physically assaulting the women and spreading news likely to cause panic.[105] News of victory spread quickly and this further energised the women to raise funds to send delegates throughout former eastern Nigeria to coordinate the Women's War.[106] The women's network continued their resistance into 1930 and later ended in fatal clashes that led to the death of some women. Importantly, the women's demands were met. This form of resistance has influenced group resistances in Nigeria and other parts of Africa as other groups tend to replicate

[105] Margery Perham, *Native Administration in Nigeria* (London: Oxford University Press, 1937).
[106] Harry A Gailey, *The Road to Aba* (New York: New York University Press, 1970).

that mode of resistance, giving rise to a certain accepted pattern of resistance to both Western and post-colonial domination.[107]

ii. NATIONALISTS AND OTHER NON-STATE ACTORS IN ANTI-COLONIAL STRUGGLES

The signing of the Atlantic Charter between President Roosevelt and Prime Minster Churchill in August 1941 sparked off bold moves in the decolonisation of African states.[108] A group of West African journalists, led by Nnamdi Azikiwe (who later became the first President of Nigeria upon independence in 1960) travelled to London with the principal interest of the third clause of the Charter which declared 'the right of all peoples to choose the form of government under which they will live'.[109] Such interest anticipated independence and the sovereignty of West African territories. In a document submitted to the British Secretary of State for the Colonies in a memorandum titled, 'The Atlantic Charter and British West Africa' by the delegates sought the 'clarification of the British policy on self-determination in the colonies and proposed, based on the Atlantic Charter, the abrogation of the crown colony system; immediate 'Africanisation' of the colonial government; and the institution of

[107] Nigeria: Vanguard Newspaper of January 08, 2014, 'Half-nude women protest against Shell in Bayelsa available on http://allafrica.com/stories/201401080080.html [accessed on 07 July, 2015]; Rosalyn Terborg-Penn, Black Women Freedom Fighters in South Africa and in the United States: A Comparative Analysis DIALECTICAL ANTHROPOLOGY (1990) Vol. 15, No. 2/3, pp. 151-157.
[108] Bonny Ibhawoh, 'Testing the Atlantic Charter: linking anticolonialism, self-determination and universal human rights' (2014) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS, Vol. 18, Nos. 7–8, 842–860.
[109] Atlantic Charter, 14 August 1941, http://avalon.law.yale.edu/wwii/atlantic.asp [accessed 24 October, 2015].

representative government in the colonies with the goal of 'full responsible government'.[110]

Unfortunately, the above encounter did not yield the expected result of self-governance for the West African territories due to the unwillingness of Western countries to end colonial rule.[111] However, such reluctance by the colonialists did not deter anticolonial movements.[112] Other bodies such as the West African Students Union, Colonial Bureau of the Fabian Society and members of British Parliament interested in Africa continued the campaign for the emancipation of African peoples.[113] Over time, the Atlantic Charter became crucial to post-World War II international anticolonial politics.[114] The Charter was later described as the first major document of global significance to proclaim the right to self-determination in both humanistic and universalist terms. It was subsequently incorporated into the United Nations (UN) Charter in 1945 and the Universal Declaration of Human Rights (UDHR) in 1948.[115]

---

[110] National Archives of the United Kingdom (NAUK), 'Memorandum on The Atlantic Charter and British West Africa by the West African Press Delegation to the United Kingdom, 1 August 1943', CO 554/133/3.

[111] Antonio Cassese, *Self-Determination of Peoples: A legal* Reappraisal (Cambridge: Cambridge University Press, 1995).

[112]James Coleman, *Nigeria: Background to Nationalism* (Berkeley: University of California Press, 1971).

[113] Gabriel Olakunle Olusanya, *The West African Students' Union and the Politics of Decolonisation, 1925–1958* (Ibadan: Daystar Press, 1982); Bonny Ibhawoh, 'Testing the Atlantic Charter: linking anticolonialism, self-determination and universal human rights' (2014) see note 108.

[114] In 1942, the Phelps-Stokes Fund in the United States sponsored a report entitled: 'The Atlantic Charter and African from an American Standpoint'; Eric Porter, *The Problem of the Future World: W. E. B. Du Bois and the Race Concept at Mid-century* (Durham, NC: Duke University Press, 2010), 76.

[115] By implication, Article 21 of the UDHR incorporates self-determination by stating that the 'will of the people shall be the basis of the authority of government'; Douglas Brinkley and David R. Facey-Crowther, (eds.) *The Atlantic Charter* (New York: St. Martin's Press, 1994).

Beyond the power elites, it has been argued that anticolonial discourses incorporate ordinary people and their daily lives.[116] Women, for example the Fummilayo Ransome-Kuti (from the western part of Nigeria) women's Union, market women and other grassroots mobilizations of non-state actors in Nigeria, supported nationalist and anticolonial struggles through the invocation of human rights.[117] Transnationally, some of these women were active in several women's organisations, such as the Women's International Democratic Federation, to pursue decolonisation in Africa.[118] The involvement of these diverse groups of non-state actors no doubt has expanded the frontiers of human rights discourse, highlighting contradictions, as well as challenging its 'perceived notion of universality'.[119] This makes such non-state actors relevant as agents of resistance in the Third World. At times, post-colonial states rely on some of these non-state actors to effectively govern their respective territories by appointing them as officers in their government. These could offer opportunities for these non-state actors to influence policies or make laws (for example judges)[120] and these lead to the discussion below.

e.) INDIGENOUS SYSTEMS

The presence, participation and resistance of many African indigenous systems comprising non-state actors, such as indigenous leaders, family heads, community

[116] Bonny Ibhawoh, 'Testing the Atlantic Charter: linking anticolonialism, self-determination and universal human rights' (2014) see note 108.
[117] Funmilayo Ransome-Kuti, 'For Women: She Speaks for Nigeria – We had Equality till Britain Came, Daily Worker (London), 18 August 1947.
[118] Cheryl Johnson-Odim, 'For their Freedoms: The Anti-imperialist and International Feminist Activity of Funmilayo Ransome-Kuti of Nigeria', Women's Studies International Forum, 32 (2009): 53.
[119] Bonny Ibhawoh, 'Testing the Atlantic Charter: linking anticolonialism, self-determination and universal human rights' (2014) see note 108.
[120] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007).

groups, age grades, men and women, among others, are prevalent in many African post-colonial states. Although some have argued that the domination of post-colonial states has rendered these indigenous systems 'old-fashioned, reactionary and anachronistic', there are people who are not willing to expunge these systems, as they are still relevant to their daily lives.[121] It has been argued that instead of totally extinguishing indigenous African systems, such institutions should be purged of any colonial influence, as they can be used positively to enhance African identity and dignity in the post-colonial era.[122] According to the Nigerian body of polity, indigenous systems have remained permanent and are the closest political institution governing Nigerian citizens at the grass root level; moreover, their practices are creating order in the state.[123]

Based on the above, there has been a mandatory call for indigenous intervention within the Nigerian state since the colonial encounter. Arguably, such desires for indigenous intervention demonstrate that the 'promises of the civilising mission' which led to the imposition of Western principles and practices (customary international law, for example) has not resulted in a total success in the administration of African states. Consequently, 'indigenous intervention' has continued to be relevant for the effective administration of the Nigerian state. For instance, Kenneth Nweke recently asserted that although the Niger Delta communities in Nigeria are

[121] S. O. Arifalo and S.T. Okajare, 'The Changing Roles of the Traditional Rulers and the challenge of Governance in contemporary Nigeria: Yorubaland in Historical perceptive,' *Monograph series No: 03302, AAU, Akungba Akoko*, p.2.
[122] Iyortange Igoil, 'The Evolution of Political Institutions among the Tiv of Nigeria and the Question of Relevance' *in* Ayoade and Agbaje (eds.) *African Traditional Political Thought and Institutions* (Lagos: Centre for Black and African Arts and Civilisation, 1989), p. 173.
[123] Epiphany Azinge, *Restatement of Customary Law of Nigeria' Vol. 1-69* (Lagos: Nigerian Institute of Advanced Legal Studies, 2013).

currently enjoying relative peace through the federal government's amnesty programme, the region still stands on 'fragile and wobbly legs with some potentialities of a return to its former state of unrest if nothing was done urgently to sustain the tempo'.[124] He recommended that, as part of the peace-building process in the post-amnesty era, indigenous institutions of governance in the Niger Delta should be strengthened to work in synergy with other stakeholders, such as Nigerian state institutions and transnational corporate actors, in evolving processes that will lead to sustainable peace in the region.

Pre-colonial times encouraged these systems through the active participation of certain non-state actors, but colonial times witnessed their suppression by the use of 'locals' for indirect rule.[125] However, the post-colonial period is witnessing a re-emergence of indigenous systems through the leadership and group members of these systems in the post-colonial state, as well as in other parts of the Third World.[126] These situations are creating opportunities for participation, representation of the interests of the ordinary people, as well as a platform from which to question and resist post-colonial states. Arguably, such indigenous activities become relevant in the

---

[124] Kenneth Nweke, 'The Role of Traditional Institutions of Governance in Managing Social Conflicts in Nigeria's Oil-Rich Niger Delta Communities: Imperatives of Peace-Building Process in the Post-Amnesty Era.' (2012) BRITISH JOURNAL OF ARTS AND SOCIAL SCIENCES, Vol.5 No.2 p.202.

[125] As explored in chapter two, this form of governance involved the use of indigenous rulers such as chiefs to administer British rule in Nigeria. Although there were other arguments for the use of indigenous rulers, such as lack of finance and manpower on the part of British government to fund colonial rule in Nigeria, it is obvious that the use of these types of non-state actors were relevant in the international relations between Nigeria and Britain. The use of these persons were not particularly intended for the benefits of Nigerians, however, this establishes the presence of non-state actors in the international relations between Britain and Nigeria during this period.

[126] Pita Ogaba Agbese, 'Chiefs, Constitutions, Policies in Nigeria' (2004) WEST AFRICA REVIEW Issue 6 available at http://www.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/ILO/CHIEFS,%20CONSTITUTIONS,%20AND%20POLICIES%20IN%20NIGERIA.htm [accessed on 12 September, 2016].

making of customary laws within the African region in the face of hegemonic states both domestically and internationally.

The indigenous systems are continuously made relevant in post-colonial Nigeria by certain non-state actors, such indigenous community leaders: chiefs, obas, sultans and numerous persons occupying such positions in different regions of Nigeria. These groups of people are the effective channel through which the Nigerian state reaches the grassroots due to the confidence and legitimacy placed on these non-state actors and the institutions they represent.[127] These non-state actors also counsel and directly intervene whenever state policy makers are overwhelmed and there is a fear of failure.[128] For instance, in 1993 when the economic policy of the regime of the Nigerian military head of state, Ibrahim Babangida, was having adverse effects on the Nigerian people, an ad hoc council meeting of indigenous chiefs was called by the subsequent transitional government of Ernest Shonekan to find solutions.[129] Also, these groups of indigenous leaders were called on to quell crises that were triggered by the annulment of a presidential election in order to prevent a total breakdown of law and order in Nigeria.[130] Similarly, a National Committee of Leaders of Thought and Traditional Rulers (i.e. indigenous leaders) was called in order to respond to national and international condemnation of the execution of Ken Saro-Wiwa and eight other members of the Movement for the Survival of Ogoni People (MOSOP), a social movement group for the self-determination of a section of southern Nigeria known as

[127] Pita Ogaba Agbese, 'Chiefs, Constitutions, Policies in Nigeria' (2004), see note 126.
[128] Najeem Ade Lawal, 'The Position of Chiefs' in Yusufu Bala Usman (ed.) Nigeria Since independence: The First 25 Years: Volume 1: The Society (Ibadan, Nigeria: Heinemann Educational Books, 1989), p. 83.
[129] Pita Ogaba Agbese, 'Chiefs, Constitutions, Policies in Nigeria' (2004), see note 126.
[130] Pita Ogaba Agbese, 'Chiefs, Constitutions, Policies in Nigeria' (2004), see note 126.

the Ogoni people.[131] The roles of these non-state actors appear to affect what practices are followed in the resolution of conflicts in post-colonial states. Consequently, these could contribute to the practices employed in the resolution of conflicts between the Nigerian people and international bodies, such as multinational organisations, which continually conflict with their host communities. Arguably, such practices could develop into legal obligations between these parties and would assist in resisting state and international hegemony in Africa.

Besides the above political roles played by indigenous leaders in post-colonial Nigeria, they also oversee educational functions. In this regard, they are appointed as chancellors of federal and regional universities. For instance, the Emir of Zaria, Oba of Benin, Emir of Kano and Obi of Onitsha serve as chancellors of various universities.[132] They also serve as special emissaries of the Nigerian state to help justify the government stance on various issues to Nigerians domestically and internationally.[133]

Indigenous leaders and other members of indigenous institutions are also engaged in judicial functions. One of the obvious effects of the colonial encounter in the Nigerian legal context is the multiplicity of judicial systems.[134] These judicial systems include the Western court system and other indigenous judicial systems that operate in different communities. For example, the maintenance of peace in the Igbo community can be carried out by the *Amala* (Also referred to as *umunna*). In most Igbo communities, this group consists of immediate and extended family members sharing

[131] *ThisDay* July 19, 1997, p. 3.
[132] Pita Ogaba Agbese, 'Chiefs, Constitutions, Policies in Nigeria' (2004) see note 126.
[133] Pita Ogaba Agbese, 'Chiefs, Constitutions, Policies in Nigeria' (2004) see note 126.
[134] Akintude O. Obilade, *The Nigerian Legal System* (Ibadan: Spectrum Law Publishing, 1979).

common ancestry.[135] In Igbo indigenous systems, these individuals carry out legislative as well as judicial functions.[136] Such indigenous judicial systems afford non-state actors in this part of Nigeria the opportunity to administer customary rules in the settlement of disputes. The familiarity of such laws and the outcomes they provide claimants and defendants are often satisfactory to the parties involved.[137]

Studies carried out by scholars concerning the relationship between post-colonial state laws and indigenous systems show the persistence of non-state quasi-judicial modes of conflict resolution.[138] However, this is often dependent on the nature of the matter at hand. For instance, in Igbo communities, owing to the importance and complexity surrounding land matters, redress is usually sought through indigenous judicial systems. Sometimes, when such land issues are brought before the state court or police, these state institutions refer the litigants/applicants to indigenous systems where they believe the matter will be appropriately dealt with.[139] Most times, people resist the state court systems by opting for indigenous judicial alternatives.[140] In this regard, section VI of the Nigerian constitution recognises the freedom of citizens to choose the judicial system that will determine their case, including customary

[135] Ernest E. Uwazie, 'Modes of Indigenous Disputing and Legal Interactions among the Ibos of Eastern Nigeria' (1994) THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW, Vol. 26, Issue 34, pp. 87-103.
[136] Bonachristus Umeogu, 'Igbo African Legal Justice System: A philosophical Analysis' (2012) OPEN JOURNAL OF PHILOSOPHY vol. 2, no. 2, pp. 116-122.
[137] Annette Iris Idler and James J.F. Forest, 'Behavioural Patterns among (violent) Non-state Actors: A Study of Complementary Governance' available at http://www.stabilityjournal.org/articles/10.5334/sta.er/ [accessed on 20 August 2016].
[138] Epiphany Azinge, *Restatement of Customary Law of Nigeria, Volumes 1-69* (2013), see note 123.
[139] Ernest E. Uwazie, 'Modes of Indigenous Disputing and Legal Interactions among the Ibos of Eastern Nigeria' (1994) see note 135.
[140] Ernest E. Uwazie, 'Modes of Indigenous Disputing and Legal Interactions among the Ibos of Eastern Nigeria' (1994) see note 135.

systems.[141] This position was interpreted in *Awosile v Sotunbo,*[142] where the court held that:

> … the courts take the view that it is open to the parties to choose whether to follow the normal channel for determination of controversy through the machinery of the courts or to submit the matter voluntarily to the non-judicial body for a decision.[143]

However, the received English system of adjudication appears to operate side by side with the indigenous system of arbitration. There are merits and demerits to each system, and diverse complexities.[144] In spite of this, the preference for indigenous systems over post-colonial institutions in the resolution of certain matters demonstrates the continuous relevance of indigenous systems in the affairs of the people. These forms of indigenous systems of dispute resolution appear to satisfy the kind of 'justice' desired by the people.[145]

In contemporary times, the role of indigenous justice system, either as a form of dispute resolution or substantive norms, especially in post conflict times, has come to be recognised as forming a core element of international best practice.[146] This serves

---

[141] Under section VI of the Constitution of the Federal Republic of Nigeria 1979 (as well as of 1999), judicial powers of the Federal Republic of Nigeria are vested in the courts and not non-judicial bodies. However, the choice of judicial system is made by parties to a dispute.

