Book Section:
Hendry, J orcid.org/0000-0002-4313-7280 (2019) A legally pluralist approach to the Bakassi Peninsula case. In: Gonzalez-Salzberg, D and Hodson, L, (eds.) Research Methods for International Human Rights Law: Beyond the traditional paradigm. Routledge Research in Human Rights Law . Routledge , Abingdon , pp. 123-145. ISBN 9781138603554

https://doi.org/10.4324/9780429468971-6

Legal Pluralism & Human Rights: The Case of the Bakassi Peninsula

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Theoretical lens: Legal Pluralism

Considerations of legal pluralism and human rights do not go readily hand in hand. On the face of it they appear to have different core concerns and motivations: the former being descriptive in character while the latter is normative.[1]This chapter argues, however, that a reading of human rights as being solely about liberal norms is an overly narrow one, and that a more nuanced approach – one that reflects upon the operation of human rights norms within varied, co-existing and overlapping legal regimes – is required. It employs the International Court of Justice (ICJ) decision in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment,* I.C.J. Reports 2002, p.303 ('the *Bakassi Peninsula* case') as a lens through which to consider fertile intersections of legal pluralism and human rights, with a focus on two issues: first, the challenge of addressing contemporary border disputes that can trace their origins to colonialisation, and; second, the matter of human rights' effectiveness in producing changes to international legal mechanisms and practices. In choosing an ICJ case as its study, this chapter draws attention to the purportedly neutral definitions, practices and forums that permeate both international law and international human rights law, and presents legal pluralism as a vital resource in both recognising and combatting such default settings. This chapter first provides an overview of theories of legal pluralism, then a summary of the decision and its context, after which follows an in-depth critical analysis of the case, one that engages specifically with – what I argue are connected – issues of legal pluralism and human rights.

Although there is considerable contestation about the definition of legal pluralism, a broad reading of the concept includes within its ambit the ideas that: non-state normative orders can have the status of law; different normative orders can occupy the same legal space; and that there can be disagreement over which law is applicable within that legal space, with applicability being context-dependent. In this regard, and as a 'key concept in a post-modern view of law',[2] legal pluralism has for some forty years now drawn the attention of sociologists, anthropologists and legal theorists to issues concerning the character and scope of the concept of law. By introducing the notion that law could be a broader phenomenon than the one traditionally asserted by modern analytical jurisprudence and its focus on state institutions, legal pluralism posed – and continues to pose – a challenge to conceptions of law as a discrete and autonomous discipline or practice. Contrary to

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[1] R. Provost and C. Sheppard, (2012) 'Dialogues on Human Rights and Legal Pluralism' in R. Provost & C. Sheppard (eds), *Dialogues on Human Rights and Legal Pluralism* (Springer), 1

[2] B. de Sousa Santos, (1987) 'Law: A Map of Misreading. Toward a Postmodern Conception of Law', 14 *Journal of Law & Society* 279, 297

Kelsenian, Hartian or Razian theories, therefore, legally pluralist approaches allow for non-state normative orders to have the status of law, acknowledge that different normative orders can occupy the same legal space, and accept that there can be contestation as to which 'law' within that legal space is applicable dependent upon circumstances and context.

This *broadening* of the category of the legal is not without its analytical problems, however. As Brian Tamanaha has outlined: 'First, there is no agreed upon definition of law; and, secondly, the definitions of law proffered by legal pluralists suffer from a persistent inability to distinguish law sharply from social life, or legal norms from social norms'.[3] Sally Engle Merry famously drew attention to the latter difficulty, querying '[w]here do we stop speaking of law and find ourselves simply describing social life?'.[4] But the popularity of legal pluralism as an approach persists almost despite these issues, most likely as a result of the 'hugely diverse regulatory practices of contemporary law and governance',[5] and the utility of legal pluralism as a tool for their description and analysis.[6] Indeed, this variety, alongside the diversity of opinions concerning the analytical issues mentioned, has generated a situation whereby even proponents of legal pluralism disagree about what it encompasses as a term and as an approach. As I have discussed elsewhere, '[t]he potential and scope of the concept of legal pluralism lend it a malleability that operates as a double-edged sword: on the one hand it is flexible enough to be discussed from many different perspectives, while on the other it appears to lack any real defining contours, other than being premised upon contestability'.[7]

The aim of the first part of this chapter is to provide an overview of legal pluralism's main developments and debates, and to highlight the importance of context. I will then provide a short synopsis of the *Bakassi Peninsula* case, which will act as a lens through which to consider some of the issues at the core of legally pluralist approaches, with this critique comprising the chapter's final section. I should note that it is not my intention to enter into deliberation as to what does or does not fall within the concept of law but rather to highlight where such definitional differences have a bearing on the relevant theories.

A note on human rights before proceeding further. As Provost and Sheppard have outlined, human rights and legal pluralism 'are not conceptual analogs: the first is normative in its essence, capturing a bundle of rights reflecting the interests most fundamental to any human being; the second is conceptual, offering a model of how to construct legal normativity in a society'.[8] Nevertheless, this chapter will argue that

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[3] B.Z. Tamanaha (2000) 'A Non-Essentialist Version of Legal Pluralism', 27(2) *Journal of Law & Society* 296-321, 298

[4] S.E. Merry, (1988) 'Legal Pluralism', 22 *Law & Society Review* 869, 870

[5] S. Douglas-Scott (2014) 'Brave New World? The Challenges of Transnational Law and Legal Pluralism to Contemporary Legal Theory', in R. Nobles and D. Schiff (eds), *Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell* (Ashgate), 3

[6] F von Benda-Beckmann (2002) 'Who's Afraid of Legal Pluralism?' 47 *Journal of Legal Pluralism* 38, 40

[7] J. Hendry (2013) 'Legal Pluralism and Normative Transfer' in G. Frankenberg (ed.) *Order Through Transfer: Studies in Comparative Constitutional Law* (Edward Elgar) chapter 7, 153-170, 156

[8] Provost & Sheppard (2012) *supra* note 1

an investigation of human rights (and human rights discourse) in legally pluralist terms can provide a means for considering purportedly universal ideals through contextualised processes, as well as for recognising the importance of local and contextual issues in justice claims.