[142] (1992) 5 NWLR (Pt 243) 514.

[143] See note 142 at p. 532. The use of the term 'normal' may become hegemonic if interpreted to mean the 'received English court system'. However, such could be resisted and 'normal' could become the use of indigenous judicial system as a means to maintain the *status quo* become colonial disruption.

[144] For a comprehensive analysis of both systems, prospects and challenges, see Olubayo Oluduro Customary Arbitration in Nigeria: Development and Prospects, (2011) 19 Afr. J. Int'l & Comp. L. 307

[145] T.O. Elias, *The Nature of African Customary Law* (1956), see note 57.

[146] UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616, 23 August 2004, 2, para. 36.

as a bottom up alternative to the elitist formal justice system.[147] Such systems resist state interference, whether as a form of supervision, monitoring or directing. They appear to encourage independence in the administration of indigenous systems. Such wide opportunity has been received with scepticism, and it has been argued that, while employing indigenous law as a form of transitional justice, these systems should complement and not obstruct the processes of state and peace builders to accommodate these customs in national justice systems.[148] Although this position appears logical and progressive, it seems to encourage the state and its institutional dominance in the dispensation of justice. As argued in this thesis, such state dominance often results in hegemonic tendencies in post-colonial states and to which there is continuous resistance. Resistance through indigenous systems and customs arising therefrom encourage accommodation in post-colonial states, although such customs are often scrutinised under repugnancy tests based on English standards of justice.[149] However, such tests have faced resistance through Nigerian courts, which have been empowered to apply results that appear efficacious.[150] Although some Nigerian judges who have been trained under the English system are often influenced by such systems in the application of indigenous customary law, as explored in chapter one, it also affords resistance opportunities to some other Nigerian and African judges through their identification and affirmation of the position and significance of custom

---

[147] Padraig McAuliffe, 'Romanticization Versus Integration?: Indigenous Justice in Rule of Law Reconstruction and Transitional Justice Discourse' (2014) GOETTINGEN JOURNAL OF INTERNATIONAL LAW 5, 1, 41-86.

[148] Padraig McAuliffe, 'Romanticization Versus Integration?: Indigenous Justice in Rule of Law Reconstruction and Transitional Justice Discourse' (2014), see note 147.

[149] *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* (1931) A.C. 662; *Edet v. Essien* (1932) 11 N.L.R. 47; *Mariyama v. Sadiku Ejo* 1961 N.R.N.L.R. 81; Akintude Olusegun Obilade, The Nigerian Legal System (1979) see note 124 particularly pp. 100-110.

[150] E. S Nwauche 'The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana' (2010) 25 TUL. EUR. & CIV. L. F. 37.

in Nigerian courts.[151] Such roles could contribute to the resistance acts of the Third World to Western hegemony, as well as the assertion of the capacity of judges to make laws.[152] For instance, the law of inheritance in the Edo area of Nigeria provides evidence of this assertion in *Edward Omorodion Uwaifo v. StanleyUyinmwen Uwaifo & Ors*,[153] which arose from what the appellant considered unfair treatment meted out to him by his father in the latter's will. The appellant, being a Bini man and firstborn son, was entitled to his father's house (that is the particular house where his father lived and died) under 'Igiogbe' Bini native custom. However, his father, in his will, disinherited him of this entitlement. The Supreme Court of Nigeria held the will invalid to the extent of its contradiction of this custom that has found judicial notice and statutory backing. It is worth reproducing here a somewhat lengthy excerpt from the concurring judgment of Clara Bata Ogunbiyi, J.S.C.:

> I wish to add that the attempt in this case is to vary the course of on existing and long-standing custom, which had passed down from generation to generation and as a result, had been accorded statutory recognition. In other words, the practice of a Bini customary law, which gives the eldest son the prerogative to inherit the 'Igiogbe' has not changed from time immemorial. Under Benin Native Land and Custom, *Igiogbe* meant a principal house where a deceased Benin man lived and died; the right to inherit and possess such property vests only in the eldest son. The tradition takes precedent over and above the wishes of a deceased father no matter how strong he feels against

[151] *Idehen V. Idehen* (1991) S LRCN 1590; *Oke V. Oke* (1947) 3 SC 1; *Arase V. Arase* (1981) 5 SC 33.
[152] Alan Boyle and Christine Chinkin, The Making of International Law (2007), see note 120.
[153] (2013) LPELR-20389 (SC).

> his son as the prospective heir. It is a right vested in the eldest son and which cannot be divested by means of disinheritance. The entire claim revolves around section 3(1) of the Wills Law of Bendel State of Nigeria 1976, which is still applicable in Edo State. By the use of the phrase "subject to any customary law relating thereto," in the section, is a confirmation of a statutory backing and recognition, which is given to the prevailing custom to operate within its area of application.[154]

The infusion of indigenous customs in Nigerian law attests to the indispensable nature of indigenous customs within the Nigerian state. It is noteworthy that these customs emanated from the people within various communities in Nigeria. The successful application of these customs in post-colonial Nigeria is still highly dependent on the people. In some communities, there are certain professionals trained to play the role of a spokesman for what the customary rule of law is.[155]

The roles of indigenous systems and the persons who operate through such platforms as those detailed above have been observed to be customary in nature and uniform in practice, following the reports of the Nigerian Institute of Advanced Legal Studies on the restatement of customary law in Nigeria.[156] This report showed commonalities among the diverse geo-political zones in the area of Nigerian customary jurisprudence. Therefore, it could be inferred that customary practices exist within Nigeria that resist Western domination. In addition to the Nigerian example, many other African states employ these indigenous systems and their custodians in the

---

[154] (2013) LPELR-20389 (SC) per Clara Bata Ogunbiyi, J.S.C.
[155] Taslim O. Elias, *The Nature of African Customary Law* (1956), see note 57.
[156] Epiphany Azinge, *Restatement of Customary Law of Nigeria, Volumes 1-69* (2013) see note 123.

name of chiefs, communities and family leaders in post-colonial times. For instance, The Independence Constitution of Botswana in 1966 created a House of Chiefs to serve as a consultative body in respect of indigenous matters.[157] The Constitution of Ghana also states that the institution of chieftaincy, together with its traditional councils as established by customary law and usage, is guaranteed.[158] Although the Ugandan position has faced changes, its 1995 Constitution restores constitutional status to traditional leadership. Furthermore, the Zimbabwean constitution provides the opportunity for chiefs to preside over indigenous people.[159] The roles played by these indigenous institutions and by their officers generate solidarity between them and the ordinary people they protect and represent. Such solidarity could provide them with a platform to resist hegemonic customs imposed by the post-colonial state and the international system. Arguably, the customary practices leading to obligations among the people, their state and international community are challenged. State practice and *opinio juris* are confronted and, in many instances in the post-colonial African states, state and non-state actors are forced to operate side by side as demonstrated above. The assessment of this resistance by non-state actors and how they could influence the conceptualisation of customary international law beyond state domination are discussed further in the subsequent sections.

[157] Pita Ogaba Agbese, 'Chiefs, Constitutions, Policies in Nigeria' (2004) see note 126.
[158] Constitution of the Federal Republic of Uganda, 1995.
[159] Constitution of Zimbabwe 1985, p. 100.

3. ASSESSING RESISTANCE IN POST-COLONIAL STATES: A RE-EMERGENCE OF THIRD WORLD NON-STATE ACTORS IN THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW

Assessment of Third World resistance for emancipation, self-determination and legal participation in the international legal system has been viewed from different angles. This could have been provoked for various reasons. For instance, the inability of post-colonial African states to make 'tangible progress' in resisting hegemonic powers in order to protect the interests of their people has led to a pessimistic view of the future of the Global South in international law.[160] However, significant progress appears to have been made through resistance by non-state actors, especially through social movements. For example, anti-colonial movements no doubt made significant progress in achieving their aim of self-governance, as well as reshaping the human rights discourse of self-determination, as discussed above. The achievements of such non-state actors cannot be overlooked. Arguably, this presents non-state actors as indispensable forces for the freedom and self-governance that post-colonial states are enjoying in the present international legal system. This position generates another optimistic view of the Third World struggle for emancipation and self-determination in the international sphere.

The resistance of non-state actors to the state and their ability to retain some indigenous systems predating colonialism also strongly confirm that Third World non-state actors cannot be completely displaced from legal matters, especially in Africa.

[160] Joel Ngugi, 'Making new wine for old wineskins can the reform of international law emancipate the Third World in the age of globalisation' (2002) UC DAVIS JOURNAL OF INTERNATIONAL LAW AND POLICY, 8, pp. 73-80.

From the above exploration of resistant mechanisms, the Nigerian situation is exemplary. For instance, customary law emanates from the practice of the Nigerian people, and it forms part of the sources of the Nigerian legal system. Although the repugnancy test creates tension in the judicial application of custom, this source of law forms part and parcel of the legal system of Nigeria and some other parts of Africa.[161]

The underlying elements of the above sources of the Nigerian legal system demonstrate congruence between the indigenous system (which emanates from the people) and the state (which arises from the post-colonial state) to address the tensions arising from their differences. Many other post-colonial African states, such as Ghana, Uganda, Kenya, Tanzania and Zambia, have also been faced with similar experiences to those of Nigeria. In Zambia, the quest to find common legal ground between the state and the people led to the establishment of the Zambia Law Development Commission.[162] The commission recognises that the daily life of the majority of its people is lived under customary law. Following this knowledge, one of the Commission's mandates was to reconcile indigenous systems with present post-colonial structures by reflecting the people's values in the legal system.[163] Furthermore, in South Africa, customary law is an important part of the legal system, as the constitution of the Republic of South Africa, 1996, brought it on par with the

[161] Akintunde Olusegun Obilade, *The Nigerian Legal System* (1979), see note 134.
[162] http://www.zambialaws.com/Principal-Legislation/zambia-law-development-commission-act.html [accessed on 1 September 2016].
[163] http://www.zambialii.org/files/zm/other/zmldc/report/2002/2002/Customary%20Law.pdf [accessed on 25 October, 2015].

common law of South Africa by affording it constitutional recognition, but also subjecting it to the constitution and other legislation.[164]

The co-existence between state and indigenous systems no doubt has been forced by the resistance of various groups of non-state actors from colonial to post-colonial periods, as typified in the continuous roles of indigenous rulers and law-makers. Arguably, such co-existence appears to demonstrate a widespread of resistance and behaviour towards the post-colonial system. Such resistant practices and behaviour have forced considerable reconciliation within the African region through the infusion of native customs and indigenous systems in state activities. The effectiveness of this resistance to the state is quite obvious. In reaction to this situation, Antony N Allot stated that:

> …there are two points which I would stress ... The first is that one can find many merits in the features of African customary legal systems; and it is important, without being sentimental in this matter, to recognise that these systems have grown out of what the people, by their behaviour as much as by their conscious choice, have decided was suitable for their condition. The second point is that the resistances to legal change are now recognised to be far stronger than legislation-happy legislators are wont to admit; the legislator proposes, but the people often dispose. We would be wise to recognise these resistances.

---

[164] Christa Rautenbach, 'South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition' (2008) ELECTRONIC JOURNAL OF COMPARATIVE LAW, Vol. 12. p. 1.

> They have spelt the failure of many grand schemes of legal reform in Africa.[165]

The effect of resistance by these non-state actors arguably demonstrates how laws emanate from the African region. In some circumstances, the state appears to have a greater chance of imposing its rule through the constitution. For instance, there are 68 items contained in the exclusive list, Second Schedule, Part 1, of the Nigerian constitution 1999. These include matters such as arms, ammunition, citizenship, immigration and currency. However, in matters of human rights, it has not been so clear because of the tension between national human rights laws and African cultural practices, especially in matters of gender equality, child rights and early marriages.[166] In spite of these complexities, the constitutions of Zimbabwe, Swaziland and Botswana provide that the application of African customary law is not subject to the prohibition on discrimination contained in the constitution.[167] Arguably, as long as these competitions continue to exist between the state and the people, law creation and enforcement cannot be said to emanate from any one particular structure. It appears that for the smooth running of each post-colonial African state, subjugation, struggle, resistance and compromise amongst the various actors (both state and non-state actors) come into play in the determination of what a particular practice and behaviour should be in different matters within the region. Consequently, the co-

[165] A.N. Allot, 'WHAT IS TO BE DONE WITH AFRICAN CUSTOMARY LAW? The experience of problems and reforms in Anglophone Africa from 1950' (1984) JOURNAL OF AFRICAN LAW, Vol. 28, Issue 1-2, pp. 56-71 at p. 70.

[166] Bonny Ibhawoh, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State (2000) HUMAN RIGHTS QUARTERLY, Vol. 22, No. 3, pp. 838-860.

[167] T. W. Bennett, Human Rights and African Customary Law under the South African Constitution 28 (Juta Legal and Academic Publishers, 1995); Bonny Ibhawoh, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State (2000), see note 166.

existence between state and non-state actors as contributors to law-making aid the understanding of customary international law from an African perspective.

Furthermore, based on the reality of co-existence between state and non-state actors, as discussed above, contemporary scholarship pursues congruence in order for African states and their people to adjust to the changing circumstances created by colonisation and decolonisation, as well as globalisation.[168] Considering Africa's circumstances, such arguments will privilege both state and non-state actors where their resources are pulled together for the achievement of international goals. For instance, in the incorporation of human rights laws into the constitution by states, contributions by non-state actors will be relevant for the success of such legislation, as the latter would represent diverse cultures and experiences. This situation is evidenced in matters of female genital mutilation. Although some countries, such as Ghana, Senegal and Burkina Faso, have banned it, implementation of the law has been difficult.[169] Therefore, the intensity of such cultural practice can only be curtailed with the participation of the communities involved. In Kenya, where success in curtailing Female Genital Mutilation has been recorded, it is evidenced that families, the community and non-governmental organisations worked together to provide alternative female rituals in order to drop the old tradition of genital mutilation.[170]

Where the participation of the post-colonial state and non-state actors (forced through resistances) form the practices leading to legal obligation, would it not be

[168] Bonny Ibhawoh, Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State (2000), see note 166.
[169] 'Female Genital Mutilation-Is it Crime or Culture?' ECONOMIST, 13 Feb. 1999, at 45.
[170] Malik Stan Reaves, 'Alternative Rite to Female Circumcision Spreading in Kenya', AFR. NEWS ONLINE, 19 Nov. 1997.

inconsistent to insist that only state practice and *opinio juris* constitute customary international law from this region? Insistence on a solely statist approach would only continue to subjugate Africans and beget counter movements. This, consequently, escalates conflicts within the African region. The participation of non-state actors or indigenous systems in creating certain norms leads to legal obligation in post-colonial African states and affords people the opportunity for true representation in the present legal system. Therefore, it becomes imperative that non-state actors are expected to participate in transnational activities. Unfortunately, where post-colonial African states decide to ignore indigenous systems (which involve non-state actors) in dealing with other international actors in matters that affect the people, resistance leading to crises often occurs. For instance, the neglect of non-state actors in the Niger Delta area of Nigeria in matters of oil exploration and related multinational organisation activities have often resulted in crises.[171] Following this interplay of activities among competing actors in post-colonial African states, scholars tried to inquire into how state, non-state, local and external actors interact to produce order and authority in different kinds of social and political space.[172] Arguably, practices resulting from such activities could contribute to some of customary practice within

---

[171] Cyril I. Obi, 'Global, State and Local Intersections: Power, authority and conflict in the Niger Delta oil Communities in Thomas Callaghy *et al* (eds.) *Intervention and Transnationalism in Africa: Global-Local Networks of Power* (Cambridge: Cambridge University Press, 2001) p. 173; Eghosa E. Osaghae, 'The Ogoni Uprising: Oil Politics, Minority agitation and the Future of the Nigerian State' (1995) AFRICAN AFFAIRS, 94, pp. 325- 344; Kaniye S. A. Ebeku, 'Niger Delta Oil, Development of the Niger Delta and the New Development Initiative: Some Socio-Legal Perspective' (2008) JOURNAL OF ASIAN AND AFRICAN STUDIES, Vol. 43 (4), pp. 399-425; Daniel E Agbiboa, 'Transformational Strategy or Guided Pacification? Four Years On: The Niger Delta Armed Conflict and the DDR Process of the Nigerian Amnesty Programme' (2015) JOURNAL OF ASIAN AND AFRICAN STUDIES, Vol. 50 (4), pp. 387-411; Declan Azubuike Amaraegbu, 'Violence, terrorism and security threat in Nigeria's Niger Delta: An old problem taking a new dimension' AFRICAN JOURNAL OF POLITICAL SCIENCE AND INTERNATIONAL RELATIONS Vol. 5(4), pp. 208-217.