(i) Legal pluralism's anthropological heritage

The initially descriptive nature of early legal pluralism comes from its background in (legal) anthropology, which studied the effects of colonisation and imposed law upon colonised indigenous peoples. As Merry points out, 'for proponents of empire in the nineteenth century, this imposition of European law was a great gift, substituting civilised law for the anarchy and fear that they believed gripped the lives of the colonized peoples'.[9] Although robust about bringing order and civilisation to the natives, colonial states often found it easier to leave issues of, for example, family or religious life to be regulated by indigenous, local, or customary law.[10] The violence of colonialism thus gave rise to a mixture of European and indigenous legal practices within the boundaries of colonised states. Such situations came to be referred to as weak, classic, or juristic legal pluralism[11] in recognition that these customary and/or religious legal orders were spheres separate and autonomous from that of the official, imposed legal order of the colonised state – this in notable distinction to recognition as legal traditions existing in parallel. The initial legal academic interest in legal pluralism thus arose from attempts accurately to describe 'a notion of normativity [that] did not correspond to an idealised understanding of law in western thought'.[12] In their exploration of the way overlapping legal orders interacted, legal pluralists were able to observe that 'the very existence of multiple systems [could] at times create openings for contestation, resistance, and creative adaptation'.[13]

Two important observations should be made at this juncture. The first is that under this weak definition of legal pluralism, state law effectively remains central, with the alternative legal order(s) merely recognised as covering those issues that the official legal order opted to leave unregulated. This results in the creation of a hierarchy whereby official legal norms become privileged over social norms by virtue of the authority that they draw from their association with the state. In a move that will be recognisable to anyone familiar with the concept of a liberal legal order, the imposed law thus establishes itself as superior, neutral, rational, universal and autonomous. This sneaky non-neutrality therefore operates both as the foundation and the mask for a variety of structural violence and persistent inequality. The second observation is that this classic form of legal pluralism is 'embedded in relations of unequal

[9] Merry (1988) 870, *supra* note 5

[10] Such colonial era 'customary law' was oftentimes itself an artificial construct, that is to say, 'a product of the interaction between colonial officials and local leaders or informants, with the result that attempts to codify custom or administer it in state courts were often far removed from the actual social practices of ordinary people'. See W. Twining (2010) 'Normative and Legal Pluralism: A Global Perspective', 20 *Duke Journal of Comparative and International Law* 473, 509

[11] J. Griffiths (1986) 'What is Legal Pluralism?' *Journal of Legal Pluralism and Unofficial Law* 1-55, 5

[12] Provost & Sheppard (2012) *supra* note 1, 2

[13] P. Schiff Berman (2012) *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP), 14

power',[14] which has not only shaped the legal and cultural development of (now) postcolonial states but also permeates the jurisprudence of these states to this day. I will return to this point in the critique section of this chapter. The next part discusses the idea of *normative* pluralism.

(ii) Normative pluralism

By contrast to the 'classic' form of legal pluralism outlined above, William Twining's conception of 'normative pluralism' takes as its primary task the decentring of the state. Defining normative pluralism as 'the wide range of rules, norms, and practices that one encounters in daily life',[15] Twining focuses specifically on generalisable norms that direct behaviour and act as reasons for action. Indeed, he separates out as particularly problematic phenomena such as customs, social practices, and conventions that combine both descriptive and normative elements as particularly difficult to taxonomise and define.[16] This qualification is an important one in terms of the ensuing discussion in this paper, not least because it serves to shake off the purely descriptive baggage that come part and parcel of the term's anthropological heritage, but also because it reorients the vital distinction. Where previously the vital consideration was state/non-state, for normative pluralism the salient issue became *legal/non-legal*.

While Twining himself is not overly concerned about drawing a distinction between the legal and the non-legal, this 'definitional stop', as he called it[17] was the subject of much academic discussion.[18] While arguably characteristic of legal philosophy as it then existed, such conversations occurred in the shadow of the realisation that – once the concession was made that there were non-state and non-official forms of normative ordering – nothing much of practical import turned upon the answer.

In terms of normative pluralism specifically, it is perhaps Eugen Ehrlich's 'living law'[19] that provides the most intriguing approach. As Tim Murphy observes, 'the "law" in the living law approach is not of law as posited or laid down in the way a constitution, statute, code or other set of rules is posited or laid down; rather it denotes the idea of normative or social ordering, of "the way things are done" or "what is generally accepted and approved"'.[20] The living law understood thus therefore accommodates *both* state law *and* non-state customary law, and recognises (what we usually understand as) legal rules as being 'nothing more than norms that have been elevated to the level of legal rules … merely norms that have acquired a greater

[14] Merry (1988), *supra* note 5, 874; see also J. Comaroff and J. Comaroff (1991) *Of Revelation and Revolution: Christianity, Colonialism, and Consciousness in South Africa* (University of Chicago Press)

[15] Twining (2010) *supra* note 10, 479

[16] *Ibid*: 480; see also W. Twining (2009) *General Jurisprudence: Understanding Law From A Global Perspective* (Cambridge University Press), 131

[17] Twining (2010) *supra* note 10, 497

[18] See, for example, Tamanaha 2000, *supra* note 3; Merry 1988, *supra* note 5

[19] E. Ehrlich (2002) *Fundamental Principles of the Sociology of Law* (Transaction Publishers, republished Walter L Moll translation (1936) Harvard University Press)

[20] T. Murphy (2012) 'Living Law, Normative Pluralism, and Analytic Jurisprudence' in *Jurisprudence* 3(1) 177-210, 180

degree of status and support'.[21] Defined this broadly, the living law would encompass norms deriving from non-state custom and social practice, such as for example the Japanese social customs *giri, tatemae,* and *honne*[22]; in this regard it conceptualises informal, rather than institutional, normative orders,[23]), and draws attention to the notion that law can emerge from below. The next section will elaborate on this idea.