[172] Robert Latham *et al*, 'Introduction: Transboundary formations, intervention, order and authority' in Thomas Callaghy *et al* (eds.) *Intervention and Transnationalism in Africa: Global-Local Networks of Power* (2001) see note 165 at p. 1.

the region. This chapter has demonstrated that both state and non-state actors are made stakeholders in this regard. Such recognition is crucial for the actual participation of the Third World in the making of international custom that protects the interests of the Third World. It demonstrates the re-emergence of Third World non-state actors in post-colonial times after the suppression of colonialism and positivist scholarship that asserts a statist position.

4. CONCEPTUALISING CUSTOMARY INTERNATIONAL LAW FROM AN AFRICAN PERSPECTIVE

As stated at the beginning of this thesis, the traditional notion of custom based on state practice and *opinio juris* is derived from a Western perspective. This assertion formed the foundations of the argument for the hegemonic nature of customary international law. In previous sub-headings, attempts were made to demonstrate Third World resistance to such Western domination. Such counter-hegemonic struggles are demonstrations of Third World protection of their interests in international relations, as well as their position in the making of custom. It has been stated many times that custom-making is not alien to the Third Wold.[173] Most laws within Africa are derived from customary practices, which give rise to legal obligations. Therefore, an inquiry into the African perspective in the making of customary international law further shows resistance to Western domination. This is also relevant towards understanding the polarised nature of international systems, and the need for international law to accommodate various cultures. In this section, the

[173] E. S. Nwauche, 'The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana' (2010), see note 150; Taslim O Elias, *The Nature of Customary Law* (1956), see note 57.

African example will be explored to understand the making of custom in the Third World, as adopted in this thesis.

Taslim Elias, an early Third World scholar, made significant progress in understanding the nature of custom from an African perspective. He was a Nigerian, an international lawyer with extensive legal experience, including serving as an Attorney General of Nigeria, Chief Justice of the Supreme Court of Nigeria and the Gambia, and a judge of the International Court of Justice. His positions exposed him to vast knowledge of indigenous laws in different parts of Africa, as well as the international legal system. In view of such knowledge and exposure, Elias argued that pre-colonial Africans were engaged in diplomatic relations with the West and that the practices emanating from said relationship are not different from customary international law.[174] In his analysis, the concept of African law is brought into perspective.

The mention of African law usually heralds divergent views.[175] While some authors accept its existence, others oppose such assertions.[176] There are contentions that such diversity is driven by some sort of prejudice: ranging from a lack of full knowledge of African systems to an attempt to justify or defend a position instead of looking at the facts.[177] In this contestation, African law is denied the possession of the character of law. The laws within this region are perceived in association with magic, the supernatural, rigidity, cruelty and other negative forms. While opposing views aim to equate African laws with English laws and having attributes such as 'just and good,

[174] Taslim O Elias, *The Nature of Customary Law* (1956), see note 57.
[175] Taslim O Elias, *The Nature of Customary Law* (1956) see note 57.
[176] Antony Allot, *Essays in African Law with Special Reference to the Law of Ghana* (London: Butterworth & Co., 1960).
[177] Antony *Allot, Essays in African Law with Special Reference to the Law of Ghana* (1960) see note 176.

reasonable, civilised and advanced'. It is believed that these opposing views have elements of racial bias.[178] It could also be regarded as a hegemonic attempt by the Western position to dominate African systems and a counter-hegemonic response by the later.

In spite of the above views, efforts have been made to understand the nature of African customary law and how it could affect the international legal system. According to Taslim Elias, in order to understand whether African laws actually play significant roles in the international legal sphere, hinges on the inquiry into what law is. In this regard, Elias reviewed different definitions of law. While appreciating the complexity of the term and the criticisms associated with it, he settled for a description of law that would serve both African and non-African societies. He suggested that 'the law of a given community is the body of rules which are recognised as obligatory by its members'.[179] Such a definition seeks to embrace all human groupings while avoiding the imposition of a sovereign from above. Here, he appears to portray most African settings whose laws emanate from the community. Although Elias aimed to write both Africans and non-Africans into his definition, the definition also fits into the decentralised nature of the international legal system that seeks to embrace the general practices arising from members of the international system for the development of customary international law. Importantly, Elias argues that his definition of law regards African legal ideas as an integral part of the general theory of law. Arguably, such postulation counters the perceived label of inferiority placed on

[178] Antony Allot, *Essays in African Law with Special Reference to the Law of Ghana* (1960) see note 176.
[179] Taslim O Elias, *The Nature of Customary Law* (1956) see note 57, at p. 55.

African legal systems while placing African law and its sources on the same ground as their international counterparts.

African legal systems are believed to have common features, leading to the description of African laws as 'unity in diversity', derived from their customary character.[180] Such notions of unity in diversity could be traced to pre-colonial Africa. Common challenges, ranging from social, political and economic changes, appear to strengthen the similarities in the ways Africans respond to such challenges. For example, common patterns of resistance to colonial rule in Africa have been noted.[181] On some occasions, such resistance involved violent movements, such as the *Ekumeku* movement, *ogu umuwanyi* (Aba women's riot), and *Mau Mau*, amongst others. In the post-colonial period, some aspects of African indigenous customary practice have been retained in post-colonial African states. Indigenous political systems in the region still persist, as discussed earlier in this chapter. The retention of such indigenous systems appears necessary, following the argument that although Western domination significantly tarnished traditional political and social institutions, it did not replace them with superior ones.[182] Such resistance has created legal obligations to protect their existence, as they are part of the legal system of post-colonial Nigeria, as well as acquired judicious notice.[183] If such resistance is general and consistent practice, leading to legal obligations within Africa, could this regional development of custom contribute to the making of general customary international law?

---

[180] Antony Allot, *Essays in African Law with Special Reference to the Law of Ghana* (1960) see note 176.
[181] Adiele Afigbo, 'Igbo, Nigeria and African Studies' *in* Falola, Toyin (Ed.) *Nigeria, nationalism, and writing History* (University of Rochester Press, 2010).
[182] Falola, Toyin (Ed.) *Nigeria, nationalism, and writing History* (2010), see note 181.
[183] *Edward Omorodion Uwaifo v. StanleyUyinmwen Uwaifo & Ors* (2013) LPELR-20389 (SC).

Although Article 38 of the statute of the ICJ refers to 'international custom as evidence of a general practice accepted as law', international legal doctrine recognises that, in exceptional cases, rules of customary international law may not necessarily apply to all states.[184] These two situations raise issues of general and particular (regional, local) customs. The ICJ and various scholars have made efforts to define and differentiate between these two types of situations, custom based on expressions of consent, special interest in a subject matter and geography, amongst other things.[185] Classifying customs based on these factors presents a fluid outcome, as it is difficult to identify essential differences between these forms of custom.[186] Most often, international courts apply rules accepted by all parties to a dispute as customary law. In the European Commission of the *Danube* case, the Court applied a 'usage having juridical force as it had become consistently applied with the unanimous consent of the states concerned'.[187] In the *Right of Passage* case, the ICJ found it 'unnecessary' to consider what the position might be under general customary law since there was a particular rule in operation between the parties.[188] These two decisions have provoked scholarly debates on whether there is any basis for such distinctions in the application of custom.[189] It has been argued that there is no basis for such a distinction following the

---

[184] Olufemi Elias, 'The Relationship Between General and Particular Customary International Law' (1996) 8 AFR. J. INT'L & COMP. L. 67.
[185] North Sea Continental Shelf cases, ICJ Reports, 1969, p.43, para. 74, and p.44, para. 77; D'Amato, The Concept of Custom in International Law, (London: Cornell University Press, 1971); see generally, Olufemi Elias, 'The Relationship Between General and Particular Customary International Law' (1996), see note 184.
[186] Olufemi Elias, 'The Relationship Between General and Particular Customary International Law' (1996), see note 184.
[187] PCIJ Reports, Series B, No. 14, p.17. There is a contention that the Court had not contemplated customary law and this had led into questioning what customary law is? See generally Olufemi Elias, 'The Relationship Between General and Particular Customary International Law' (1996), see note 184, particularly p. 85.
[188] ICJ Reports, 1960, pp. 43-44.
[189] See generally Olufemi Elias, 'The Relationship Between General and Particular Customary International Law' (1996), see note 175 particularly p. 85-88.

difficulty in making a clear demarcation. Moreover, it is believed that a particular custom is 'a core example of the normal operation of the consensual system of law-making that is customary international law'.[190]

From the preceding discussion, it could be argued that custom emanating from African regions can be regarded as binding in the international legal system. There is no 'actual distinction' between custom existing in Africa and what may be regarded as custom emanating from 'other non-African regions' in the international system (care should be taken, so that the criteria would not be based on a privileged few). It could also be stated that customary practices arising from resistance in this region contribute to the development of customary international law. At least, this could guide the rules governing activities within the region. Arguably, such customary rules could contribute to the resolution of international conflicts, especially on matters affecting international bodies and members of African regions in issues within the African region. Furthermore, it could be posited that law-making originating from African regions contributes to the participation of non-state actors in the international legal system, since it has been shown in the previous chapters that non-state actors contribute immensely to law-making in this region. Importantly, from an African perspective, the contribution of non-state actors to resistance confirms the argument of this thesis on their capacity to contribute to the making of international custom.

[190] Olufemi Elias, 'The Relationship Between General and Particular Customary International Law' (1996) see note 184 at p. 68.

5. CONCLUSION

Resistance by various non-state actors in the Third World has become a crucial discourse in the pursuit of the reconstruction of international law. In particular, this chapter demonstrated resistance to the insistence on the state as the sole determinant of the making of (customary) international law. Non-state actors are at the centre of such resistance, and these include intellectuals, indigenous political leaders and women’s groups, among others. In post-colonial Africa, non-state actors are shown in this chapter to have employed certain resistance mechanisms to enforce their voices in law-making. Such resistance is shaping certain principles of international law, such as human rights law and self-determination, among other international law principles. Consequently, consistency and wide spread resistance by non-state actors in shaping certain principles expands the frontiers of international law-making, particularly customary international law.

The flexible and dynamic nature of customary international law provides important grounds on which to improve Third World participation in the formation of custom. For instance, Western scholars provided an understanding of the formation of custom from a Western perspective. Similarly, Third World scholars, such as Taslim Elias and Antony Allot, provide an understanding of customary international law from an African perspective. Importantly, the roles of these scholars (both Third World and Western) contribute to the understanding of customary international law and how their views could shape its formation. From the above, this chapter demonstrated counter-hegemonic tools of resistance through the contribution of non-state actors in custom-making from an African and Third World perspective. This situation is creating

an inclusive system for the formation of customary international law that does not only involve the state actor, but also non-state actors.

CONCLUSION

> We are no longer silent, not asking for recognition; this should be clear by now. What is at stake is affirmation and re-emergence of the communal (rather than the commons and the common good).[1]

This thesis highlighted the hegemonic nature of traditional customary international law, demonstrating that is monopolised by a few Western states who advocate its universal application. This narrow understanding of one of the key sources of international law neglects other legal traditions as well as the diverse participants in the international legal system. Consequently, the legal capacity of non-Western non-state actors to contribute to international law-making is adversely affected. The concerns of this thesis are the challenges faced by the Third World in the participation of the making of customary international law as a consequence of the colonial encounter, which 'stripped' their legal personality. However, Third World confrontation of this inequality demonstrates their counter-hegemonic potential in custom-making.

The argument here did not totally discard the role of states in the formation of customary international law. Rather, it questioned the hegemonic tendencies of the influence of a few Western states' practices and *opinio juri* on an area of international law which has such universal legitimacy and applicability. Although Third World states have made efforts to resist such hegemony, they have failed to achieve the desired success. In part, this is due to those in power being viewed (often accurately) as agents

[1] Hamid Dabashi, *Can Non-Europeans Think?* (London: Zed Books, 2015).

of powerful states in the Global North in the execution of hegemonic tendencies in the Third World. In view of this background, the interests of ordinary people are not represented or protected, and this results in continuous resistance to such state structures. Also, one of the legacies of colonialism is the multiplicity of legal systems in most Third World states. In Africa, which was the particular object of study in this thesis, both indigenous and European systems co-exist and compete. These activities and historical experiences greatly influence law-making domestically and regionally (internationally), as diverse actors participate to represent their respective interests. Consequently, the making of laws in this region is not an exclusive reserve of the European model of states, as diverse non-state actors are contributing as well. The participation of these non-states actors in custom-making demonstrates Third World efforts to circumvent the status of being perpetual-recipient-heirs of hegemonic customary rules in the international system.

In setting out the above study, key terminologies, such as hegemony and counter-hegemony, in relation to customary international law were examined from the perspective of Antonio Gramsci's ideas, due in particular to their relevance in post-colonial theory. According to Gramsci, power is distributed both through force (in political society) and through manufactured consent (in civil society), whereby his emphasis is on the latter.[2] The ideologies developed from the ruling class are

[2] It is important to note here that Gramsci used the term 'civil society' in a different manner from how it is generally understood today as concerning grassroots movements. He understood civil society as the public sphere, which is shaped by media, universities and religious institutions. It is the sphere in which ideas and beliefs are shaped.

consented to through diverse means of indoctrination of the people, who regard such ideologies as inevitable and universal.

The universality of international law, and therewith of customary international law, is often invoked through the global reach of member states of the United Nations and other international organisations. It is claimed that international law is a tool to fight hegemony and, through its consensual nature, to keep hegemony in check. However, this was considered here as a case of manufactured consent in which the inequality of states is *enabled* through international law. Customary international law is a particularly interesting field in which to explore questions of hegemony in international law since many indigenous legal systems refer to custom as an important source of law, even in those societies in which no central legal system exists and in which law is not written.

In addressing the above issues, Chapter One examined hegemony by investigating whether the insistence on the formation of customary international law through state practice and *opinio juris* represent the domination of a particular Western ideology. It also considered what form hegemonic rule takes and how it has been reproduced in the making of customary international law. The examination of these issues demonstrated how the dominant position on custom is presented and reproduced as a universal ideology by a few powerful states in the Global North. It was revealed that hegemony is reproduced and sustained through channels such as education, media, and international organisations. These were analysed with Nigeria as an example.

The Nigerian example was particularly significant, as argued in Chapter Two, as it demonstrates the diversity of African societies. In spite of such diversity, a common

feature among the indigenous Nigerian systems is that diverse actors in this region have been participating in the international sphere through different entities within the African region and beyond long before colonial times. As noted in Chapter Two, Portugal had trade relations with these non-state actors even during pre-colonial times. As is well documented, a subsequent scramble for and partition of Africa were justified on the grounds of the civilising mission; a mission that indoctrinated the Third World into European ideologies, which included the latter's principles of international law-making. The custom that counted as the law was that which was practised only among the 'civilised' countries.[3] Henry Wheaton, an influential American jurist, identified these civilised nations in his influential treatise on international law, *Elements of International Law*, as 'the Christian people of Europe or those of European origin'.[4]

Chapter Three demonstrated in detail how traditional customary international law was formulated by a few powerful states in the Global North to protect their economic interests centred on raw materials in the Global South. Sustenance of colonial boundaries (based on the customary principle of *uti possidetis juris*) reproduced hegemony, as shown in the Nigerian case of *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*,[5] which has resulted in various forms of hardship for the Nigerian people.