(iii) Critical legal pluralism

Margaret Davies' recent book *Law Unlimited*[24] draws attention to a burgeoning body of work on legal pluralism of a critical bent. The unifying characteristics of such critical legal pluralist writings lie the way that they not only allow for pluralism to be 'found where different legal orders exist within the one territory, but also more importantly in "the very nature of law" and in the social and political dialogues that are constitutive of law'.[25] Such 'bottom-up' conceptualisations of law are not especially novel in themselves – in addition to those insights of Eugen Ehrlich already outlined and, as Davies has pointed out, Sally Falk Moore raised the issue of everyday norms in 1973,[26] Robert Cover discussed semi-autonomous communities in 1983,[27] and Patricia Ewick and Susan Silbey published on legal consciousness in 1998[28] – but the challenge they pose to centrist and hierarchical forms of legal order becomes both more apparent and more robust when these vital socio-legal observations are twinned with insights drawn from critical legal theory. Indeed, through highlighting the idea of law as a dynamic process, these approaches[29] facilitate an understanding of law as constituted by its subjects.[30] It is such a critical conception of legal pluralism I employ in this chapter's discussion of human rights, specifically with the aim of combatting the static, apparently fixed, and supposedly neutral practices of international law and human rights law.

(iv) A note on universalism v. cultural relativism

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[21] H. Hydén (2011) 'Looking at the World through the Lenses of Norms. Nine Reasons for Norms: A Plea for Norm Science' in K. Papendorf, S. Machura and K. Andenaes (eds), *Understanding Law in Society: Developments in Socio-Legal Studies* (LIT), 132

[22] R. Taylor-Harding (forthcoming) *Japanese Legal Culture and the Hybrid Illusion*

[23] Murphy (2012) *supra* note 20, 188

[24] M. Davies (2017) *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge)

[25] *Ibid*: 33

[26] S. Falk Moore (1973) 'Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study', *Law & Society Review* 7, 719-746

[27] R. Cover (1983) '*Nomos* and Narrative', *Harvard Law Review* 97, 4-68

[28] P. Ewick and S. Silbey (1992) 'Conformity, Contestation, and Resistance: An Account of Legal Consciousness', *New England Law Review* 26, 731-749

[29] J. Hendry and M.L. Tatum (2018) 'Justice for Native Nations: Insights from Legal Pluralism', *Arizona Law Review* 60(1) 91-113; K. Anker (2014) *Declarations of Interdependence: A Pluralist Approach to Indigenous Rights* (Ashgate); E. Melissaris (2008) *Ubiquitous Law* (Routledge)

[30] Davies (2017) *supra* note 24, 114. It is worth noting here that such approaches do not 'promote a "subjective" notion of the law, but rather a notion that takes adequate regard of the fact that social subjects are plural and that law is created by interactions in social spaces', *ibid* at 117.

As is evident from the above discussions, theories of legal pluralism tend to concern questions of which 'law' applies to which individuals, under which circumstances, within which legal space. More normative considerations, such as those raised within human rights discourse, were often hidden or, at least obfuscated, by what appeared to be conflicts of laws issues or questions of competence. Scholarly attention to the challenges posed to human rights by legal pluralism first arose in the form of the so-called 'universality debate', within which a supposedly innate incommensurability was identified between upholding the universal values of human rights and respecting diverse cultural practices. Perhaps one of the most discussed subjects in critical human rights theory,[31] the challenge from cultural relativists was a simple one, namely that human rights are not – and cannot be – universal, and that practices should therefore be evaluated by cultural standards alone. Thankfully for human rights discourse the discussion has since moved on, but two points are worth flagging up here. First, as Jeremy Waldron explains:

> '[I]f we take a human rights norm and try to apply it to another society, and we find that it is resisted on the grounds of a contrary evaluation which is, let us suppose, common in, and typical of, that society, then that contrary evaluation should not be regarded simply as an objection to the *universality* of our human rights claim. It will usually amount to an objection to the *content* of our claim even on its home ground…'.[32]

This position clearly acknowledges that considerations of content and context are paramount. Critical scholars have augmented this view by observing that human rights standards should instead be thought of in terms of 'relative universality' (Donnelly 2007), which is to say, as sensitive to culturally-specific complexities. This insight can be found mirrored in legal theory and political philosophy, where Bernard Williams refers to it as the 'relativism of distance'.[33] Second, and of particular importance in terms of post-colonial legally pluralist situations, is the idea that (legal) cultures should not be treated as epistemically closed: 'self-contained, impermeable, unchanging' but rather as responsive, adaptive, flexible and interactive.[34]

This critical ground here is well-trodden; however, contemporary approaches to human rights in legally pluralist contexts are intriguing in that their focus rests in 'understanding the variety of norms and disputing institutions that characterise the contexts in which human rights operate'.[35] Provost and Sheppard rightly note that this kind of approach diverges 'from the general tendency to presume that human rights are exclusively about universal norms and principles,[36] instead considering

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[31] J. Donnelly (2007) 'The Relative Universality of Human Rights', 29(2) *Human Rights Quarterly* 281-306, 282

[32] J. Waldron (1999) 'How to Argue for a Universal Claim', 30 *Columbia Human Rights Law Review 305, 311*

[33] B. Williams (1985) *Ethics and the Limits of Philosophy* (Harvard University Press), chapter 9

[34] J. Hendry and M.L. Tatum (2018) 'Justice for Native Nations: Insights from Legal Pluralism', *Arizona Law Review* 60(1) 91-113, 111

[35] G. Corradi (2017) 'Introduction: Human Rights and Legal Pluralism: Four Research Agendas', in G. Corradi, E. Brems & M. Goodale (eds) *Human Rights Encounter Legal Pluralism: Normative & Empirical Approaches* (Bloomsbury) 1-20, 2 fn 5

[36] Provost & Sheppard (2012), *supra* note 1, at 2

human rights norms within the setting of diverse, over-lapping, co-existing legal regimes. Such scholarly critical endeavours seem to harbour significant potential for the realisation of social justice in pluralist societies. The remainder of this chapter will dedicate itself to a discussion of the 2002 International Court of Justice (ICJ) case of the Bakassi peninsula, with a view to showing the value of such approaches.

Summary of the decision

The case of the *Bakassi Peninsula* concerns the contested border between Nigeria and Cameroon in West Africa. Although only one of many African border disputes arising since the former colonies declared independence, the increased attention it drew because of the presence of petroleum and natural gas in the region and the escalation of tensions that ultimately resulted in military action, combined to make this among the most contentious. Like many such clashes, the *Bakassi* disagreement was and is a direct result of colonialism: a 'consequence of the indiscriminate and haphazard fixing of African boundaries by the Europeans'.[37] More than simply being residual of colonialism, however, the Bakassi dispute also concerned the question of territorial title between independent nations, a question that remained unresolved until 1994, when Cameroon filed an application on this issue to the ICJ.

After confirming jurisdiction and dealing with other preliminary objections, the issue facing the Court thus centred on the question of title over the Bakassi Peninsula. This had been contested since both nations gained their independence in 1960, Cameroon from French – initially German[38] – rule, and Nigeria from British administration. Importantly, the historic actions of the colonial powers ended up having real significance over this decision, the deliberations for which focused substantially on the legal status of the 1913 Anglo-German Treaty. Cameroon made its claim over the Bakassi Peninsula based on this international agreement, which they argued had placed this territory under German authority.

Nigeria refuted this claim, however, arguing instead that in 1913 Britain lacked title to the Bakassi Peninsula and was therefore unable to have ceded it to Germany as alleged – *nemo dat quod non habet* ('no one gives what he does not have'). They submitted that title in fact lay with the Kings and Chiefs of Old Calabar, an 'acephalous federation' comprising 'independent entities with international legal personalities',[39] who had retained independent international status and rights, including the power to make international agreements. Nigeria argued that the 1884 Treaty of Protection between Britain and the Kings of Old Calabar, while conferring some rights on Britain, in no way constituted a transfer of title over territory.

The Court nonetheless rejected this argument, observing that the international legal status of a Treaty of Protection could not be inferred from the name alone. In their view, the 1884 Treaty did not establish an international protectorate but rather simply

[37] E.E. Alobo, J.A. Adams and S.P. Obaji (2016) 'The ICJ's Decision on Bakassi Peninsula in Retrospect: A True Evaluation of the History, Issues and Critique of the Judgement', 6(10) *International Journal of Humanities and Social Science* 108-117, 109

[38] France gained the formerly German territory of North Cameroon via the Treaty of Versailles.

[39] *Bakassi* judgement at 402 para 201

'confirm[ed] the British administration by indirect rule'.[40] Moreover, the Court pointed out that Nigeria had not provided conclusive evidence that, first, Old Calabar was in fact such a protectorate; second, that the Kings and Chiefs of Old Calabar had protested the signing of the Anglo-German Treaty in 1913; and third, that they had formally passed title of Bakassi to Nigeria upon the state's independence in 1960 – indeed, no query concerning this territory had arisen from Nigeria at that time.[41] Finding itself unable to accept the bases for title advanced by Nigeria, the Court concluded (voting 13-3) that the boundary was established in the 1913 Agreement, and that title over the peninsula lay with Cameroon. The Bakassi Peninsula was formally handed over to Cameroon on August 14, 2008.

On the face of it, this decision seems a fairly straightforward one, with credence being given to the 1913 Agreement and everything moving forward from there. What it omits to discuss in its focus on sovereignty and territory, however, is the *people* of Bakassi, 90% of who are Nigerians of the indigenous Efik tribe. Overlooked amidst the dispute over territory, the Efik people's way of life – by and large sustained until 2008 in spite of the historical impact of colonial rule – was brought to an end by the implementation of the ICJ's ruling.

Although this judgement did not explicitly deprive the people of the Bakassi peninsula of their extant nationality, it meant that they were left with two options: either take Cameroonian nationality or retain Nigerian nationality and become foreigners in their ancestral homeland.[42] One year on from the formal handover, Presidential spokesperson Dr Reuben Abati commented that:

> No serious effort has been made to reintegrate the over 300,000 persons who chose to stay in Nigeria. They are not wanted by Cameroon; they are ignored by Nigeria. At the Mbo and Ikang Resettlement Centres [popularly known as the New Bakassi], the people are having difficulties adjusting to a new environment and a new way of life. Essentially a riverine group, they are now compelled to learn a new mode of survival on land. Many of them who used to be landlords in their old homesteads are now refugees in their own country. They cannot be blamed for seeing themselves as "victims" of "dirty local and international politics"'[43]

Far from bringing a contentious issue to a close, therefore, it is alleged that the ICJ decision concerning the Bakassi Peninsula had the effect of perpetrating either forced denaturalisation or relocation – arguably both forms of violence – against its indigenous people, who have been and remain unsettled over this past decade as a result. The principal consideration here is the way that this decision has had the effect of dividing people of the same ethnicity and cultural descent by a newly-hardened national border, one that did not follow pre-colonial boundary lines. The next section will provide a critical legally pluralist perspective on this issue and its related human rights implications.

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[40] *Ibid* 405-406 para. 207.

[41] *Ibid* 409 para 213.

[42] Bakassi Resettlement Commission report (2009), Governor's Office, Calabar, Cross River State

[43] R. Abati (2009) 'Bakassi: One Year Later', published in the Guardian (Nigeria) on August 14, 2009

Critiquing the case

The *Bakassi Peninsula* case was selected as the case study for this discussion of legal pluralism and human rights because of the way it draws attention to those issues of power and interlegality[44] that can arise in a postcolonial context. Despite not engaging explicitly with considerations of human rights, it concerns itself with one of the most fundamental rights issues for indigenous peoples: the right to self-determination. Indeed, as Brownlie observes, one of the 'Purposes of the United Nations' set forth in the 1945 UN Charter was the development of 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.[45] Furthermore, by encompassing issues of local and customary legal practice, colonial- and post-colonial state laws, and international legal arbitration, this case draws attention to the marked disjunction between the respective behaviours of international law and international human rights law in terms of their treatment towards indigenous peoples. While international law has often operated effectively to legitimise their colonisation, international human rights law has by contrast taken a more accommodating stance when it comes to the acknowledgment of indigenous normative orders.[46] Deliberations in this case paid little attention to the will of the Efik people of the Bakassi peninsula, and none whatsoever to legally pluralist considerations or alternatives.