---

[3] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', (1999) 40 HARV. INT'L L. J. 1.
[4] Henry Wheaton, 1866 Elements of International Law, George Grafton Wilson (ed.), The Carnegie Institute of Washington photo, reprint 1964, at p. 15.
[5] (2002) ICJ Reports, p. 303.

In spite of the above complexities and the serious consequences of colonisation for the Third World, some distinctive indigenous features have not been extinguished. This could be exemplified by the retention of the indigenous political systems described above and their ability to operate side by side with the post-colonial state in contemporary times.

The retention and relevance of indigenous values and non-state actors demonstrates the co-existence of both the European model of states and non-state actors on the one hand. On the other hand, however, we have resistance by these non-state actors to the hegemonic tendencies of the state, as well as the international system which allegedly perpetuates its atrocities through post-colonial states and other institutionalised bodies. This situation serves to confirm the diversity of actors in the international system. In this regard, Chapter Four of this thesis investigated the legal capacity of non-state actors in international law. It showed that the legal capacity to participate in international law is no longer the exclusive preserve of the state. Non-state actors are also participating in diverse fields of international law.

The concept of non-state actors has been viewed in various ways. This thesis explored such views, as well as conceptualised non-state actors from a Third World perspective. Here, non-state actors appeared to include 'every stakeholder', including ordinary people such as peasants, farmers and social movements. These groups of non-state actors are at the centre of the counter-hegemonic discourse of the Third World. In exploring resistance, it was noted that solidarity is an important factor in the various forms that resistance take. Resistance through education, scholarship and media also play important roles in counter-hegemonic efforts. Besides these elements, scholars,

anti-colonialists and other non-state actors through indigenous platforms, such as social movements, indigenous customs and systems of law-making, are resisting hegemonic tendencies. African judges, through their decisions, are upholding these resistant positions. All these non-state actors and events compel and create changes in the customary practices of the African region.

Based on the above, the roles of non-state actors in the formation of custom within the African region cannot be overlooked. These activities demonstrate the expanding nature of the frontiers of international custom-making. Consequently, customary rules from this region could contribute to customary international law, especially in matters that are relevant here.

The potentials of non-state actors to contribute to custom-making is not an emerging phenomenon. Rather, it has been demonstrated that the legal capacity of Third World non-state actors, especially that of Africa, has been an existing legal right since pre-colonial times. Such legal capacity was generally suppressed during colonialism. However, African resistance to such domination has led to continuous resistance in post-colonial times, demonstrating the re-emergence of Third World non-state actors and their continuing participation in the making of (customary) international law. Consequently, the customary practices arising from non-state actors in the Third World could aid the identification of Third World perceptions of customary international law, as well as enable the resolution of multiple conflicts arising within the region, particularly where other legal instruments have failed.

BIBLIOGRAPHY

Acharya, Uprendra D. 'Globalization and Hegemony Shift: Are States merely Agents of Corporate Capitalism?' (2013) BOSTON COLLEGE LAW REVIEW, Vol. 54, Issue 3, p. 937.

Achebe, Chinua *There was a Country: A personal History of Biafra*, (London: Penguin Group, 2012).

Achebe, Chinua *Things Fall Apart* (Oxford: Heinemann Educational Publishers, 1958).

Adebanwi, Wale and Obadare, Ebenezer (eds.) *Encountering the Nigerian State* (New York: Palgrave Macmillan, 2010).

Adegbule, Femi 'From Warrant Chiefs to Ezeship: A distortion of traditional Institution in Igboland?' (2001) AFRO ASIAN JOURNAL OF SOCIAL SCIENCES, Vol. 2, No. 2 Quarter II, available at onlinereseachjournals.com/aajoss/art/63.pdf [accessed 7 June 2014].

Adesoji, Abimbola 'The Boko Harem Uprising and Islamic Revivalism in Nigeria' (2010) AFRICAN SPECTRUM, VOL. 45, NO.2, pp.95-108.

Adeyeri, Olusegun and Adejuwon, Kehinde David 'The Implications of British Colonial Economic Policies on Nigeria's Development' (2012) INTERNATIONAL JOURNAL OF ADVANCED RESEARCH IN MANAGEMENT AND SOCIAL SCIENCES, Vol. 1, No. 2, pp. 1.

Adibe, Tony 'My Role in Radio Biafra-Pete Edochie' Daily Trust March 15, 2015 available on dailytrust.com.ng [accessed on 21 October 2015].

Afe, Adedayo Emmanuel and Adubuola, Ibitayo Oluwasola 'The Travails of Kingship Institution in Yorubaland: a Case Study of Isinkan in Akureland' available at http://www.nobleworld.biz/images/Afe_Adubuola.pdf [accessed on 16 May, 2015].

Afigbo, Adele E. *The Warrant Chiefs: Indirect Rule in Southern Nigeria 1891-1929* (London: Longman Group Limited, 1972).

Afigbo, Adiele 'Igbo, Nigeria and African Studies' *in* Falola, Toyin (Ed.) *Nigeria, nationalism, and writing History* (University of Rochester Press, 2010).

Agbese, Pita Ogaba 'Chiefs, Constitutions, Policies in Nigeria' (2004) WEST AFRICA REVIEW Issue 6, available at http://www.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/ILO/CHIEFS,%20CONSTITUTIONS,%20AND%20POLICIES%20IN%20NIGERIA.htm [accessed on 12 September, 2016].

Agbiboa, Daniel E. 'Transformational Strategy or Guided Pacification? Four Years On: The Niger Delta Armed Conflict and the DDR Process of the Nigerian Amnesty Programme' (2015) JOURNAL OF ASIAN AND AFRICAN STUDIES, Vol. 50 (4), pp. 387-411.

Akachi, Theodora 'Traditional Women's Society: Implications for the female writers' (1990) AFRICAN LANGUAGES AND CULTURES, 3:2, pp. 149-165.

Akehurst, Michael 'Custom as a Source of International Law' (1974-5) BRITISH YEARBOOK OF INTERNATIONAL LAW, Vol. 47, p. 1.

Ako-Nai, Ronke Iyabowale (ed), *Gender and Power Relations in Nigeria* (Plymouth: Lexington Books, 2013).

Akpan, Ntieyong U. *The struggle for Secession, 1966-1970: A Personal Account of Nigerian Civil War* (London: Frank Cass, 1971).

Al Attar, Mohsen 'Moving the centre of International Legal Education' (2011) TRADE, LAW AND DEVELOPMENT, Vol. III, No. 1, p. 266.

Al Attar, Mohsen and Tava, Vernon Ivan 'TWAIL Pedagogy-Legal Education for Emancipation' (2010) PALESTINE YEARBOOK OF INTERNATIONAL LAW, Vol. 15, No. 5.

Alexandrowicz, Charles Henry *An Introduction to the History and Law of Nations in the East Indies* (Oxford: Clarendon, 1967).

Alexandrowicz, Charles Henry *The European-African Confrontation: A Study in Treaty Making* (Leiden: AW Sitjhoff, 1973).

Allen, Judith Van 'Aba Riots or the Igbo Women's War? Ideology, Stratification and the Women's War' (1975) UFAHAMU: A JOURNAL OF AFRICAN STUDIES 6 (1) p. 11.

Allot, A. N. 'What Is to be Done With African Customary Law? The experience of problems and reforms in Anglophone Africa from 1950' (1984) JOURNAL OF AFRICAN LAW, Vol. 28, Issue 1-2, pp. 56-71.

Allot, Antony *Essays in African Law with Special Reference to the Law of Ghana* (London: Butterworth & Co., 1960).

Alston, Philip (ed.) *Non-state Actors and Human Rights* (Oxford: Oxford University Press, 2005).

Amaraegbu, Declan Azubuike 'Violence, terrorism and security threat in Nigeria's Niger Delta: An old problem taking a new dimension' AFRICAN JOURNAL OF POLITICAL SCIENCE AND INTERNATIONAL RELATIONS Vol. 5(4), pp. 208-217.

Amba-Rao, Sita C. 'Multinational corporate social responsibility, ethics, interactions and Third World governments: An agenda for the 1990s' (1993) JOURNAL OF BUSINESS ETHICS, Vol. 12, Issue 7, pp. 553-572.

Anand, R. P. *Development of Modern International Law and India* (Germany: Nomos, 2005).

Anaya, J. *Indigenous Peoples in International Law* (2nd edn.) (Oxford: Oxford University Press, 2004).

Anaya, S. James *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2000).

Anghie, Antony 'Identifying Regions in the History of International Law *in* Fassbender, Bardo and Peters, Anne *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) p. 1058.

Anghie, Antony 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) THIRD WORLD QUARTERLY, Vol. 27, No. 5, pp. 739-753.

Anghie, Antony *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP, 2005).

Anghie, Antony and Chimni, Bhupinder 'Third World Approaches to International Law and Individual Responsibility in Internal conflict' (2003) 2 CHINESE J. INT'L L. 77 at 79.

Anghie, Antony 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) HARVARD INTERNATIONAL LAW JOURNAL, Vol. 40, No. 1, p. 1.

Anghie, Antony 'Francisco De Vitoria and the Colonial Origins of International Law' (1996) 5 SOCIAL LEGAL STUDIES, p. 321.

Meijknecht, Anne *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Groningen: Intersentia, 2001).

Arajärva, Noora 'From State-Centricism to Where?: The Formation of (Customary) International Law and Non-State Actors', available at http://ssrn.com/abstract=1599679 [accessed on 4 May, 2013].

Araujo, Robert John 'International Law Clients: The Wisdom of Natural Law' (2000) FORDHAM URBAN LAW JOURNAL, Volume 28, Issue 6, 1750.

Arifalo, S. O. and Okajare, S. T. 'The Changing Roles of the Traditional Rulers and the challenge of Governance in contemporary Nigeria: Yorubaland in Historical perceptive,' *Monograph series No: 03302, AAU, Akungba Akoko*, p.2.

Armstrong, Natalie and Murphy, Elizabeth 'Conceptualising Resistance' available on http://hea.sagepub.com/content/16/3/314 [accessed on 4 July 2014].

Arts, Bas ‘Non-state Actors in Global Governance: Three Faces of Power’, Max Planck Project Group on Common Goods, Bonn, Germany, April 2003 available at https://www.coll.mpg.de/pdf_dat/2003_04online.pdf [accessed on 15 August 2016].

Arts, Bas, Noortmann, Math and Reinalda, Bob (eds.) *Non-state actors in International Relations* (Aldershot: Ashgate, 2001).

Artz, Lee and Kamalpour, Yahya R. (eds.) *The Globalization of Corporate Media Hegemony* (Albany: State University of New York Press, 2003).

Asagba, Joseph O. *The Untold Story of a Nigerian Royal Family: The Urhobo Ruling Clan of Okpe Kingdom* (New York-Lincoln-Shanghai: IUniverse Inc., 2005).

Atanda, J. A. *The New Ọyọ Empire: Indirect Rule and Change in Western Nigeria 1894-1934* (London: Longman Group Ltd, 1973).

Aufricht, Hans ‘Personality in International Law’, (1992) THE AMERICAN POLITICAL SCIENCE REVIEW, Vol. 37, No. 2, p. 217.

Aust, Anthony *Hand Book of International Law* (2nd edn.) (Cambridge: Cambridge University Press 2010).

Ayittey, George ‘Indigenous African Institutions’ (2nd edn.) (Ardsley, NY: Transnational Publishers, Inc., 2006).

Azinge, Epiphany *Restatement of Customary Law of Nigeria’ Vol. 1-69* (Lagos: Nigerian Institute of Advanced Legal Studies, 2013).

Azoro, C. J. S. The Place of Customary International Law in the Nigerian Legal System: A Jurisprudential Perspective (2014) INTERNATIONAL JOURNAL OF RESEARCH, Vol. 1, Issue 3, p. 74.

Bachand, Remi 'Non-State Actors in North American Legal Scholarship: Four Lessons for Progressive and Critical International Lawyer *in* d'Aspremont, Jean (ed.) *Participants in International Legal System: Multiple Perspectives on Non-State Actors in International Law* (London- New York: Routledge, 2011) p. 97.

Bamodu, Gbenga 'Transnational Law, Unification and Harmonisation of International Commercial Law in Africa; (1994) JOURNAL OF AFRICAN LAW, vol. 38, p. 125.

Barcia, Manuel '"Locking horns with the Northern Empire": Anti-American Imperialism at the Tricontinental Conference of 1966 in Havana' (2009) JOURNAL OF TRANSATLANTIC STUDIES, Vol. 7, No. 3, pp. 208-217.

Bedjaoui, Mohammed *Towards a New International Economic Order* (New York: Holmes and Meier, 1979).

Bennett, T. W. *Human Rights and African Customary Law under the South African Constitution* (Juta Legal and Academic Publishers**,** 1995).

Beres, Louis René 'Self-Determination, International Law and Survival on Planet Earth' (1994) ARIZ. J. INT'L COMP. L. 1.

Berger, M. 'The End of the ''Third World''?' 15:2 (1994) THIRD WORLD QUARTERLY, 15:2. Pp. 257–275.

Berman, Bruce 'Ethnicity Patronage and the African State: The Politics of Uncivil Nationalism' (1998) AFRICAN AFFAIRS, Vol. 97, pp. 305-341.

Berman, Nathaniel 'Sovereignty in Abeyance: Self-Determination and International Law', (1988) WISCONSIN INTERNATIONAL LAW JOURNAL 7, 51.

Bethel Chuks Uweru, Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism' (2008) AFRICAN RESEARCH REVIEW, VOL. 2 (2), pp.286-295 at 292.

Bianchi, Andrea (ed.) *Non-State Actors and International Law* (Aldershot: Ashgate, 2009).

Blanton, Robert *et al*, 'Colonial Style and Post-colonial Ethnic Conflict in Africa' (2001) JOURNAL OF PEACE RESEARCH, Vol. 38, No. 4, pp. 473-491.

Boyle, Alan and Chinkin, Christine *The Making of International Law; Foundations of Public International Law* (New York, Oxford University Press, 2007).

Brand, Ronald A. 'Sovereignty: The State, the Individual and the International Legal System in the Twenty First Century' (2002) HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW, Vol. 25, pp. 279-295.

Bratton, Michael 'Beyond the State: Civil Society and Associational Life in Africa' (1989) WORLD POLITICS, Vol. 41, No. 3, pp. 407-430.

Brier, J. L. *The Basis of Obligation in International Law* (Oxford: Clarendon Press 1958).

Brinkley, Douglas and Facey-Crowther, David R. (eds.) *The Atlantic Charter* (New York: St. Martin's Press, 1994).

Brookes, Heather Jean 'Suit, Tie, and a touch of Juju'- The Ideological Construction of Africa; A Critical Discourse of News on Africa in the British press' (1995) DISCOURSE & SOCIETY, Vol. 6, pp. 461-494.

Brownlie, Ian *Principles of Public International Law* (7th edn.) (Oxford: Oxford University Press, 2008).

Brownlie, Ian *Principles of Public International Law* (6th edn.) (Oxford: Oxford University Press, 2003).

Brownlie, Ian *Principles of Public International Law* (5th edn.) (Oxford: Clarendon Press, 1998).

Brownlie, Ian *Principles of Public International Law* (4th edn.) (Oxford: Oxford University Press, 1990).

Brzezinski, Zbigniew *The Choice: Global Domination or Global Leadership* (New York: Basic, 2004).

Burke, Roland *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2010).

Buse, Margaret 'Non-state Actors and their Significance' available at http://www.jmu.edu/cisr/journal/5.3/features/maggie_buse_nsa/maggie_buse.htm [accessed on 12 August 2016].

Byers, Michael *Custom, Power and the power of Rules: International Relations and Customary International* Law (Cambridge: Cambridge University Press, 1999).

Byfield, Judith et al (Eds.) *Africa and World War II* (New York: Cambridge University Press, 2015).

Carlston, S. Kenneth *Social Theory and African Tribal Organisation* (Urbana, IL: University of Chicago Press, 1968).