In this critical section, I will demonstrate how a legally pluralist perspective provides new means of analysing this decision and its implications. In doing so I will look at three core issues, namely i) colonial and post-colonial violence; ii) the principle of self-determination; and iii) different European and African conceptions of borders.

(i) Colonial and post-colonial violence

First and foremost, Cameroon's application to the ICJ to settle the Bakassi dispute can be cited as evidence of reliance on European forms of dispute resolution, methods and mechanisms that, as a result of the limited attention paid to regional particularities and realities, have proven themselves as unfit to solve African disputes. This observation is not intended to be an entirely scathing one: considering how disputes arising from colonial legacies are articulated through state-centric language, such overreliance is entirely understandable. By virtue of its claim to dominance, therefore, Westphalian paradigm – and thus government-to-government interaction – presents itself as the only visible and only viable option.

This section will argue, drawing on an historical account of the development of international law's treatment of and engagement with indigenous peoples, that this default to formal issues of title under international law is a form of structural violence. Such violence tends to characterise postcolonial situations, and is exacerbated by the existence of indigenous populations within territories that invariably do not conform to colonial lines drawn on maps. The intention here is to argue not only that

[44] Santos (1986), *supra* note 2 and B. de Sousa Santos, (2002) *Toward a New Legal Common Sense* 2nd ed. (CUP)

[45] I. Brownlie (1988) 'The Rights of Peoples in Modern International Law', in J. Crawford (ed.) *The Rights of Peoples* (Clarendon)

[46] S.J. Anaya (2004) *Indigenous Peoples in International Law*, 2nd ed. (OUP)

these formalities should be juxtaposed with actualities and materialities – which is to say that considerations of how people live within these spaces should be taken as having *legal* relevance – but also that the adoption of a critical legally pluralist perspective can facilitate the identification of viable alternatives more in keeping with human rights provisions.

It should not be forgotten that the central motif underpinning colonialism and its racist doctrine of *terra nullius* ('land belonging to no-one') was that the indigenous inhabitants of a territory 'were not organised in a society that was united permanently for political action'.[47] Furthermore, in their adoption of a doctrine that vested a European right of first discovery and occupation in indigenous lands, European colonial powers assumed superiority over these 'savages', which is to say, the 'people over whom the superior genius of Europe might claim an ascendency'.[48] In such a manner, the colonial powers not only claimed for their respective sovereigns' exclusive title to those territories 'discovered', but importantly also extinguished native rights to property and self-determination. This continues even today: as Robert Williams says, 'I imagine most people are simply unaware that this blatantly racist European colonial-era legal doctrine continues to be used by courts and policy makers in the West's most advanced nation-states to deny indigenous peoples their basic human rights guaranteed under principles of modern international law'.[49]

From the outset, then, international law and indeed international society can be seen as only being interested in relations among states with Westphalian forms of government. The privileging of these types of administrative and organisational structures has salience for this study, concerning as it does the indigenous people of the Bakassi Peninsula; whilst it is now generally accepted that states are not the only actors in the international legal system, they remain in many ways its primary – and most privileged – subjects. As a result, indigenous peoples find it comparatively difficult to engage with international law on their own behalf: for instance, the ICJ only has jurisdiction to hear disputes between states.[50] These problematic barriers to participation for indigenous peoples are shown in sharp relief when juxtaposed with the way that the initial violence of colonialism and the subsequent interventions of international law have had upon their lives.

Critical legal pluralism serves to draw attention to this exclusion from the law 'from above', whether in the form of the domestic municipal or the international legal order. In terms of the violence of colonialism, nothing is more indicative of the lack of interest in and engagement with local particularities that this 1892 comment by Lord Salisbury: 'We have been engaged in drawing lines upon maps where no White man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and the rivers were'.[51] This haphazard drawing of African borders, whereby territories were determined by European political considerations,

[47] *Mabo & Others v. Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1, 33

[48] Chief Justice Marshall, *Johnson v. McIntosh 21 U.S. 543* (1823).

[49] R. Williams (2012) *Savage Anxieties* (Palgrave Macmillan), 228

[50] Art. 38 ICJ Statute

[51] Quoted in J. Herbst (1989) 'The Creation and Maintenance of National Boundaries in Africa', *International Organization* 43(4) 673

often meant that such boundaries either divided tribes and other homogenous cultures, or enclosed within a territory tribes and cultures with long histories of hostility and antagonism. This very situation is evidenced in the Bakassi Peninsula case by the following statement, which featured in a speech given in 1914 to the Royal Empire Society of Britain by the Consul-General involved in the very drawing of the border between eastern Nigeria and western Cameroon:

> In those days we just took a blue pencil and a rule, and we put it down at Old Calabar, and drew that blue line to Yola. … I recollect thinking when I was sitting having an audience with the Emir [of Yola], surrounded by his tribe, that it was a very good thing that he did not know that I, with a blue pencil, had drawn a line through his territory.[52]

It is through such wilful disregard for local and historical contexts and practices on the part of European colonialists that situations like the Bakassi dispute were created. As Basil Davidson has noted, 'nineteenth century imperialism cut across boundaries and peoples and left, for a later Africa, the problem of redrawing frontiers on a rational plan'.[53] The problem of the Bakassi Peninsula was further exacerbated by tensions arising from the Nigerian civil war (1967-1970), itself the result of post-colonial pressures that led to a failed secession attempt by the Biafra region in eastern Nigeria, and the hostilities stemming from competing claims to the large deposits of oil, petroleum, and natural gas to be found there. Indeed, it was more consideration of these claims that featured in the ICJ case, not concern over a people's homeland.

The decision of the ICJ and thus the ruling in international law here can thus be seen to be an additional, subsequent violence piled on top of the violence of colonialism. The argument here is that this latter violence is facilitated by the ideology of state centrism, which is to say, the idea of law as operating only top-down, as something that *acts upon* society. As Davies observes, this top-down understanding of law often results from people's experiences of it, 'especially those [people] who have been marginalised or excluded by it',[54] which is very much the case of those living on the Bakassi Peninsula. The Efik people's exclusion and dispossession were effected and sanitised through international law mechanisms that defined the new map lines of post-colonial Nigeria and Cameroon by confirming and reifying those European colonial boundaries that had been imposed without reference or correspondence to their territory.

The question here becomes, how much difference could have been made though engagement at either international or state level with the situation of the Peninsula's indigenous people had the concept of law employed been a dynamic instead of a static one? Critical legal pluralism's specific insight here is threefold. First, such a subject-driven, bottom-up conceptualisation of law empowers those subjects by vesting their lived experiences with legal relevance – the people of Bakassi's concerns would thus at least potentially have had more weight within the municipal

[52] Quoted in J.C Anene (1970) *The International Boundaries of Nigeria 1885-1960* (Humanities Press) 2-3

[53] B Davidson ((1967) Old Africa Rediscovered (Longman) 337

[54] Davies (2017)) *supra* note 24, 119

legal systems of Nigeria and Cameroon. Instead of a situation where ICJ jurisdiction and procedure have the effect of relegating human rights issues to an afterthought,[55] a pluralistic approach would have opened up the ICJ's jurisdictional blindspot. While the Court is incapable of compelling the relevant states to address human rights issues due to its restricted terms of reference and the fact that only consenting states can be parties to proceedings brought before it, a bottom-up legally pluralist approach facilitates the consideration of non-state and thus human rights considerations. Second, greater consideration by the Cameroonian government of the everyday reality of the Bakassi Peninsula's inhabitants and their historical claim to inhabit that territory might have precluded at least part of the need for an application to the ICJ, thus paving the way for another form of dispute resolution. Third, such alternative approaches to resolving the dispute would not have to have happened along statist lines but rather could have included (representatives from) all the affected peoples in a heterarchical forum, ensuring greater representation and legitimacy.

The intention here is not to revisit an old dispute but rather to point to the structural problems leading to its unsatisfactory resolution. Indeed, it is in such a manner that legal pluralism can augment the exercise of people's economic, social, and human rights. The next section will build on this argument with reference to the specific right to self-determination.

(ii) Self-determination

This section will raise three points of critique. The first is that the Bakassi case can be read, instead of one concerning the appropriation of ancestral lands and resources, as one about self-determination, and that the self-determination of the Efik people has been largely overlooked at local, national and international levels. The second is that (international) human rights' traditional focus on individual rights over those rights of a collective or group overlook the unique character and potential of those collective rights.[56] The third is that the – perhaps understandable – fear of fragmentation post-independence can itself be understood as being underpinned by a state-centric ideology, one that overlooks the dynamic potential of both human rights and legal pluralism.

In the mid-20th century, almost every colony in Asia, Africa, and Oceania chose political independence under the right to self-determination, including Cameroon, who declared independence from France on January 1, 1960, and Nigeria, who followed suit in declaring independence from the United Kingdom later that same year on October 1. The right to self-determination for colonial countries and peoples is articulated in UN Resolution 1514 (1960), which provides that, '[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development' (para. 2). It also states, however, that '[a]ny attempt aimed at the partial or total

[55] Questions posed to the ICJ routinely avoid human rights issues – a notable example of this is the Kosovo Declaration of Independence, where the ICJ found itself trammelled by the specificity of the question and thus unable to comment on the issue of self-determination.

[56] J. Hendry & M.L. Tatum (forthcoming) *Spaces of Indigenous Justice* (Routledge Glasshouse)

disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations' (para. 6). It is clear from this caveat, therefore, that this Resolution was intended to support nascent states, instead of providing a genuinely restorative mechanism for people(s) negatively affected by colonial violence.

Once again it is worth highlighting how a purportedly neutral legal measure is, in actuality, anything but, rather pursuing a clear ideological agenda. Indeed, as Marie Battiste and James (Sákéj) Youngblood Henderson observe, 'most of the colonized Indigenous peoples were not given the right to self-determination'.[57] International law can be said to have privileged the territorial unit, not the (more numerous) ethnic ones. Formally speaking, such steps took place in accordance with the principle of *uti possidetis* ('as you possess') which in this context stands for the stability of post-colonial borders, and was justified by the ICJ in the 1986 case *Burkina-Faso v. Mali* as follows:

> Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the changing of frontiers following the withdrawal of the administering power.

Whether or not this justification holds in general, it remains the case that the self-determination of various indigenous peoples – understood within international law as subsets of humanity that embody 'a certain common set of experiences rooted in historical subjugation by colonialism, or something like colonialism'[58] – was overlooked by this principle's application.

The difficulty international law has with the right to self-determination boils down, therefore, to the way in which it appears only to uphold the self-determination claims of those who have least need of protection, namely those political communities that constitute states. By contrast, it as a result often fails to uphold the plausible moral claims to self-determination of those whose political community is not already recognised, thus arguably ignoring the common-sense idea of what most people would take self-determination to mean.

If international law wants to claim that it protects the right to self-determination as a declared *value* within the international legal system, then its account of that value needs to be a more holistic one.[59] As it stands, despite widespread recognition of this value, in practice there is very little by way of a thick *right* to self-determination for political communities falling outwith the dominant paradigm.[60] To be clear on this point: while indigenous peoples often have the right to self-determination within the overarching political community of the state, they do not have the right to enjoy this right in a manner of their choosing. In terms of the Bakassi case in point, this exact

[57] M. Battiste and J. Youngblood Henderson (2000) Protecting Indigenous Knowledge and Heritage (Purich Publishing), 2

[58] Anaya (2004) *supra* note 44, 5

[59] I should note that this is not necessarily forwarded as a legal claim (although it might be) but rather the highlighting of a rhetorical inconsistency; while there are questions that could be raised on a fully moralised account of international law, this is not the place.