Carroll, William K. 'Hegemony, Counter-hegemony, Anti-hegemony' (2006) SOCIALIST STUDIES/ÉTUDES SOCIALISTES, Vol. 2, No. 2, p. 9.

Carthy, Anthony 'Doctrine versus State Practice' *in* Fassbender, Bardo and Peters, Anne *Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) at p. 977.

Cassese, Antonio *International Law* (2nd edn.) (Oxford: Oxford University Press, 2005).

Cassese, Antonio *Self-Determination of Peoples: A legal* Reappraisal (Cambridge: Cambridge University Press, 1995).

Cassese, A. and Weiler, J.H.H. *Change and Stability in International Law-Making* (Florence, European University Institute, 1988).

Chapman, Tim *The Congress of Vienna: Origins, Process and Results* (London& New York: Routledge, 1998).

Charlesworth, Hilary and Chinkin, C. M. *The boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000).

Charney, Jonathan 'The Persistent Objector Rule and the Development of Customary International Law' (1985) BRITISH YEARBOOK OF INTERNATIONAL LAW, Vol. 56, 1, 16.

Chavis, Rod 'Africa in the Western Media' available at www.africa.upenn.edu/Workshop/chavis98.htm [accessed 20 August, 2014].

Cheng, Bin 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 INDIAN J. INT'L L. 23.

Chiapello, Eve 'Capitalism and its Criticisms' *in* Gay, Paul Du and Morgan, Glenn (Eds.) *New Spirits of Capitalism?: Crises, Justifications and Dynamics* (Oxford: Oxford University Press, 2013).

Chigara, Ben Legitimacy Deficit in Custom: A Deconstructionist Critique (Hants & Burlington: Dartmouth- Ashgate, 2001).

Childe, V. Gordon *Social Evolution* (London: Watts & Co., 1951).

Chiluwa, Innocent and Adegoke, Adetunji 'Twittering the Boko Harem Uprising in Nigeria: Investigating in the Social Media' (2013) AFRICA TODAY, Vol. 59, No. 3, pp.82-102.

Chimni, B. S. 'Globalization, Humanitarianism and the Erosion of Refugee Protection', (2000) JOURNAL OF REFUGEE STUDIES 13 (3) p. 243.

Chimni, B. S. 'Permanent Sovereignty over Natural Resources: Toward a Radical Interpretation' (1998) INDIAN JOURNAL OF INTERNATIONAL LAW Vol. 38, p. 208**.**

Chimni, B. S. 'Third World Approaches to International Law: A Manifesto' (2006) INTERNATIONAL COMMUNITY LAW REVIEW 8: 3-27.

Chimni, B. S. *Capitalism, Imperialism, and International Law in the Twenty-First Century*, (2012) 14 OR. REV. INT'L L. 17.

Churchill R. R. and Lowe, A. V. *The Law of the Sea* (3rd edn) (Manchester: Manchester University Press 1999).

Cohen, Robin *Labour and Politics in Nigeria: 1945-71* (London: Heinemann, 1974).

Coleman, James *Nigeria: Background to Nationalism* (Berkeley: University of California Press, 1971).

Connor, Walker *The National Question in Marxist-Leninist Theory and Strategy* (Princeton N. J: Princeton University Press, 1984).

Cox, Robert W. 'Civil Society at the turn of the new millennium: Prospects for the alternative world other' *in* Amoore, Louise (ed.) *The Global Resistant Reader* (Oxon: Routledge, 2005) p. 103.

Cox, Robert 'Ideologies and the NIEO: Reflections on some recent literature', (1979) INTERNATIONAL ORGANIZATION 33 (2): 257-302.

Craven, Matthew 'Colonialism and Domination' *in* Fassbender, Bardo and Peters, Anne (eds.) *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) at p.862.

Crawford, James 'Forward- Agents of Change: Individuals as a Participant in the Legal Process' (2012) 1 (3) C.J.I.C.L. p. 1.

Crawford, James *Brownlie's Principles of Public International Law* (8th edn.) (Oxford: Oxford University Press, 2012).

Crawford, James *The Creation of States in International Law* (2nd edn.) (Oxford: Oxford University Press, 2007).

Crowder, Michael 'Indirect Rule-French and British STYLE' AFRICA: JOURNAL OF THE INTERNATIONAL AFRICAN INSTITUTE, Vol. 34, No. 3 (Jul., 1964), pp. 197-205.

Crowder, Michael and Abdullahi, Guda *Nigeria: An Introduction to its History* (London: Longman Group Limited, 1979).

Croxton, Derek *Westphalia: The Last Christian Peace* (New York: Palgrave Macmillan, 2013).

Curran, James and Park, Myung-Jin (eds.) *De-Westernizing Media Studies* (London-New York: Routledge, 2000).

D'Amato, Anthony 'Trashing Customary International Law' (1987) 81 AJIL 101.

D'Amato, Anthony *The Concept of Custom in International Law* (Ithaca N.Y. and London: Cornell University Press, 1971).

d'Aspremont, Jean *Formalism and the Sources of International Law* (Oxford: Oxford University Press, 2011).

Daase, Cindy 'The Law of the Peacemaker: The Role of Mediators in Peace Negotiations and Law making' (2012) 1 (3) C.J.I.C.L. pp. 107-135.

Dabashi, Hamid *Can Non-Europeans Think?* (London: Zed Books, 2015).

Dakas, Dakas C. J. 'The Role of International Law in the Colonization of Africa: A Review in Light of Recent calls for Re-colonization' (1997) AFRICAN YEARBOOK OF INTERNATIONAL LAW, Vol. 7, p. 85.

Danilenko, Gennadij *Law-making in International Community* (Dordrecht: Martinus Nijhoff Publishers 1993).

Dann, Philipp *'*Solidarity and the Law of Development Cooperation' *in* Wolfrum**,** Rüdiger and Chie Kojima (eds.) *Solidarity: A Structural Principle of International Law* (Heidelberg: Springer, 2009) p. 61.

Darby, Paul *Africa Football and FIFA: Politics, Colonialism and Resistance* (Oxon: Frank Cass Publishers, 2002).

Davidson, Basil *The African Past: Chronicles From Antiquity to Modern Times* (New York: Grosset and Dunlap, 1967).

Degan, V. D. *Sources of International Law* (The Hague: Martinus Nijhoff Publishers 1997).

Delancey, Mark Dike, Mbuh, Rebecca Neh and Delancey, Mark W. *Historical Dictionary of the Republic of Cameroon* (4th edn.) (Lanham, Maryland-Toronto-Plymouth, UK: Scarecrow Press Inc., 2010).

Dibua, Jeremiah I. *Modernization and the Crisis of Development in Africa: The Nigerian Experience* (Aldershot-Burlington: Ashgate Publishing Limited, 2006).

Dike, Kenneth Onwuka *Trade and Politics in the Niger Delta 1830-1885: An Introduction to the Economic and Political History of Nigeria* (Oxford: Clarendon Press, 1956).

Drayton, Richard The wealth of the west was built on Africa's exploitation 'available at https://www.theguardian.com/politics/2005/aug/20/past.hearafrica05 [accessed on 25 September 2016].

Duchesne, Ricardo 'The French Revolution as a Bourgeois Revolution: A Critique of the Revisionists' (1990) THE FRENCH REVOLUTION AND MARXISM Vol. 54, No. 3, pp. 288-320.

Dumberry, Patrick 'The Last Citadel! Can a State Claim the Status of Persistent Objector to prevent the Application of Customary International Law in Investor-State Arbitration?' LEIDEN JOURNAL OF INTERNATIONAL LAW, vol. 23, no. 2 June 2010, p. 381.

Dunn, F. S. 'The Legal Rights of Individuals' (1941) PROCEEDING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, Vol. 35, p. 14.

Dupuy, P. M. 'Formation of customary International Law and General Principles' *in* D Bodansky, J Brunee and E Hey (eds.) *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2008), p. 451.

Ebeku, Kaniye S. A. ‘Niger Delta Oil, Development of the Niger Delta and the New Development Initiative: Some Socio-Legal Perspective’ (2008) JOURNAL OF ASIAN AND AFRICAN STUDIES, Vol. 43 (4), pp. 399-425.

Edet, Okon *Bakassi Peninsula: The Untold Story of a People Betrayed* (Singapore: Partridge Publishing, 2015).

Eide, Asbjorn ‘In Search of Constructive Alternatives to Secession’ *in* Tomuschat, Christian ed. *Modern Law of Self-Determination* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993) 139.

Elias, Olufemi ‘The Relationship Between General and Particular Customary International Law’ (1996) 8 AFR. J. INT'L & COMP. L. 67.

Elias, Taslim O. *Africa and the Development of International Law*, (second revised by Akinjide, Richard) (Dordrecht: Martinus Nijhoff Publishers, 1988).

Elias, Taslim Olawale *The Nature of African Customary Law* (Manchester: Manchester University Press, 1956).

Enneking, L. F. H. *Foreign Direct Liability and Beyond – Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (The Hague: Eleven International Publishing 2012).

Enneking, Liesbeth F. H. ‘Multinational Corporations, Human Rights Violations and a 1789 US Statute- A Brief Exploration of the Case of *Kiobel v. Shell’* (2012) NEDERLANDS INTERNATIONAAL PRIVAATRECHT (3) 396.

Escobar, Arturo *Territories of Difference: Place, Movements, Life and Redes* (United States of America: Duke University Press, 2008).

Escobar, Arturo 'Beyond the Third World: Imperial Globality, Global Coloniality, and Anti-Gloalization Social Movements' (2004) THIRD WORLD QUARTERLY, Vol. 25, No.1, pp. 207-230.

Eslava, Luis *Local Space, Global Life: The Everyday Operation of International Law and Development* (Oxford: Oxford University Press, 2015).

Eslava, Luis, Fakhri, Michael & Nesiah, Vasuki (eds), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press, 2015- Forthcoming).

Eslava, Luis and Pahuja, Sundhya 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' JOURNAL OFLAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA - VERFASSUNG UND RECHT in ÜBERSEE (VRÜ), Vol. 45(2), 2012, pp. 195-221.

Espoell, Héctor Gross 'Self Determination and Jus Cogens' *in* Antonio Cassese (ed.) *U.N. Law/Fundamental Rights: Two Topics in International Law* (The Netherlands: Sijthoff & Noordhoff, 1979).

Fafunwa, B. Aliu *History of Education in Nigeria, 1842-1939: An Historical Analysis* (Ikeja: Longman, 1978).

Fakhri, Michael 'Questioning TWAIL's Agenda' (2012) OREGA REVIEW OF INTERNATIONAL LAW, vol. 14, no. 1, p. 1.

Falk, R. Rajagopal, B. and Stevens, J. (eds.) *International Law and the Third World: Reshaping Justice* (London and New York: Routledge-Cavendish, 2008).

Falk, Richard A. *The New States and International Legal Order* (Leiden-Boston: Brill-Nijhoff, 1966).

Falola, Toyin *Colonialism and Violence in Nigeria* (Bloomington: Indiana University Press, 2009).

Falola, Toyin and Adebayo, Akanmu 'Culture, Politics and Money Among the Yoruba' (New Brunswick, U.S.A. - London, UK: Transaction Publishers, 2000).

Fanon, Frantz *The Wretched of the Earth*, Translated by Richard Philcox (New York: Grove Press, 1963); Edward W. Said, *Orientalism* (London: Penguin books, 2005-Reprint).

Fassbender, Bardo and Peters, Anne (Eds.) *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012).

Fidler, David P. 'Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law, (2003) 2 CHINESE J. INT'L L. 29 at p. 29-32.

Fidler, David 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law (1996) GERMAN YEARBOOK OF INTERNATIONAL LAW, Vol. 39, p. 198.

Fieldhouse, D. K. *The Colonial Empires: A Comparative Survey from the Eighteenth Century* (New York, Delacorte Press, 1966).

Fitzmaurice, G. 'The Principles of International Law Considered from the Standpoint of the Rule of Law', 1957 Recuiel Des Cours, vol. 92 No.2, p.1.

Flew, Terry 'Six Theories of Neoliberalism' (2014) THESIS ELEVEN 122: 49.

Forde, D. and Jones, G. I. (1950). *The Igbo and Ibibio Speaking Peoples of Eastern Nigeria* (London: International African Institute, 1950).

Forrest, Alan *The French Revolution and the Poor* (New York: St. Martin's Press, 1981).

Fosson, Gabriel 'The Evolution of Westphalian Sovereignty' (2003) JOURNAL OF INTERNATIONAL RELATIONS, Vol. 9, pp. 31-41.

Francese, Joseph 'Introduction, "Gramsci Now"' *in* Joseph Francese (Ed) *Perspectives on Gramsci, Politics, Culture and Social Theory* (New York and London: Routledge, 2009) p. 1.

Frenkel, M. Yu 'Edward Blyden and the Concept of African Personality' (1974) AFRICAN AFFAIRS, Vol. 73, No. 292, pp. 277-289.

Frynas, Jedrezey Georg *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (Hamburg-London: LIT Verlag, 2000).

Fuchs, Christian and Mosco, Vincent (Eds.) *Marx and the Political Economy of the Media* (Leiden-Boston: Brill, 2015).

Gailey, Harry A. *The Road to Aba* (New York: New York University Press, 1970).

Gathii, James Thuo 'Africa' *in* Fassbender, Bardo and Peters, Anne (eds.) *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) p. 407.

Gathii, James Thuo 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography' (2011) 3 (1) TRADE L. & DEV. 26.

Gathii, J. T. 'Assessing Claims of the Emergency of a New Doctrine of Pre-emptive War under the Doctrine of Sources' (2005) 43 OSGOODE HALL LAW JOURNAL, p. 67.

Gathii, James Thuo 'Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory' (2000) SYMPOSIUM ISSUE FORWARD, Vol. 41, No. 2, p. 263 at 273.

Gathii, James Thuo 'Neocolonialism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' (2000) 98 MICHIGAN LR 2054.

Gbowee, Leymah 'Effecting Change through Women's Activism in Liberia' (2009) IDS BULLETIN, VOL. 40, ISSUE 2, p. 50.

Geny, Franҫois *(Methode d'interpretation et sources en droit prive positif* (2nd ed.) (Paris: Librairie Generale de Droit et de Jurisprudence, 1919).

Glanhn, Gerhard Von and Taulbee, James Larry *Law Among Nations: An Introduction to Public International Law* (10th edn.) (London-New York: Routledge, 2016).

Gong, Gerrit W. *The Standard of Civilization in International* Society (Oxford: Oxford University press, 1984).

Govern, Kevin H. 'The Twitter Revolutions: Social Media in the Arab Spring' available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2093434 [accessed on 14 September 2016].

Gower, L. C. B. *Independent Africa: The Challenge to the Legal Profession* (Cambridge, Massachusetts and London: Harvard University Press and Oxford University Press, 1967).

Gramsci, Antonio *Selections from Prison Notebooks of Antonio Gramsci* (edited and selected by Quintin Hoare and Geoffrey Nowell Smith) (London: Lawrence and Wishart, 1971).

Grenier, L. *Working with Indigenous Knowledge: A Guide for Researchers* (Ottawa: International Development Research Centre, 1998).

Grotius, Hugo *Law of War and Peace* (1625) - De Jure Belli ac Pacis ... Translated into English by Francis W. *Kelsey (Oxford: Clarendon press, 1925 Reprint).*

Guilfoyle, Douglas 'Somali Pirates as Agents of Change in International Law-making and Organisation' (2012) 1 (3) C.J.I.C.L. pp. 81-106.

Gunning, Isabelle R. 'Expanding the International Definition of Refugee: a Multicultural view', (1989-90) FORDHAM INTERNATIONAL LAW JOURNAL, vol. 13, p. 156.

Harvey, David *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005).

Hassan, Tugume Lubowa 'Attitudes of Christian missionaries towards African traditional religious beliefs in East Africa during the British colonial rule' (2015) AFRICAN JOURNAL OF HISTORY AND CULTURE, Vol. 7 (10) pp. 193-199.

Held, David and McGrew, Anthony (Eds.) *The Global Transformation Reader: An Introduction to the Globalization Debate* (2nd edn.) (Cambridge-Malden: Polity Press, 2000).