[60] A. Green (forthcoming) *The Idea of Statehood in International Law*

issue is shown in sharp relief by the way in which the Efik people were presented with the unedifying choices of keeping Nigerian nationality and either moving to a resettlement camp or remaining in Bakassi as immigrants, or taking Cameroonian nationality. The exclusion here is not from political community per se, but exclusion from their *preferred* political community; what can be observed here is recourse to a binary perspective that limits the possibility of an alternative.

What can either legal pluralism or human rights offer here, then? Insights drawn from legal pluralism have significant potential in terms of generating and justifying new practical approaches to problems created by the default to state-centric binaries – the idea, in essence, that a community either merits the status of statehood or no status at all – notably through their recognition of: 1) alternative forms of normative ordering; and 2) the idea that law can be generated from the bottom up. While legal pluralism can facilitate the possibility of more imaginative solutions at state level, (international) human rights are arguably a useful means through which such structural changes can be brought about in municipal legal and political systems. For example, the neglect of the people of Bakassi by both national governments in Cameroon and Nigeria post-2008 could and should have been pre-empted through a recognition and accommodation of their *particular* circumstances, both historical and contemporary. Once more it is worth noting that this failure to consider the situated particularities of this indigenous people is in itself a moral wrong; it is not special treatment when you are a special case.

The people of Bakassi are not alone in their predicament: this repeated recourse to binary understandings of self-determination vis-à-vis independent statehood has long stymied its unequivocal extension to indigenous peoples. As Anaya observes, 'this tendency [to understand self-determination as wedded to the attributes of statehood] has impeded widespread explicit affirmation that self-determination, as a principle of international law, applies to indigenous peoples'.[61] This lack of imagination is frustrating, not least because such historical contingencies have been adequately and creatively accommodated in Europe and the West through, for example: federalism in Germany, asymmetric federalism in India, devolution in the United Kingdom, autonomous regions in Spain, the asymmetric autonomous regions and communities of Belgium, Denmark's constituent countries of the Faroe Islands and Greenland, the Spanish exclaves of Ceuta and Melilla in North Africa, the self-governing UK territory of Gibraltar, the special administrative region of Hong Kong in the People's Republic of China (PRC), and even First Nation and American Indian reservations in North America.

Where international human rights can have significant potential impact, therefore, is in providing further texture to the international law right to self-determination. To this end, this perceptive passage from James Anaya is worth quoting at length:

> Under a human rights approach, attributes of statehood or sovereignty are at most instrumental to the realization of these values [of freedom and autonomy] – they are not in themselves the essence of self-determination. And for most peoples – especially in light of cross-cultural linkages and other patterns of interconnectedness that exist alongside diverse realities – *full self-*

[61] Anaya (2004) *supra* note 44, 7-8

> *determination, in a real sense, does not require or justify a separate state* and may even be impeded by establishment of a separate state. It is a rare case in the post-colonial world in which self-determination, understood from a human rights perspective, will require secession or the dismemberment of states. For many groups, however, *some change in existing structures of governance or other measures short of secession are needed* to bring about and ensure an atmosphere in which they may live and develop freely, under conditions of equality in all spheres of life.[62]

Suitable changes to existing governance structures could include such alternatives as those listed above; there is no legal impediment precluding self-determination for the people of Bakassi from taking the institutional form of a semi-autonomous region through, for example, federation or, as would be more likely, devolution.[63] The obstacles to such a development arise instead in terms of internal Nigerian and Cameroonian politics, which of course is another issue entirely. The final part of this section will return to this strong pull of state-centrist institutional legal forms in its consideration of the dynamic potential of fragmentation. This argument will now turn to the idea of group rights.

(iii) Self-determination and group rights

The benefit of articulating self-determination through the language of international human rights, can be said to manifest through the latter's narrative function of 'capturing people's struggles for justice'.[64] Indeed, there is a temptation to conceive of human rights as *de facto* vehicles for social justice, for how could they be otherwise? As I have argued elsewhere, however, rights discourse can present 'itself as a means of achieving social justice while at the same time legitimating and perpetuating the status quo'.[65] Rather than necessarily reflecting matters of universal value, the language of human rights is often used to represent contingent selections made according to a dominant ideology: consider the deployment of human rights rhetoric in attempts to justify the existence of legal doctrines such as humanitarian intervention, the responsibility to protect, and 'just' war.[66]

It is the rhetorical power of human rights that enables these hegemonic machinations, however, and that self-same power might well cut the other way. Whilst human rights discourse has historically been linked to liberal individualism, the current state of international law shows that this need not be the case. Various

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[62] *Ibid* 7, emphasis added

[63] While the Federal Republic of Nigeria is a federal state, comprising a Federal Capital Territory and 36 states, the Republic of Cameroon is a unitary presidential republic.

[64] G. Frankenberg (2016) *Comparative Law as Critique* (Edward Elgar), 167

[65] J. Hendry and M. Tatum (2016) 'Human Rights, Indigenous Peoples, and the Pursuit of Justice' (with M. Tatum) *Yale Law and Policy Review* (2016) 34(2) 351-386; 34 *Yale L. & Pol'y Rev*. 351 (2016) 357

[66] Indeed, there is some evidence to suggest that these attempts have been successful, at least in relation to the British and American publics' willingness to support war. See M. Tomz and J. Weeks, 'Human Rights and Public Support for War' (2018 working paper), available at: https://web.stanford.edu/~tomz/working/TomzWeeks-HumanRights-2018-01-18.pdf (last accessed 03/06/2018)

international instruments now exist that provide both a legal and rhetorical basis for group rights claims *as* human rights claims.[67] This potential, combined with the rhetorical appeal of self-determination itself, discloses the possibility of indigenous peoples utilising human rights as a means for engaging other parties on mutually comprehensible terms.

This premise has already been accepted by eminent international lawyers, for example Ian Brownlie, who notes that:

> [I]n practice the claim to self-determination does not necessarily involve a claim to statehood and secession. In fact, there is a sort of synthesis between the question of group rights as a human rights matter and the principle of self-determination. The recognition of group rights, more especially when this is related to territorial rights and regional autonomy, represents the practical working out of self-determination'.[68]

By this token, not only is it possible for group rights to exist but it is also arguably preferable – at least in some circumstances – for self-determination claims to be articulated in this manner. Once more, legal pluralism smooths the way for such an approach, allowing for a more subject-driven, bottom-up conceptualisation of the (nature of the) law. This leads me to the final critical point for discussion, namely the reliance on the institutional form of the state.

(iv) Self-determination and fragmentation

To return briefly to a point raised earlier: the principle of *uti possidetis* had considerable influence upon newly independent colonial states retaining the same form and contours. This doctrine – exercised in the specific context of decolonisation – provided for the stability of existing borders. Perhaps understandably, then, there were limited attempts to pursue alternatives to the unitary state form, a situation that is not only frustrating by virtue of the myriad problems engendered by such reification of those borders, of which the Bakassi Peninsula dispute is one, but also by the fact that these states came into being in what has been referred to as 'the sad evening of the world of nation states'.[69].

It is my contention here that, in addition to the *uti possidetis* principle, this adherence to the state form and the apparent fear of territorial fragmentation was, yet again, something underpinned by a state-centric ideology. State-centrism here insisted on presenting as a *fait accompli* the smooth edges and fixed contours of fully-formed states that replicated, so much as was possible, those of the Westphalian model. Legal pluralism, by contrast, offers far more dynamic potential, not least in the way in its recognition of law as a process: 'law is open-ended, interpretable, in flux, formed by everyday relations and contextual'.[70] While the vagaries of periods of transition can be disruptive, such disruptions need not always be perceived negatively but

[67] See, for example, the1957 International Labour Organisation (ILO) Convention 107 and the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

[68] Brownlie (2001) *supra* note 43, 6

[69] Davidson (1959) *supra* note 52, 337

[70] Davies 2018) *supra* note 24, 34

rather can be seen as offering vital impetus or fertile foundation. Territorial fragmentation premised upon state-internal cultural diversity need not spell the end of a state – on the contrary, it can serve as a useful safety valve in the event of internal tensions, and can even provide the foundation for non-statehood self-determination claims such as those discussed above. Discussions of democratic plurinational states, such as that by Stephen Tierney,[71] provide explicitly for such multi-level, usually asymmetric, polities that are reflective of the realities and materialities of diverse societies. Attenuation from state-centrist forms and increased openness to alternative governance arrangements – with preferences sourced through consultation and discussion with the affected people – is a more optimal way of supporting their human rights. Recognising that the ICJ's hands were tied over the Bakassi dispute is accurate but unsatisfactory. Although practically unlikely in the current international context, it is undeniable that the wholesale revision of the jurisdictional restrictions and terms of reference limitations that currently encumber the ICJ, done along lines sensitive to legally pluralist insights, would go a long way to improving the effectiveness of the Court in similar circumstances.

(v) Borders

This final section submits, building on the previous argument concerning the state form, that in the postcolonial context the notion of borders is also one that needs to be problematised. By contrast to European understandings of borders, which rely upon these to delimit the contours of the components of the international legal system, African conceptions of boundaries have less to do with drawing lines of separation and more to do with reflecting social and ethnic contact.[72]

I discussed some of the issues with colonial boundaries in the first part of this chapter, but they are sufficiently important to my argument for reiteration here: European colonial powers invariably took little account of the areas concerned prior to drawing border lines, with the inevitable result that they either divided tribes and cultures, or enclosed them with other tribes and cultures with which they shared a history of animosity. A common challenge for post-colonial states, therefore, has been that of accommodating what effectively amounts to a multiplicity of nations within a single state – the Hutus and Tutsis of Rwanda being perhaps the most distressing example. The general problem that can be identified here is with the Western conception of borders, and the manner in which this conception has been transplanted to an African context, first imposed but then accepted, relied upon, and indeed reinforced through adherence to a state-centric model.

This legal transplant is an unfortunate one because it affected, and indeed still affects, people's everyday lives. In contrast to being restricted by hard boundary lines, the African tendency had previously been for integration – indeed, as Davidson observes, 'integration by conquest as the times prescribed, but also by an ever-fruitful mingling and migration; they were never patient of exclusive frontiers.[73] This

[71] S. Tierney (2005) *Constitutional Law and National Pluralism* (OUP)

[72] M.B. Funteh (2015) 'The Concept of Boundary and Indigenous Application in Africa: The Case of the Bakassi Border Lines of Cameroon and Nigeria', 1(4) *International Journal of Humanities and Cultural Studies* 220-237, 227

[73] Davidson (1959) *supra* note 52, 337

notion of porosity of borders crops up in the literature with some regularity: Mark Funteh outlines how there exist 'inevitable conditions of fluidity along most of the African boundary zones'[74] where the indigenous peoples ignore those colonial borders in favour of adherence to those that support their socio-economic and socio-cultural needs, usually their own historic and ethnically-determined borders. Such indigenous understandings of borders, as being porous, often fluctuating, and mutable, seem far more in keeping with a legally pluralist perspective. Moreover, legal pluralism in turn appears to offer possibilities for exploring alternate means of resolving boundary disputes according to these differing conceptions.

To conclude: this chapter has endeavoured to highlight the innate connections between human rights and legal pluralism through an in-depth critical and contextual analysis of the Bakassi Peninsula case. The analyses of colonial and post-colonial violence, of the right to self-determination under a human rights framework, and of the contested concept of borders undertaken here have shown that the apparently neutral approach of international law is in fact anything but. Rules and principles that take neutral and universal form often disclose an ideological agenda that adversely affects those who, arguably, most need the law's protection. By reimagining the study and practice of law in a subject-driven, bottom-up manner, critical legal pluralism facilitates the conception of alternative modes of governance. In particular, its sensitivity to historical injustice and contemporary social context refocus our attention on what needs to be done to guarantee effective human rights protection for indigenous peoples and minority groups.

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