Henckaerts, Jean-Marie and Doswald-Beck, Louise *ICRC Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005).

Herbst, Jeffrey Ira *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton: Princeton University Press, 2000).

Herman, Edward S. and Chomsky, Noam *Manufacturing Consent: The Political Economy of the Mass Media* (London: Vintage, 1994).

Herskovits, M. J. *The Myth of the Negro Past* (New York: Beacon Press, 1941).

Higgins, Rosalyn *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994).

Higgins, Rosalyn 'Conceptual Thinking about individuals in International Law' (1978) BRITISH JOURNAL OF INTERNATIONAL STUDIES, Vol. 4, Issue 1, p.1.

Higgott, Richard A. et al. (eds.) *Non-state actors and Authority in the Global System* (London- New York, 2000).

Hillier, Tim *Sourcebook on Public International Law* (London-Sydney: Cavendish Publishing Limited, 1998).

Hollander, Jocelyn A. and Einwohner, Rachel L. 'Conceptualising Resistance (2004) SOCIOLOGICAL FORUM, VOL. 19, NO. 4 pp. 533-554.

Hollis, D.B. 'Why State Consent Still Matters- Non-state Actors, Treaties and the Changing Sources of International Law' (2005) 23 BERKELEY JOURNAL OF INTERNATIONAL LAW 138.

Hopf, Ted 'Common-sense Constructivism and Hegemony in World Politics' (2013) INTERNATIONAL ORGANISATIONS, Vol. 67, Issue 02, pp. 317-354.

Hopkins, A. G. *An Economic History of West Africa* (London-New York: Routledge, 1973).

Hutter, Bridget M. 'The Role of Non-state actors in Regulation.' Available at http://eprints.lse.ac.uk/36118/1/Disspaper37.pdf [accessed on 5 August 2016].

Ibhawoh, Bonny 'Testing the Atlantic Charter: linking anticolonialism, self-determination and universal human rights' (2014) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS, Vol. 18, Nos. 7–8, 842–860.

Ibhawoh, Bonny 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) HUMAN RIGHTS QUARTERLY, Vol. 22, No. 3, pp. 838-860.

Idler, Annette Iris and Forest, James J. F. 'Behavioural Patterns among (violent) Non-state Actors: A Study of Complementary Governance' available at

http://www.stabilityjournal.org/articles/10.5334/sta.er/ [accessed on 20 August 2016].

Idoo, Akwasia 'Africa: Democracy without Human Rights?' (1993) 15 HUM. RTS. Q. 703, 713.

Igoil, Yortange 'The Evolution of Political Institutions Among the Tiv of Nigeria and the Question of Relevance' *in* Ayoade and Agbaje (eds.) *African Traditional Political Thought and Institutions* (Lagos: Centre for Black and African Arts and Civilisation, 1989), p. 173.

Ikelegbe, Augustine 'The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria' (2005) NORDIC JOURNAL OF AFRICAN STUDIES 14(2): 208-234.

Ikelegbe, Augustine 'Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramification of Civil Society for a Regional Resource Struggle' (2001) JOURNAL OF MODERN AFRICAN STUDIES 39, 3, pp. 437- 469.

Irele, F. Abiola and Jeyifo, Biodun (eds.) *The Oxford Encyclopedia of African Thought*, Volume 1: Absolutism-Imperialism (Oxford: Oxford University Press, 2010).

Irwin, Graham W. 'Precolonial African Diplomacy: The Example of Ashanti' (1975) THE INTERNATIONAL JOURNAL OF AFRICAN HISTORICAL STUDIES, VOL. 8, NO. 1, pp. 81-96.

Isichei, Elizabeth *A History of Nigeria* (New York: Longman Inc., 1983).

Isichei, Elizabeth *A History of the Igbo people* (London-Basingstoke: The Macmillan Press Ltd., 1976)

Isichei, Elizabeth *The Ibo People and the Europeans* (London: Faber and Faber Ltd, 1973).

Jabri, Vivenne *The Postcolonial Subject: Claiming Politics/ Governing others in Late Modernity* (New York and Canada: Routledge, 2013).

Jackson, Robert H. *Quasi-states: Sovereignty, international relations and the Third World* (Cambridge: Cambridge University Press, 1990).

Jayakumar, Kirthi 'Where does Article 38 Stand Today?' available on http:ssrn.com/abstract=2121012 [accessed on 03 May 2013].

Jeffreys, M. D. W. 'Niger: Origins of the World' (1964) CASHIERS D'ETUDES AFRICANES, Vol. 4, No. 15, pp. 443-451.

Jellinek, Georg *Dierechtliche Natur der Staatenverträge* (1880), at 2, 48–49.

Joseph, Jonathan *Hegemony: A Realist analysis* (London-New York: Routledge, 2002).

Josselin, Daphne and Wallace, William (eds.), *Non-State Actors in World Politics* (Hampshire-New York: Palgrave, 2001).

Kaczorowska, Alina *Textbook Public International Law*, (London: Old Bailey Press, 2002).

Kammerhofer, Jörg 'Uncertainties in the Formal Sources of International Law: Customary International Law and some of its Problems' (2004) EJIL Vol. 15, No. 3, pp. 523-553.

Kastfelt, Niels 'African Resistance to Colonialism in Adamawa' (1976) JOURNAL OF RELIGION IN AFRICA, Vol. 8, pp. 1-12.

Keech, Susan McIntosh (ed.) *Beyond Chiefdoms: Pathways to Complexity in Africa* (Cambridge: Cambridge University Press, 1999).

Keim, Curtis A. 'Africa and Europe before 1900 *in* Martin, Phyllis M. and O'Meara, Patrick *Africa* (3rd edn.) (Bloomington: Indiana University Press, 1995) p.115.

Kelly, J. Patrick 'The Twilight of Customary International Law' (1999- 2000) 20 VA. J. INT'L L. 449.

Kelsen, H. *Reine Rechtslehre* (2nd edn) (Vienna: Franz Deuticke, 1960).

Kettemann, Matthias C. *The Future of Individual in International Law: Lessons from International Internet Law* (The Hague: Eleven International Publishing, 2013).

Khan, Ali 'The Extinction of Nation-States', (1992) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 7, no. 2, 197-234.

Khonder, Habibul Haque 'Role of New Media in the Arab Spring' (2011) GLOBALIZATIONS, Vol. 8, No. 5, pp. 675-679.

Kingsbury, Benedict 'A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull' (1997) 17 QUINNIPIAC L. REV. 3, p. 10.

Kinyatti, Maina wa *Thunder from the Mountains: Mau Mau Patriotic Songs* (London-Kenya: Zed Press & Midi-Teki Publishers, 1980).

Kirgis, Frederic L. Jr., 'Custom on a Sliding Scale' (1987) 81 AJIL 146.

Klabbers, Jan *An Introduction to International Institutional Law* (2nd edn.) (Cambridge: Cambridge University Press, 2009).

Klabbers, Jan, Peters, Anne and Ulfstein, Geir *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

Klabbers, Jan 'The Concept of Legal Personality' (2005) JUS GENTIUM, pp. 35-66.

Kolb, Robert 'Selected Problems in the Theory of Customary International Law', (2003) NETHERLANDS INTERNATIONAL LAW REVIEW / Volume 50 / Issue 02 / August 2003, pp 119-150.

Kooijmans, Pieter Hendrik *The Doctrine of the Legal Equality of States: An Inquiry into the Foundations of International Law* (Leyden: A. W. Sijthoff, 1964).

Koskenniemi, Martti 'A History of International Law Histories,' *in* Bardo Fassbender and Anne Peters (eds.) *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) pp. 943–971.

Koskenniemi, Martti 'Histories of International Law: Dealing with Eurocentrism' (2011) 19 RECHTGESCHICHETE 151-76, particularly p. 158.

Koskenniemi, Martti *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2001).

Krishnan, Devashish 'India and International Investment Laws' *in* Bimal N. Patel (ed.), *India and International Law: Introduction*, (Vol 2.) (Leiden-Boston: Martinus Nijhoff Publishers, 2008).

Kupchan, Charles A. 'The Normative foundations of Hegemony and the Coming Challenge to Pax America' (2014) SECURITY STUDIES, Vol. 23, p. 219.

Kyriakopoulos, Georg D. 'Formation of international Custom and the Role of Non-state Actors' *in* Photini Pazartzis *et al* (eds.) *Reconceptualising The Rule Of Law in Global Governance, Resources, Investment and Trade* (Oxford and Portland, Oregon: Hart Publishing, 2016), p. 43.

Larkin, Brian *Signal and Noise: Media, Infrastructure and Urban Culture in Nigeria* (USA: Duke University Press, 2008).

Larrain, Jorge *Marxism and Ideology* (London: Macmillan, 1983).

Lauterpacht, H. *International Law and Human Rights* (London: Stevens & Sons Limited, 1950).

Lawal, Najeem Ade 'The Position of Chiefs' *in* Usman**,** Yusufu Bala (ed.) Nigeria Since independence: The First 25 Years: Volume 1: The Society (Ibadan, Nigeria: Heinemann Educational Books, 1989), p. 83.

Lears, T. J. Jackson 'The Concept of Cultural Hegemony: Problems and Possibilities' (185) THE AMERICAN HISTORICAL REVIEW, Vol. 90, No 3, pp.567- 593.

Lievrouw, Leah A. 'New Media and the 'Pluralization of the life-worlds': A Role for information in Social Differentiation' (2001) NEW MEDIA AND SOCIETY, Vol. 3, No1, pp. 7-28.

Lievrouw, Leah A. *Alternative and Activist New Media* (Cambridge: Polity Press, 2011).

Lindley, M. F. T*he Acquisition and Government of Backward Territory in International Law: Being A Treatise on the Law and Practice Relating to Colonial Expansion* (London: Longmans, Green and Co., 1926).

Loader, Brian D. and Mercea, Dan (eds.) *Social Media and Democracy: Innovations in Participatory Politics* (Oxon-New York: Routledge, 2012).

Lorca, Arnulf Becker 'Eurocentricism in the History of International Law**'** *in* Fassender**,** Bardo and Peters**,** Anne (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012).

Lundy, Patricia and McGovern, Mark 'Whose Justice? Rethinking Transitional Justice from Bottom up' (2008) JOURNAL OF LAW AND SOCIETY, Vol. 35, Issue 2, pp. 265-292.

Lyons, Gene M. and Mastanduno, Michael (eds.) *Beyond Westphalia? State Sovereignty and International Intervention* (Maryland: The John Hopkins University Press, 1995).

Macdonald, Ron & McMorrow, Thomas 'Decolonizing Law School,' paper presented at the University of Alberta, 2013 at a conference on 'The Future of Law Schools' (2014) 51:4 ALTA. L. REV. 717.

Macfarlane, S. N. 'Taking Stock: The Third World and the End of the Cold War', *in* L Fawcett and Y Sayigh (Eds.), *The Third World Beyond the Cold War: Continuity and Change* (Oxford: Oxford University Press, Reprinted 2003) p. 15 at 21.

Machiavelli, Niccolò *The Prince* (Cambridge: Cambridge University Press, 1988).

Machiavelli, Niccolò, 'The Art of War' in *The Chiefs and Others*, Vol. 2, (Durham, NC: Duke University Press, 1965).

Mackie, Jamie *Bandung 1995: Non-Alignment and Afro-Asian Solidarity* (Singapore: Editions Didier Millet, 2005).

Majid, Amir A. *Legal Status of International Institutions: SITA, INMARSAT and EUROCONTROL Examined* (Aldershot: Ashgate Publishing Group, 1996).

Malainowski, Bronislaw *Crime and Custom in Savage Society* (New Jersey: Rowman & Allanheld Publishers, Reprint 1985).

Manner, George 'The Object Theory of individuals in International Law' (1952) 46 AM. J. INT'L L. 428.

Manuh, Takyiwaa 'Law and Society in Contemporary Africa' *in* Phyllis M Martin and Patrick O'Meara (eds.) *Africa* (3rd edn.) (Bloomington: Indian University Press, 1995) p. 330.

Marah, John Karefeh *African People in the Global Village: An Introduction to Pan African Studies* (Lanham-New York-Oxford: University Press of America**,** 1998).

Marks, Susan *The Riddles of All Constitutions: International Law, Democracy and Critique of Ideology* (Oxford University Press, 2000).

Matua, Makau 'What is TWAIL?' (2000) *Proceedings of the Annual Meeting* (American Society of International Law).

Mutua, Makau Wa 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 VA.J. INT'L L. 339.

Mba, Emma Nina *Nigerian Women Mobilised: Women's Political Activity in Southern Nigeria, 1900-1965 (*Berkeley: University of California Press, 1982).

McAleese, Dermot 'Economic Exploitation of the Less Developed Countries: A Survey' (1973) AN IRISH QUARTERLY REVIEW, Vol. 62, No. 246, pp. 139-153.

McAuliffe, Padraig 'Romanticization Versus Integration?: Indigenous Justice in Rule of Law Reconstruction and Transitional Justice Discourse' (2014) GOETTINGEN JOURNAL OF INTERNATIONAL LAW 5, 1, 41-86.

McCorquodale, Robert 'Individuals and the International Law' *in* Malcolm Evans (Ed), *International Law* (3rd edn.), (Oxford: Oxford University Press, 2010).

McDougal, M. S. and Reisman, W. M. 'The Prescribing Function: How International Law is Made' (1980) YALE STUDIES IN WORLD PUBLIC ORDER, Vol. 6, p. 249.

McDougal, Myres S. et al., 'Theories about International Law: Prologue to a Configurative Jurisprudence' (1968) 8 VA. J. INT'L L. 188.

McIntosh, Susan Keech (ed.) *Beyond Chiefdoms: Pathways to Complexity in Africa* (Cambridge: Cambridge University Press, 1999).

Meier, Patrick 'Ushahidi as a Liberation Technology' *in* Diamond**,** Larry and Plattner**,** Marc F. (eds.) *Liberation Technology: Social Media and the Struggle for Democracy* (Baltimore: The Johns Hopkins University press, 2012).

Meijknecht, Anne *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Groningen: Intersentia, 2001).

Mendelson, Maurice 'The International Court of Justice and the sources of International Law' *in* Lowe, Vaughan, Lowe and Malgosia, Fitzmaurice *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996).

Menon, P. K. 'The International Personality of Individuals in International Law: A Broading of the traditional Doctrine (1992) 1 JOURNAL OF TRANSNATIONAL LAW AND POLICY 151.

Meron, Theodor *The Humanization of International Law* (Leiden-Boston: Martinus Nijhoff Publisher, 2006).

Mickelson, Karin 'Co-Opting Common Heritage: Reflections on the Need for South-North Scholarship', *in* Okafor**,** Obiora Chinedu and Aginam**,** Obijiofor (eds), *Humanizing Our Global Order: Essays in Honour of Ivan Head* (Toronto 2003) p.112;

Miller, Toby (ed), *Television: Critical Concepts in Media and Cultural Studies, Volume III* (London- New York: Routledge, 2003).

Mills, Jen ‘Oxford has decided Not to tear down Cecil Rhodes Statue’ http://metro.co.uk/2016/01/29/oxford-has-decided-not-to-tear-down-cecil-rhodes-statue-5650890/ [accessed on 21 March, 2016].

Mittelman, James H. and Chin, Christine B. N. ‘Conceptualising resistance to globalisation’ *in* (Louise Amoore (ed.) *The Global Resistant Reader* (Routledge: London and New York, 2005) p. 17.

Morgan, Edward M. ‘The Imagery and Meaning of Self-Determination,’ (1998) N.Y.U. J. INT’L & POL. VOL. 20, p. 355.

Morss, E. ‘The New Global Players: How They Compete and Collaborate (1991) WORLD DEVELOPMENT, Vol. 19, No. 1, pp. 55-64.

Moynihan, Daniel Patrick *Pandemonium: Ethnicity in International Politics* (Oxford: Oxford University Press, 1993).

Müller, Till ‘Customary Transnational Law: Attacking the Last Resort of State Sovereignty’, (2008) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, Vol. 15, Issue 1, p.19.

Mutua, Makau ‘Savages, Victims and Saviors: The Metaphor of Human Rights’ (2001) 42 HARVARD INTERNATIONAL LAW JOURNAL, p. 201.

Mutua, Makau ‘Critical Race Theory and International Law: The View of an Insider-Outsider’ (2000) 45 VILLANOVA LR 851-852.

Mutua, Makua W. ‘What is TWAIL?’ American Society of International Law, Proceedings of the 94th Annual Meeting, pp. 31-39, 2000.

Mutua, Makau 'Why Redraw the map of Africa: A Moral and Legal Inquiry' (1995) MICHIGAN JOURNAL OF INTERNATIONAL LAW, Vol. 16, p.113.

Mutua, Makau Wa 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 VA. J. INT'L L. 339.

Nas, Tevfik F. Tracing the Economic Transformation of Turkey from the 1920 to EU Accession (Leiden-Boston, Martinus Njihoff Publishers, 2008).

Natarajan, Usha 'TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring' (2012) 14 OREGON REV. INT'L L. 177.

Ndoh, Cyril Akobundu *Imperialism and Economic Dependency in Nigeria* (2nd edn.) (Owerri: Achugo Publications, 2000).

Ndukaihe, Vernantius Emeka *Achievement as Value in the Igbo/African identity: The Ethics* (Berlin: Lit Verlag, 2006).

Neff, Stephen C. 'A Short History of International Law,' *in* Evans, Malcolm D. (ed.) *International Law* (3rd edn.) (Oxford: Oxford University Press, 2010).

Neubert, Dieter 'Local and Regional Non-State Actors on the Margins of Public Policy in Africa' in Anne Peters et al (eds.) Non-State Actors as Standard Setters (2009) see note 13 at pp. 35-60.

Ngugi, Joel 'Making new wine for old wineskins can the reform of international law emancipate the Third World in the age of globalisation' (2002) UC DAVIS JOURNAL OF INTERNATIONAL LAW AND POLICY, 8, pp. 73-80.

Nikiema, Norbert 'Adult Education and Local Knowledge in Africa' *in* Omolewa**,** Michael *et al* (ed.) *History of Adult Education in Africa* (Florida-Cape Town: Pearson Publishers, 2009).

Northrup, David A. *Trade without rulers: Pre-colonial economic development in South-eastern Nigeria* (Oxford: Clarendon Press, 1978).

Nussbaum, Arthur *A Concise History of Law of Nations* (New York: Mcmillian, 1947).

Nwabueze, Remigius N. 'Historical and Comparative Contexts for the Evolution of Conflict of Laws in Nigeria' (2001) 8 ILSA J. INT'L & COMP. L. 31, 35-36.

Nwabughuogu, Anthony I. 'The Role of Propaganda in the Development of Indirect Rule in Nigeria, 1890-192 (1981) THE INTERNATIONAL JOURNAL OF AFRICAN HISTORICAL STUDIES, Vol. 14, No. 1, pp. 65-92.

Nwaguru, J. E. N. *Aba and British Rule: The Evolution and Administrative Developments of the Old Aba Division of Igboland, 1896-1960* (Enugu: Santana Press, 1973).

Nwauche, E. S. 'The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana' (2010) 25 TUL. EUR. & CIV. L. F. 37.

Nwauche, Enyinna S. 'Law, religion and human rights in Nigeria' (2008) 2 AFRICAN HUMAN RIGHTS LAW JOURNAL pp. 568- 598.

Nweke, Kenneth 'The Role of Traditional Institutions of Governance in Managing Social Conflicts in Nigeria's Oil-Rich Niger Delta Communities: Imperatives of Peace-Building Process in the Post-Amnesty Era.' (2012) BRITISH JOURNAL OF ARTS AND SOCIAL SCIENCES, Vol.5 No.2 p.202.

Oba, Abdulmumini A 'Administration of Customary Law in a Post-Colonial Nigerian State' (2006) 37 CAMBRIAN L. REV. 95.

Obi, Cyril I. 'Global, State and Local Intersections: Power, authority and conflict in the Niger Delta oil Communities *in* Callaghy**,** Thomas *et al* (eds.) *Intervention and Transnationalism in Africa: Global-Local Networks of Power* (Cambridge: Cambridge University Press, 2001) p. 173.

Obilade, Akintunde Olusegun *The Nigerian Legal System* (Ibadan: Spectrum Law Publishing, 1979).

Ochoa, Christiana 'The Individual and Customary International Law Formation' (2007) VIRGINIA JOURNAL OF INTERNATIONAL LAW, Vol. 48, No. 1, pp. 119-186.

O'Donoghue, Aoife 'Agents of Change: Academics and the Sprite of Debate at International Conferences' (2012) 1 (3) C.J.I.C.L. pp. 275-297.

Odumosu, Ibironke T. Locating Third World Resistance in the International Law on Foreign Investment (2007) INTERNATIONAL COMMUNITY LAW REVIEW Vol. 9 p. 427.

Ojaide, Tanure ‘Modern African Literature and Cultural Identity’ (1992) AFRICAN STUDIES REVIEW, Vol. 35, No. 3, pp. 43-57.

Oji, E. A. ‘Application of Customary International Law in Nigerian Courts’ (2011) NAILS LAW AND DEVELOPMENT JOURNAL, 1 (1) p. 151.

Okafor, Obiora Chinedu ‘Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?’ (2008) INTERNATIONAL COMMUNITY LAW REVIEW 10, pp. 371-378.

Okafor, Fidelis ‘From Praxis to Theory: A Discourse on the Philosophy of African Law’ (2006) 37 CAMBRIAN L. REV. 37.

Okafor, Obiora Chinedu ‘Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective’ (2005) OSGOODE HALL LAW JOURNAL, Vol. 43, pp. 171-191.

Okafor, Obiora Chinedu ‘Poverty, Agency and Resistance in the Future of International Law: An African Perspective’ *in* Falk, Richard**,** Rajagopal**,** Balakrishnan and Stevens**,** Jacqueline (eds.) *International Law and the Third World: Reshaping Justice* (London-New York: Routledge-Cavendish, 2008)

Okeke, Christian N. ‘The Use of International Law in the Domestic Courts of Ghana and Nigeria’ (2015) 32 ARIZ. J. INT'L & COMP. L. 371.

Okeke, Chris N. ‘The Debt Burden: An African Perspective’ (2001) THE INTERNATIONAL LAWYER, Vol. 35, No. 4, P. 1489.

Okeke, Christian N. ‘International Law in the Nigerian Legal Education’ (1997) 27 CAL. W. INT’L L. J. 311.

Okeke, Christian ‘International Law in the Nigerian Legal System’ (1996) CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL, Vol. 27, No. 2, Article 4, p. 312.

Okeke, Christian N. *The Theory and Practice of International Law in Nigeria* (Enugu: Fourth Dimension Publishing Co. Ltd, 1986).

Okigbo, Christopher *Labyrinths* (London: Heinemann, 1971).

Okodo, Ikechukwu ‘The Igbo Age Grade System and African Traditional Religion’, (2012) INTERNET AFRREV: AN INTERNATIONAL ONLINE MULTI-DISCIPLINARY JOURNAL, Vol. 1 (3) pp. 70-78.

Okoye, Felix Chuks *International Law and the New African States* (London: Sweet & Maxwell, 1972).

Olaide, Aro ‘The Nigerian Press: The Journey So Far’ (2011) CONTINENTAL J. SUSTAINABLE DEVELOPMENT, Vol. 2, pp. 8-19.

Oluduro, Olubayo ‘Customary Arbitration in Nigeria: Development and Prospects’ (2011) 19 Afr. J. Int'l & Comp. L. 307.

Olusanya, Gabriel Olakunle *The West African Students’ Union and the Politics of Decolonisation, 1925–1958* (Ibadan: Daystar Press, 1982).

Omolewa, Michael ‘African Thought’ *in* Irele**,** F.A. and Jeyifo, B. *Entry on Education for the Encyclopaedia of African Thought* (Oxford: Oxford University Press, 2007).

Omolewa, Michael 'Traditional African Modes of Education: Their Relevance in the Modern World' (2007) INTERNATIONAL REVIEW OF EDUCATION, Vol. 53, No. 5/6, pp. 593-612.

Onyeka Igwe, Onyeka 'Repugnancy Test and Customary Criminal Law in Nigeria: A time for Re-Assessing Content and Relevance'. Available at http://ssrn.com/abstract=2528497 [accessed on 15 June, 2016].

Oppenheim, Lassa 'The Science of International LAW: Its Task and Method', (1908) 2 AM. J. INT'L L. pp.323-324; UN Doc. A/45/430/Add.2 at 14, G.A. Res. 1816 (1962).

Orakhelashvili, Alexander 'The Position of Individuals in International Law' (2000-2001) 31 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL, p. 241.

Orji, Ema I. 'Issues on Ethnicity and Governance in Nigeria: A Universal Human Rights Perspective' (2001) 25 FORDHAM INT'L L. J. 431, 436.

Osaghae, Eghosa E. 'The Ogoni Uprising: Oil Politics, Minority agitation and the Future of the Nigerian State' (1995) AFRICAN AFFAIRS, 94, pp. 325- 344.

Otto, Dianne 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference' (1996) 5 SOCIAL & LEGAL STUD. 337.

Oyebade, Adebayo (ed.), *The Foundations of Nigeria: Essays in Honour of Toyin Falola* (Trenton-Asmara: Africa World Press, 2003).

Pahuja, Sundhya *Decolonising International Law: Development, Economic and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

Pahyja, S. 'The Post-coloniality of International Law' (2005) HARVARD INTERNATIONAL LAW JOURNAL 46.

Parlett, Kate 'Individuals and Structural Change in the International Legal System' (2012) 1 (3) C.J.I.C.L. pp. 60-80.

Pauwelyn, Joost *Conflicts of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003).

Payandeh, Mehrdad 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' Eur J Int Law (2010) 21 (4): 967-995.

Peil, Michael 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (2012) 1 (3) C.J.I.C.L. pp. 136-161.

Pellet Andrea 'Article 38' in Andreas Zimmermann et al (Eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006), p.750.

Perham, Margery *Native Administration in Nigeria* (London: Oxford University Press, 1937).

Perry, Amanda 'International Economic Organisations and the Modern Law and Development' *in* Seidman, Ann, Seidman, Robert and Walde, Thomas (eds.), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (The Hague: Kluwer, 1999).

Peters, Anne, Koechlin, Lucy and Zinkernagel, Gretta Fenner 'Non-State Actors as Standard Setters: Framing the Issue of an Interdisciplinary Fashion' *in* Anne Peters et

al (eds.) *Non-State Actors as Standard Setters* (Cambridge: Cambridge University Press, 2009) pp. 1-32.

Pham, J. Peter 'African Constitutionalism: Forging New Models for Multi-ethnic Governance and Self-Determination' *in* Levitt, Jeremy I. *Africa: Mapping New Boundaries in International Law*, (Portland: Hart Publishing, 2008).

Piot, Charles *Remotely Global: Village Modernity in West Africa* (Chicago & London: The University of Chicago Press, 1999).

Polański, Przemyslaw Paul *Customary Law of the Internet: In Search of a Supranational Cyberspace Law*, (The Hague: T.M.C Asser Press, 2007).

Porter, Eric *The Problem of the Future World: W. E. B. Du Bois and the Race Concept at Mid-century* (Durham, NC: Duke University Press, 2010), 76.

Portmann, Roland *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010)

Prakash, Gyan *Another Reason: Science and the Immigration of Modern India* (Princeton: Princeton University Press, 1999).

Pralten, David *The Man-Leopard Murders: History and Society in Colonial Nigeria* (Edinburgh: Edinburgh University Press, 2007).

Prost, Mario *The Concept of Unity in Public International Law* (Oxford: Hart Publishing, 2012).

Racine, Louise 'Applying Antonio Gramsci's Philosophy to Postcolonial Feminist Social and Political Activism in Nursing' (2009) NURSING PHILOSOPHY, Vol. 10, Issue 3, pp. 180-190.

Rajagopal, Balakrishnan 'Counter-hegemonic International Law: Rethinking human Rights and development as a Third World Strategy', (2006) THIRD WORLD QUARTERLY, Vol. 27, No. 5, pp. 767-783.

Rajagopal, Balakrishnan 'The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India' (2005) LEIDEN JOURNAL OF INTERNATIONAL LAW, 18, p. 345

Rajagopal, Balakrishnan *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

Rajagopal, Balakrishnan 'International Law and Social Movements: Challenges of Theorizing Resistance' (2002-2003) 41 COLUM. J**.** TRANSNAT'L L. 397

Rajagopal, Balakrishnan 'From Resistance to Renewal: The Third World, Social Movements and the Expansion of International Institutions' (2000) HARVARD INTERNATIONAL LAW JOURNAL, vol. 41, no.2, p. 529.

Rajagopal, Balakrishnan 'The Case for the Independent Statehood of Somaliland', (1992) AMERIAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW, Vol. 8, 653.

Rajagopal, Balakrishnan 'Locating the Third World in Cultural Geography' (1998-99) THIRD WORLD LEGAL STUDIES, pp.1-20.

Ratner, Steven and Anne-Slaughter (eds.) *The Method of International Law* (Washington DC: American Society of International Law, 2014).

Ratner, Steven R. and Slaughter, Anne-Marie 'Appraising the Methods of International Law: A Prospectus for Readers', 93 AJIL (1999) 291.

Rautenbach, Christa 'South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition' (2008) ELECTRONIC JOURNAL OF COMPARATIVE LAW, Vol. 12. p. 1.

Ravenhill, J. 'The North-South Balance of Power', (1990) 66:4 INTERNATIONAL AFFAIRS, 66:4, 731.

Reinisch, August 'The Changing International Legal Framework for Dealing with Non-State Actors' *in* Philip Alston (Ed.) *Non-State Actors and Human Rights*, Oxford: Oxford University Press, 2005).

Remec, Peter Pavel *The Position of the Individual in International Law according to Grotius and Vattel* (The Hague: Martinus Nijhoff, 1960).

Renger, Terrence 'The Invention of Tradition in Colonial Africa' *in* Roy Richard Grinker, Stephen C. Lubkemann and Christopher Steiner (eds.), *Perspectives on Africa: A Reader in Culture, History and Representation* (2nd edn.) (West Sussex: Wiley-Blackwell, 2010).

Robert, Bassey Joseph 'Legal History of Boundary Creation in Africa: The Case of Nigeria-Cameroon Boundary Concerning Bakassi Peninsula (1884- 2008)' (2015) BRITISH JOURNAL OF ADVANCE ACADEMIC RESEARCH, Vol. 4, No. 1, pp. 62-77.

Roberts, Anthea and Sivakumaran, Sandesh 'Law-making by Non-state Actors: Engaging armed Groups in the Creation of International Humanitarian Law' (2012) THE YALE JOURNAL OF INTERNATIONAL LAW, vol. 31:1, p.108.

Roberts, Anthea Elizabeth 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) THE AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 95, No. 4. Pp. 757-791.

Robinson, William I. and Harris, Jerry 'Towards a Global Ruling Class? Globalisation and the Transnational Capitalist Class' (2000) SCIENCE & SOCIETY, Vol. 64, No. 1, p. 11.

Rodney, Walter *How Europe Underdeveloped Africa* (London & Tanzania: Bogle-L'Ouverture Publications 1972).

Roodi, Javad Babajani 'The Role of the Third World in International Law, (2012) LIFE SCIENCE JOURNAL, Vol 9, No. 4, p.5035 at 5037.

Salami, Yunusa Kehinde 'The Democratic Structure of Yoruba Political-Cultural Heritage' (2006).

Sassen, Saskia 'De-Nationalized State Agendas and Privatized Norm-Making' *in* Karl-Heinz Ladeur (ed.), *Public Governance in the Age of Globalization* (Aldershot: Ashgate, 2004) p. 51.

Sassoon, Ann Showstack *Approaches to Gramsci* (London: Writers and Readers, 1982).

Schachter, Oscar *International Law and Theory in Practice* (Dordrecht: Martinus Nijhoff Publishers 1991).

Scharf, Michael P. ‘Seizing the “Grotian Moment” Accelerated Formation of Customary International Law in Times of Fundamental Change’ 2010) CORNELL INT’L L. J. vol. 43, p. 439.

Schwebel, Stephen ‘United Nations Resolutions, Recent Arbitral Awards and Customary International Law’, *in* Adriaan Bos and Hugo Siblesz (eds.), *Realism in Law-Making: Essays on International Law in Honour of Willem Riphagen* (Dordrecht: Martinus Nijhoff, 1986) p. 203.

Schwobel-Patel, Christine ‘Teaching International Law Critically- Critical Pedagogy and Bildung as Orientations for Learning and Teaching’ *in* Bart Van Klink and Ubaldus De Vries (eds.), *Academic Learning in Law: Theoretical Positions, Teaching Experiments and Learning Experiences* (Cheltenham, UK- Massachusetts, USA: Edward Elgar Publishing Ltd, 2016), p. 99.

Schwöbel-Patel, Christine E J ‘I'd like to learn what hegemony means' - Teaching International Law from a Critical Angle. (2013) RECHT EN METHODE VOL. 2 pp 67-84.

Scott, David *Refashioning Futures: Criticism after Postcoloniality* (Princeton: Princeton University Press, 1999).

Seddon, David *A Political and Economic Dictionary of Africa: An Essential Guide to the Politics and Economics of Africa* (Ist edn.) (London: Routledge, 2005).

Senghor, Lepold *On African Socialism* (Westport: Praeger, 1974).

Shaw, Malcolm N. *International Law* (6th edn.) (Cambridge: Cambridge University Press, 2008).

Shearer, I. A. *Starke's International Law* (11th edn.) (Sydney: Butterworths, 1994).

Simma, Bruno 'Universality of International Law from the Perspective of a Practitioner' (2009) EUROPEAN JOURNAL OF INTERNATIONAL LAW, Vol. 20, Issue 2, pp. 265-297.

Singh, Prahbakar *Macbeth's Three Witches: Capitalism, Common Good, and International Law*, (2012) 14 OR. REV. INT'L L. 47.

Sinha, S. Prakash *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971).

Skordas, Achilles 'Hegemonic Custom' *in* Byers, Michael and Nolte, Georg (eds), (ed.), *United States Hegemony and the Foundations of International Law* (New York, Cambridge University Press, 2003) 317.

Slama, Jo Lynn *'Note: Opinio Juris in Customary International Law*,' (1990) 15 OKLA. CITY U. L. REV. 603.

Slaughter, Anne-Marie *A New World order* (Princeton: Princeton University Press, 2004).

Smith, Robert 'Peace and Palaver: International Relations in Pre-Colonial West Africa' (1973) THE JOURNAL OF AFRICAN HISTORY, Vol. 14, No. 4, pp.599-621.

Sornarajah, M. *The Investment Law on Foreign Investment* (3rd edn.) (Cambridge: Cambridge University Press, 2010).

Spivak, Gayati Chkravorty *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Cambridge-Massachusetts-London: Harvard University Press, 1999).

Stalin, John *Marxist and the National-Colonial Question* (Proletarian Publishers, 1975 Reprint).

Steel, E. A. 'Exploration of Southern Nigeria' (1910) JOURNAL OF THE ROYAL UNITED SERVICES INSTITUTION 54:386, PP. 433-449.

Steinvorth, Ulrich 'Marx's Critique of Capitalism and the Concept of Basic Income' *in* Pirson Michael *et al* (eds.) *From Capitalistic to Human Business* (London-New York: Palgrave Macmillan, 2014) p. 131.

Stigltz, Joseph E. & Charlton, Andrew 'Aid for Trade' (2006) INT'L LAW J. DEV. Issues at p. 1.

Street, John *Mass Media, Politics and Democracy* (2nd) (Hampshire-New York: Palgrave Macmillan, 2011).

Suarez, F. 'Selections from Three Works' *in* Scott, J. B. (ed.), *The Classics of International* Law (Carnegie Institution Washington DC, 1917).

Syatauw, J. J. G. *Some Newly Established Asian States and the Development of International law* (The Hague: Martinus Nijhoff, 1961).

Tan, Seng and Acharya, Aimitav (eds.) *Bandung Revisited: The Legacy of the 1955 Asia-Africa Conference for International Order* (Singapore: National University of Singapore Press, 2008).

Tangwa, Godfrey 'Democracy and Development in Africa: Putting the Horse before the Cart in *Road Companion to Democracy and Meritocracy* (Bellingham: Kola Tree Press, 1998).

Tasioulas, John 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', (1996) 16 OXFORD J. LEGAL STUD. 85.

Terborg-Penn, Rosalyn 'Black Women Freedom Fighters in South Africa and in the United States: A Comparative Analysis**'** (1990) DIALECTICAL ANTHROPOLOGY Vol. 15, No. 2/3, pp. 151-157.

Thirlway, Hugh 'The Sources of International Law' *in* Malcolm D. Evans (Ed.) *International Law* (3rd edn.) (Oxford: Oxford University Press, 2010).

Thompson, John B. *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (California: Stanford University Press, 1990).

Tierney, B. 'Vitoria and Suarez on *ius gentium,* Natural Law and Custom' *in* Perreau-Saussine, A. and Murphy, J. B. (eds.), *The Nature of Customary Law, Legal, Historical and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2007) pp. 101-24.

Tignor, Robert L. 'Colonial Chiefs in Chiefless Societies' (1971) THE JOURNAL OF MODERN AFRICAN STUDIES, 9, 3, pp.339- 359.

Tikly, Leon 'Globalization and Education in the Post-colonial World: Towards a Conceptual Framework' (2001) COMPARATIVE EDUCATION, Vol. 37, No. 2, pp. 151-171.

Tobi, N. *Sources of Nigerian Law* (Lagos: MIJ Professional Publishers Ltd, 1996).

Treves, T. 'Customary International Law' in Max Planck Encyclopedia of Public International Law (Oxford: Oxford University Press, 2012) p. 18.

Triepel, Heinrich *Völkerrecht und Landesrecht* (Leipzig: Verlag von C.L. Hirschfield, 1899).

Trindade, Antônio Augusto Cançado 'The Historical Recovery of the Human Person as a Subject of the Law of Nations' (2012) CAMBRIDGE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (1) 3: 8–59.

Tzevelekos, Vassilis P. and Dzehtsiarou, Kanstantsin 'International Custom Making and the ECtHR's European Consensus Method of Interpretation.' (2016) EUROPEAN YEARBOOK ON HUMAN RIGHTS, Vol. 16, pp. 313-344.

Udofia, O. E. 'Imperialism in Africa: A Case of Multinational Corporations' (1984) JOURNAL OF BLACK STUDIES, Vol. 14, No. 3, pp. 353-368.

Udombana, Ngongura J. 'The Ghost of Berlin still haunts Africa! The ICJ Judgement on the Land and Maritime boundary disputes between Cameroon and Nigeria' in AFRICAN YEARBOOK OFF INTERNATIONAL LAW (2002) Vol. 10, p. 13.

Uduchumerie, Chukwuemerie 'Finally, Radio Biafra is off the airwaves' Premium Times, 15 July, 2015 available on premiumtimesng.com [accessed on 21 October, 2015].

Ukpokolo, Chinyere 'Ezigbo Mmadu: An Anthropological Investigation into the Concept of a Good Person in Igbo Worldview' (2010) LUMINA, Vol. 21, No.2, p. 1.

Umeogu, Bonachristus 'Igbo African Legal Justice System: A philosophical Analysis' (2012) OPEN JOURNAL OF PHILOSOPHY vol. 2, no. 2, pp. 116-122.

Umoren, U. E. 'The Symbolism of the Nigerian Women's War of 1929: An Anthropological Study of Anti-Colonial Struggle' (1995) AFRICAN STUDY MONGRAPHS, 16 (2), pp. 61-72.

Umozurike, U. O. *Introduction to International Law* (Ibadan: Spectrum Law Publishing, 1993).

Uwazie, Ernest E. 'Modes of Indigenous Disputing and Legal Interactions among the Ibos of Eastern Nigeria' (1994) THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW, Vol. 26, Issue 34, pp. 87-103.

Uwechue, Raph *Reflections on Nigeria Civil War: facing the future* (Victoria: Trafford, 2004).

Uzoigwe, G. N. 'The Warrior and the State in Precolonial Africa' *in* Ali Al Amin Mazrui (Ed.) *The Warrior Tradition in Modern Africa* (Netherlands: E.J. Brill-Leiden, 1977) p. 20.

Vande, Philip Tezungwe 'Ethnicity and the Politics of State Creation in Nigeria' (2012) EUROPEAN SCIENTIFIC JOURNAL, Vol. 8, No. 16, p. 33.

Vincent-Smith, J. D. 'The Anglo-German Negotiations over the Portuguese Colonies in Africa 1911-14' (1974) THE HISTORICAL JOURNAL XVIII, 3, pp. 620-629; 'How Portugal became the First Global Sea Power', available at

http://www.cbsnews.com/news/how-portugal-became-the-first-global-sea-power/ [accessed on 20 August 2016].

Vincent, R. J. 'Racial Inequality' *in* Hedley Bull & Adam Watson (eds.) *The Expansion of International Society* (Oxford: Oxford University Press, 1984).

Wellens, Karel 'Revisiting Solidarity as a (Re-) Emerging Constitutional Principle: Some Further Reflections' *in* Wolfrum, Rüdiger and Kojima, Chie (eds.) *Solidarity: A Structural Principle of International* Law (Heidelberg: Springer, 2009) p. 3.

Wheatley, Steven 'Democratic Governance beyond State: The Legitimacy of Non-State Actors as Stand Setters' *in* Anne Peters et al (eds.) *Non-State Actors as Standard Setters* (Cambridge: Cambridge University Press, 2009) pp. 215-240.

Wheaton, Henry Elements of International Law (George Grafton Wilson, ed., The Carnegie Institute of Washington Photo, (Reprint 1964) 1966).

White, John Charles Book Review: 'Alan Forrest, *The French Revolution and the Poor*. New York: St. Martin's Press, 1981.' (1983-1984) EIGHTEENTH-CENTURY STUDIES, Vol. 17, No. 2 pp. 210-214.

Wiredu, Kwasi 'Democracy and Consensus in African Traditional Politics: A Plea for a Non-party Polity', available at http://them.polylog.org/2/fwk-en.htm [accessed on 22 October, 2014].

Wiredu, Kwasi 'An Oral Philosophy of Personhood: Comments on Philosophy and Orality' (2009) RESEARCH IN AFRICAN LITERATURES, Vol. 40, No. 1, pp. 8-18.

Wolfke, Karol 'Some Persistent Controversies Regarding Customary International Law' (1993) 24 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW, p. 1.

Wright, Richard *The Colour Curtain: A Report on the Bandung Conference* (New York: World Publishing Company, 1956).

Yakubu, John Ademola 'Colonialism, Customary Law and the Post-colonial State in Africa: The Case of Nigeria.' (2005) AFRICA DEVELOPMENT 30 (4), pp. 201-220.

Yakubu, M. G. *Land Law in Nigeria* (Oxford: Macmillan Education, 1985).

Yakubu, Mahmood *Aristocracy in Political Crisis: The End of Indirect Rule and the Emergence of Party Politics in the Emirates of Northern Nigeria* (Aldershot, UK: Averbury, 1996).

Young, Robert J. C. 'Il Gramsci Meridionale' *in* Srivastava**,** Neelam and Bhaltacharya**,** Baidik (eds.) *The Postcolonial Gramsci* (New York and London: Routledge, 2012) p. 17**.**

DOCUMENTS

'Draft-Scheme for the Institution of the Permanent Court of International Justice Mentioned in article 14 of the Covenant of the League of Nations presented to the Council of the League by the Advisory Committee of Jurists', Official Journal, Special Supplement No.2, Article 35, September 1920.

Advisory Committee members of the Permanent Court of International Justice: http://www.archive.org/stream/procsverbauxof00leaguoft/procsverbauxof00leaguo

ft_djvu.txt [accessed on 1 June 2016].

Declaration by United Nations of 1 January 1942, available at http://www.un.org/en/about-un/index.html [accessed on 30 January 2016].

Final Report of ILA London Conference (2000) Committee on Formation of Customary (General) International law available at http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376 accessed on 18 April, 2014].

'General Course in Public International Law' (1962) HAGUE ACADEMY RECUEIL, DES COURS, 106 (II) at p. 52

Grotius Society, 'International Law in Development: Discussion on the Report of the Committee on Sources of International Law' (1942) GROTIUS SOCIETY TRANSLATION, Vol. 27, at 214.

ILA Second Report of the Committee on 'Non-State Actors in International Law: Law making and Participation Rights' (2012) available at http://www.ebookezz.net/pdf/539me15/ [accessed on 16 September, 2014].

John Quigley, 'The United States' Withdrawal from International Court of Justice in Consular cases: Reasons and Consequences', available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1057&context=djcil [accessed on 20 August 2016].

Michael Wood, Special Rapporteur, 'Third report on identification of customary international law' International Law Commission, Sixty-seventh session, 27 March

2015, available at http://legal.un.org/docs/?symbol=A/CN.4/682 [accessed on 25 September, 2016].

Michael Wood, Special Rapporteur, First report on formation and evidence of customary international law, International Law Commission Sixty-fifth session Geneva, 6 May-7 June and 8 July-9 August 2013, available at http://legal.un.org/docs/?symbol=A/CN.4/663 [accessed on 23 June 2016].

National Archives of the United Kingdom (NAUK), 'Memorandum on The Atlantic Charter and British West Africa by the West African Press Delegation to the United Kingdom, 1 August 1943', CO 554/133/3.

Navi Pillay, United Nations Human Rights chief, stated at University of Oxford during her lecture to the Rhodes House scholars while praising the work of human rights defenders in Africa. This can be viewed on http://www.ohchr.org/EN/NewsEvents/Pages/HRinAfricaprogressandchallenges.aspx [accessed on 3 August 2014.

Northern Nigeria Annual Report, 1902 Appendix 111,164

Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), Annexe No. 3, p. 306.

Project for new the New American Century: *Rebuilding America's Defenses, Strategies, Forces and Resources for a New Century*, 2000 available athttp://www.informationclearinghouse.info/pdf/RebuildingAmericasDefenses.pdf [accessed on 29 September, 2014]

Security Council Res. 1373 (2001).

The Phelps-Stokes Fund-United States report: 'The Atlantic Charter and African from an American Standpoint', 1942.

The Tricontinental Conference of African, Asian, And Latin American Peoples (A Staff Report) available at http://www.latinamericanstudies.org/tricon/tricon1.htm [accessed on 26 January 2016].

UN Doc. A/45/430/Add.2 at 14, G.A. Res. 1816 (1962),

UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616, 23 August 2004.

White House, 'National Security Strategy of the United States of America, 2002' available at http://www.state.gov/documents/organization/63562.pdf [accessed on 29 September, 2014].

MEDIA PUBLICATIONS

Agbakwuru, Joshnbosco '2500 Displaced Fishermen Protest in Calabar' available at http://www.vanguardngr.com/2012/10/2500-displaced-bakassi-fishermen-protest-in-calabar/ [accessed on 11 July, 2016].

'Female Genital Mutilation-Is it Crime or Culture?' ECONOMIST, 13 Feb. 1999, at 45.

‘How Portugal became the First Global Sea Power’, available at http://www.cbsnews.com/news/how-portugal-became-the-first-global-sea-power/ [accessed on 20 August 2016].

Jen Mills, ‘Oxford has decided not to tear down Cecil Rhodes Statue’ http://metro.co.uk/2016/01/29/oxford-has-decided-not-to-tear-down-cecil-rhodes-statue-5650890/ [accessed on 21 March, 2016].

Martin Hall, ‘The symbolic statue dividing a South African university’ BBC news available at http://www.bbc.co.uk/news/business-31945680 [accessed on 21 March, 2016].

News Express, 16 July, 2015.

Petitions.moveon.org [accessed on 23 October 2015].

Radiobiafra.co.

The Guardian Newspaper, 23 July, 2003.

The Times of London on 8 January 1897 ‘Workhorses of Empire: Railways’. Available at http://www.britishempire.co.uk/science/transport/railways.htm [accessed 26 June 2016].

ThisDay July 19, 1997, p. 3.

Vanguard Newspaper of January 08, 2014.